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Incarceration Incentives in the Decarceration Era

*Avlana K. Eisenberg**

After forty years of skyrocketing incarceration rates, there are signs that a new “decarceration era” may be dawning; the prison population has leveled off and even slightly declined. Yet, while each branch of government has taken steps to reduce the prison population, the preceding decades of mass incarceration have empowered interest groups that contributed to the expansion of the prison industry and are now invested in its continued growth. These groups, which include public correctional officers and private prison management, resist decarceration-era policies, and they remain a substantial obstacle to reform.

This Article scrutinizes the incentives of these industry stakeholders in the new decarceration era. Drawing on interviews with a wide range of industry actors, it develops a “taxonomy of resistance” to identify how and why these actors resist reform efforts and uncovers understudied parallels between private and public prison stakeholders. This fine-grained analysis grounds the Article’s recommendations for changes to compensation and assessment structures to better align industry incentives with decarceration-era goals. Ultimately, the future of the decarceration era is precarious but not doomed. The detailed incentives unearthed by this study demonstrate the significant hurdles facing emerging decarceration policies and the urgent challenge of accounting for, overcoming, and co-opting entrenched prison industry stakeholders.

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INTRODUCTION

After four decades of skyrocketing incarceration rates,¹ the prison population has finally plateaued and even very slightly

1. The literature on the rise of mass incarceration is vast. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Pattillo et al. eds., 2004); MARC MAUER, *RACE TO INCARCERATE* (2006); WILLIAM STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); James Forman, Jr., *Racial Critiques of Mass Incarceration*:

declined.² It remains to be seen whether this is a temporary, recession-fueled dip, a long-term equilibrium, or the beginning of a serious decline. The time is ripe, therefore, to examine whether this decarceration trend will continue and what response can be expected from the stakeholders who are most invested in the growth of prisons.

It is common to attribute the rise of mass incarceration in the United States to the profit-seeking private sector and the emergence of a “prison-industrial complex.”³ As the AFL-CIO, the largest federation of trade unions in the United States, has suggested: “[O]ur nation’s profit-driven justice system is producing a level of mass incarceration that is anything but just.”⁴ Some private corporations do advocate for pro-incarceration policies,⁵ even describing prisons as a kind of “product”⁶ to be sold like “selling cars or real estate or hamburgers.”⁷ But suggesting that mass incarceration is solely the result of corporate greed paints an incomplete picture. The private sector, while a significant force, constitutes only a portion of the U.S. prison industry. While the three largest private prison companies, which constitute more than 80% of the market for private prisons,⁸ together spend approximately \$4.5 million per year on lobbying expenses,⁹ California’s public correctional officers’ union alone spends nearly \$8 million

Beyond the New Jim Crow, 87 N.Y.U. L. REV. 21 (2012); see also LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, 3 (2012), <http://www.bjs.gov/content/pub/pdf/cpus11.pdf> [<http://perma.cc/3GBP-DGMT>].

2. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012 (2013), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4842> [<http://perma.cc/NUN9-D3JW>]; see also Ryan King et al., *U.S. Prison Population Declines for Third Consecutive Year*, THE SENTENCING PROJECT (Dec. 19, 2013), http://www.sentencingproject.org/detail/news.cfm?news_id=1720 [<http://perma.cc/S546-XAPY>] (detailing a “several year trend”). *But see* ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [<http://perma.cc/2ADY-399E>] (reporting a marginal increase in the 2013 state prison population, which was somewhat offset by a modest decrease in the federal prison population).

3. See, e.g., Benjamin Inman, *The Prison Doors Swing Both Ways: Elite Deviance and the Maintenance and Expansion of the Market of Prison-Industrial Complex*, in PRISON PRIVATIZATION: THE MANY FACETS OF A CONTROVERSIAL INDUSTRY 95, 103 (Byron Price & John Morris eds., 2012).

4. *Resolution 17: Prisons and Profits—The Big Business Behind Mass Incarceration*, AFL-CIO (Sept. 2013), <http://www.aflcio.org/About/Exec-Council/Conventions/2013/Resolutions-and-Amendments/Resolution-17-Prisons-and-Profits-The-Big-Business-Behind-Mass-Incarceration> [<http://perma.cc/BR9M-FJE6>].

5. See *infra* Section III.A.

6. Eric Bates, *Private Prisons*, THE NATION (1997), http://www.druglibrary.org/schaffer/media/thenation_0105bate.htm [<http://perma.cc/6ZUZ-CN9Z>].

7. *Id.* (quoting Thomas Beasley, co-founder of Corrections Corporation of America).

8. E.g., Christopher Petrella, *The Color of Corporate Corrections*, 3 RADICAL CRIMINOLOGY, Winter 2014, at 81, 83, n.9.

9. *Infra* notes 213–17 and accompanying text.

annually on political activities.¹⁰ Because of their political clout, officers' unions historically have been able to mobilize widespread support for their aims.¹¹ Support for the prison industry turns out to be widespread and tenacious, even among those who oppose mass incarceration, when it serves their financial or political interests. For example, Senator Durbin, a vocal critic of mass incarceration,¹² recently trumpeted his support for the opening of Thompson Prison, calling it "a significant investment in the economic future of northern Illinois."¹³

There is strong and deep opposition to the nascent decarceration trend. This Article explores how public and private prison industry stakeholders—those who staff, manage, and operate prisons—have contributed to the expansion of the prison population and in what ways they are resisting prison reform efforts.¹⁴ Contemporary prison reform efforts, which this Article refers to as "decarceration-era goals,"¹⁵ focus on achieving one or more of the following: reduction of the prison

10. JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* 220 (2011).

11. *Infra* Section II.A.

12. Senator Durbin was a co-sponsor of the Smarter Sentencing Act of 2014, an effort to reduce the use of mandatory minimum sentences. S. 1410, 113th Cong. (2014). Durbin has also been a strong critic of solitary confinement and called the first congressional hearing on the subject in 2012. Press Release, Durbin Chairs First-Ever Congressional Hearing on Solitary Confinement (June 19, 2012), <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=7d4f1128-4d15-4112-aa48-5315cb395142> [<http://perma.cc/ABR3-FK3U>].

13. Press Release, Durbin Statement on New Job Openings For Thomson Prison (Apr. 4, 2014), <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=64bdd25a-67da-41f0-9c9c-ac716ba68ce9> [<http://perma.cc/QR5R-QU7V>].

14. A rich theoretical literature has examined the economic theory of interest groups. *E.g.*, Daniel Farber & Philip Frickey, *The Jurisprudence of Public Choice*, 65 *TEX. L. REV.* 873 (1987); *see also, e.g.*, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223 (1986). For a discussion of how this literature can be applied to mitigating resistance to institutional reform, see MICHAEL TREBILCOCK, *DEALING WITH LOSERS: THE POLITICAL ECONOMY OF POLICY TRANSITIONS* 32 (2013). Trebilcock critiques Louis Kaplow for his presumption against engaging the "losers" in policy transitions, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *HARV. L. REV.* 509 (1986), and Richard Epstein for his presumption that "losers" in policy transitions should necessarily be compensated, RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). *Id.* at 75–76. Trebilcock strives for a middle ground, stressing that those prone to resisting reform need to be engaged in order to avoid policy stasis, and that the larger social goals must be kept in focus to avoid being overly deferential to the interests of those who would resist change. *Id.* This Article takes a similar approach, investigating the incentives of prison industry stakeholders in order to engage these stakeholders and to better align their incentives with reform goals. *See infra* Section IV.B.

15. The term "decarceration era" is meant to capture the shift in policy demonstrated by high-level court, legislative, and executive decisions. However, questions of how long this era will last, and how much reduction in the nation's prison population it will achieve, remain open. Importantly, even this "decarceration era" is still an era of mass incarceration; that is, it would take many years of decline to return even to the incarceration rate of 1980. *See infra* note 102.

population, improved prison conditions, and preparation for successful reentry into mainstream society.¹⁶

The incentives of prison industry actors in both the public and private sectors are underexplored.¹⁷ Scholars who address the burgeoning private prison sector have focused on the legitimacy¹⁸ and comparative efficiency¹⁹ of private institutions rather than on overlaps between incentives in the private and public sectors.²⁰ Many of these discussions point to the flaws of one sector while idealizing the other.²¹ In some accounts, the profit-seeking private sector is pitted against a

16. Since reoffenders comprise a huge fraction of prison admissions, the goal of successful reentry (and of a reduction in recidivism rates) is crucial to the decarceration enterprise. Furthermore, since high rates of incarceration have resulted in overcrowded facilities with poor conditions, the goal of reducing the prison population and that of improving conditions are strongly related. *Overcrowding*, PENAL REFORM INT'L, <http://www.penalreform.org/priorities/prison-conditions/overcrowding/> (last visited Sept. 9, 2015) [<http://perma.cc/W9J3-SWDY>]. By addressing these three related decarceration-era goals in tandem, this Article responds to the critique, voiced recently by Jonathan Simon, that for purposes of analysis, the “quantitative explosion” of prison inmates and the “qualitative implosion” in prison conditions and treatment of prisoners “have remained largely apart.” JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 7 (2014).

17. See *infra* Section I.C. This Article uses incentives in a broad sense, including both external reward structures and also what actually motivates people, as gleaned through deduction as well as through their self-reports and reports about what they have observed and experienced of the industry.

18. See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 438 (2005) (discussing legitimacy standards); Richard Sparks, *Can Prisons Be Legitimate? Penal Politics, Privatization, and the Timeliness of an Old Idea*, 34 BRIT. J. CRIMINOLOGY 14, 14 (1994) (discussing the problem of legitimacy directly, rather than implicitly); Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133, 133 (2012) (discussing how private contractors may lack legitimacy); Ahmed White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112 (2001) (discussing the effect that private prisons have on the relationship between the State and society).

19. See, e.g., Alexander Volokh, *Developments in the Law – The Law of Prisons*, 115 HARV. L. REV. 1838, 1879–86 (2002) (discussing the historical evolution of incarceration strategies).

20. The legitimacy inquiry yields a moral or philosophical discussion, while the comparative efficiency inquiry focuses on outcomes; both of these inquiries overlook the incentives of prison industry stakeholders and ways in which these incentives could influence institutional design reforms, increasing legitimacy and improving outcomes. On a practical front, a comparative efficiency approach is also problematic because prisoners rarely spend all of their time in one place and, given the transient nature of the population, it may be exceedingly difficult to find a control group. Telephone interview with Alex Friedmann, Managing Editor, Prison Legal News (Apr. 28, 2014); see also Alexander Volokh, *Prison Accountability and Performance Measures*, 63 EMORY L.J. 339, 343 (2013) (favoring a comparative efficiency approach but lamenting the poor quality of existing comparative studies of private and public prisons).

21. While this Article addresses the institutional design shortcomings of both public and private prisons, it does not mean to suggest that one or the other way of structuring prisons is inherently better or worse, but rather that understanding the incentives of prison industry stakeholders is indispensable to decisionmaking about the optimal design of either public or private prisons.

public sector free from financial motivations,²² while other accounts extol the virtues of private-sector efficiency as compared to a bloated, bureaucratic public sector.²³ Meanwhile, when analyzing trends in the prison population, scholars tend to discuss the dominant influence of judges, policymakers, and prosecutors,²⁴ approaching the prison industry as one that simply complies with legislative and judicial dictates. The focus on top-down dictates in the criminal justice system both ignores the full range of actors and incentives that comprise the industry and obscures principal-agent problems that may hinder implementation of law and policy reforms in both public and private sectors.²⁵

This Article's fine-grained examination of the roles and incentives of key players in the prison industry begins to fill that gap, revealing not only how policy initiatives affect prison operations but also how prison operations may undercut the aims of policymakers.²⁶ In doing so, this Article goes beyond accounts of the prison industry as a lobby that opposes reform efforts and also looks at ways the prison industry can frustrate on-the-ground implementation. The Article supplements existing research on prison industry incentives with a comprehensive review of publicly available materials—such as shareholder statements and lobbying reports²⁷—as well as dozens of original interviews with representatives of key interest groups, including correctional officers' union leaders, private prison managers

22. See, e.g., Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 149 (2010) (discussing the government's increased reliance on private prisons). Prison reform activists have also joined the anti-privatization chorus. See, e.g., Eric Bates, *CCA, the Sequel*, THE NATION (May 20, 1999), <http://www.thenation.com/article/cca-sequel/> [<http://perma.cc/K5RG-KWUH>] (“We need to shut private prisons down The care and rehabilitation of prisoners is not consistent with the profit motive.”).

23. See, e.g., Charles Logan & Sharla Rausch, *Punish and Profit: The Emergence of Private Enterprise Prisons*, 2 JUST. Q. 303, 304 (1985) (discussing the costly nature of the prison industry); Dennis Palumbo, *Privatization and Corrections Policy*, 5 REV. OF POL'Y RES. 598–605 (1986) (discussing the effect of privatization on corrections policy); E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 990 (1987) (discussing the increased reliance on private contracting in prisons).

24. See, e.g., William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (describing the political system responsible for criminal law, which includes legislators, prosecutors, and judges, while highlighting the synergistic relationship—and thus dominance—of prosecutors and legislators).

25. For an analogous discussion of principal-agent discontinuities in the context of hate crime law enactment and enforcement, see Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 858 (2014).

26. See, e.g., Donald Tibbs, *Peeking Behind the Iron Curtain: How Law “Works” Behind Prison Walls*, 16 S. CAL. INTERDISC. L.J. 137, 139 (2006) (examining the inmate disciplinary process at the Fox Lake Correctional Institution in Wisconsin).

27. I have also examined state contracts with private prison corporations obtained through Freedom of Information Act requests by In the Public Interest (on file with author).

and executives, prison reform advocates, department of corrections leaders, and others.²⁸ These interviews supplement the written record with the insights of highly informed and influential leaders of various stakeholder groups,²⁹ including a broad array of industry leaders from states with contrasting prison reform narratives—from those that recently closed prisons, to those that unsuccessfully attempted to close prisons; and from those that have lowered their prison populations, to

28. Telephone Interview with Joe Baumann, Chapter President, Cal. Corr. Peace Officers Ass'n at Norco (May 23, 2014); Telephone Interview with Robert Blackmer, Political Action Comm. Sec'y, Ariz. Corr. Peace Officers Ass'n (July 25, 2014); Telephone Interview with Jonathan Burns, Spokesperson, Corr. Corp. of America (July 29, 2014); Telephone Interview with Les Cantrell, Statewide Coordinator, Fla. Teamsters Local 2011 (Aug. 4, 2014); Telephone Interview with Patricia Caruso, former Dir., Mich. Dep't of Corrs. (July 15, 2014); Telephone Interview with Donald Cohen, Exec. Dir., In the Public Interest (April 8, 2014); Telephone Interview with Lili Elkins, Chief Dev. and Strategy Officer, Roca (July 28, 2014); Telephone Interview with David Fathi, Dir., ACLU Nat'l Prison Project (July 16, 2014); Telephone Interview with Ralph Fretz, Dir. of Assessment and Research, Cmty. Educ. Ctrs. (July 16, 2014); Friedmann interview, *supra* note 20; Telephone Interview with Justin Jones, former Dir., Okla. Dep't of Corrs. (Aug. 11, 2014); Telephone Interview with Jody Lewen, Exec. Dir., Prison Univ. Project (May 29, 2014); Telephone Interview with Lance Lowry, President of Huntsville Local Chapter, Am. Fed'n of State, Cty. and Mun. Emps. (July 15, 2014); Telephone Interview with Marc Mauer, Exec. Dir., The Sentencing Project (July 10, 2014); Telephone Interview with Terri McDonald, Chief, L.A. Cty. Jails, former Undersecretary, Cal. Dep't of Corrs. and Rehab. (Aug. 12, 2014); Telephone Interview with Kate Miller, Program Dir., ACLU of Ky. (Aug. 13, 2014); Telephone Interview with Tani Mills, Chief of External and Legislative Affairs, Ctr. for Emp't Opportunities (July 24, 2014); Telephone Interview with Ed Monahan, Pub. Advocate, Ky. Dep't of Pub. Advocacy (July 30, 2014); Telephone Interview with Christopher Petrella, Co-leader, Private Prison Info. Act Coal. (July 14, 2014); Telephone Interview with LeeAnn Prince, Dir., Corrs. Programs, Mgmt. and Training Corp. (Dec. 11, 2013); Telephone Interview with Dennis Schrantz, former Deputy Dir. of Planning and Cmty. Dev., Mich. Dep't of Corrs. (July 25, 2014); Telephone Interview with Don Spector, Dir., Prison Law Office (July 16, 2014); Telephone Interview with Marc Suvall, Volunteer instructor, Taconic Corr. Facility in Bedford Hills, N.Y. (Aug. 5, 2014); Telephone Interview with Terry Teetz, former Use of Force Specialist, Tex. Dep't of Criminal Justice (Aug. 6, 2014); Telephone Interview with Arthur Townes, Dir. of Alumni Servs., Cmty. Educ. Ctrs. (July 22, 2014); Telephone Interview with Peter Wagner, Exec. Dir., Prison Policy Initiative, ACLU (July 16, 2014); Telephone Interview with A.T. Wall, Dir., R.I. Dep't of Corrs. (July 25, 2014); Telephone Interview with Jerry Williams, Deputy Comm'r, Miss. Dep't of Corrs. (Aug. 5, 2014); Interview with Jeffrey Beard, Sec'y, Cal. Dep't of Corrs. and Rehab., in Salt Lake City (Aug. 16, 2014); Interview with Burl Cain, Warden, La. State Penitentiary at Angola, in Salt Lake City (Aug. 16, 2014); Interview with Matthew Cate, former Sec'y, Cal. Dep't of Corrs. of Rehab., in Salt Lake City (Aug. 16, 2014); Interview with Jim Conway, former Superintendent, Attica Corr. Facility Prison, in Salt Lake City (Aug. 16, 2014); Interview with Cathy Fontenot, Assistant Warden, La. State Penitentiary at Angola, in Salt Lake City (Aug. 18, 2014); Interview with Michael Greer, Captain, Mecklenburg Cty. Sheriff's Office, in Salt Lake City (Aug. 16, 2014); Interview with Randy Hill, Manager, Black Creek Integrated Sys. Corp., in Salt Lake City (Aug. 18, 2014); Interview with Debra O'Neal, Training/Educ. Adm'r, Del. Dep't of Servs. for Children, Youth and Their Families, in Salt Lake City (Aug. 17, 2014); Interview with Bernard Rochford, Exec. Vice President, Oriana House Servs., in Salt Lake City (Aug. 18, 2014); Interview with Mark Saunders, Vice President, The Nakamoto Grp., Inc., in Salt Lake City (Aug. 16, 2014).

29. While these interviews inform the Article's investigation of prison industry incentives, they are not meant to be representative of all industry actors.

those whose prison populations continue to rise.³⁰ These interviews provide an in-depth look at prison industry actors and their incentives in a changing landscape.

The Article focuses specifically on the incentives of public correctional officers³¹ and private prison management, highlighting significant points of overlap *between* public- and private-sector motivations, as well as significant areas of divergence *within* both public and private sectors. It highlights the role each of these groups has played in the expansion of the prison population. These groups are united by a dependence on prisons for their livelihood and a preference for prisons as a growth industry; they also represent the strongest, most vocal interests in their respective sectors. Both groups have worked to expand the prison population and have allied themselves with law enforcement and community groups that share their interests. The Article's examination of these groups and their respective interests illuminates this convergence. It also demonstrates why scholars and reformers should complement their analysis of top-down reform efforts by examining the incentives of institutional actors who make on-the-ground decisions such as contract negotiation, inmate discipline, and day-to-day implementation of prison reforms.

The Article exposes the tensions that arise when these groups that have historically preferred (and worked toward) a growing prison population encounter widespread momentum for prison reform. It develops a "taxonomy of resistance"³² that reveals the different ways by which prison industry stakeholders may disrupt reform efforts focused

30. Some states have experienced multiple narratives. For example, stakeholders in Florida and Michigan, among others, described the experience of successful prison closure as well as that of unsuccessful attempts to close prisons. *See, e.g.*, Cantrell interview, *supra* note 28; Schrantz interview, *supra* note 28.

31. The Article purposefully refers to "correctional officers" rather than "prison guards." While the terms were used interchangeably among some industry stakeholders during the interviews, union websites refer to their membership as "officers" and one prominent corrections department leader insisted that it was "a sign of disrespect" to refer to someone as a "prison guard." Wall interview, *supra* note 28.

32. While the details of legislative enactments, judicial proclamations, and prison industry decisionmaking change on a day-to-day basis, it is crucial to develop tools to assess these changes and a conceptual framework to anticipate strains of resistance and to understand possible mitigating approaches. The broader literature on resistance to organizational change is also relevant. *See, e.g.*, Carol Agocs, *Institutionalized Resistance to Organizational Change: Denial, Inaction and Repression*, 16 J. BUS. ETHICS 917, 917 (1997) (discussing available literature on organizational change); Michael Hannan & John Freeman, *Structural Inertia and Organizational Change*, 49 AM. SOC. REV. 149, 149 (1984) (describing internal and external factors that generate inertia in organizations); Kristin Kusmierek, *Understanding and Addressing Resistance to Organizational Change* (Apr. 2001) (unpublished manuscript), <http://www-personal.umich.edu/~marvp/facultynetwork/whitepapers/kusmierekresistance.html> [<http://perma.cc/W969-7BXE>] (discussing recommendations for organizational change).

on reducing the prison population, improving prison conditions, and promoting successful reentry. These modes of resistance include: (a) political activism through lobbying and alliances with other groups opposing prison closures and sentencing reforms; (b) discretionary decisions about discipline; (c) collusion between public and private actors toward the common goal of growing the prison industry; and (d) propagation of an “us versus them” mentality that dehumanizes inmates, thus impeding efforts to improve prison conditions and to promote rehabilitation.

The Article’s detailed analysis of power centers in the prison industry unveils not only strong currents of resistance to decarceration-era goals but also countervailing pressures that complicate the resistance story. For example, some prison industry stakeholders have begun adapting to decarceration efforts by finding business opportunities in the broader corrections industry (e.g., by investing in surveillance technologies) and by forming alliances with prison reformers to improve prison conditions. By scrutinizing early examples of prison industry adaptation to, and even cooperation with, decarceration-era goals, we can better understand and anticipate the role of institutional design in shaping the future contours of prison reform and the attitudes of prison industry stakeholders.

The Article proposes four strategies that would better align prison industry incentives with the goals of the reform movement.³³ It suggests that states (a) restructure contracts to decouple prison profits from the number of prisoners incarcerated; (b) invest in “pay for performance” schemes to reward positive outcomes; (c) diversify prison industry actors’ profit motives by encouraging companies and employees to invest in related industries with less dependence on incarceration; and (d) reconceptualize the function of prison work by altering the social norms that shape relationships among management, officers, and inmates.

The prison industry is an archetypal example of an established industry preventing public-spirited reform because of the incentives of existing stakeholders. Drawing on incentive-based analyses of other sectors, this Article’s insights about overcoming resistance to reform in the prison context are applicable to efforts to reform institutions in industries as diverse as utilities, education, and health care.³⁴

33. These prescriptions take the incentives of prison industry actors into account and build on these incentives, avoiding the “inside/outside fallacy” that would juxtapose “deeply pessimistic accounts” of actors’ motivations with an “optimistic proposal that the same actors should supply public-spirited solutions.” Eric Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1743 (2013).

34. See *infra* Section IV.B

The Article proceeds as follows. Part I contextualizes recent fluctuations in the prison population and reviews the academic literature in this area, exposing the need for sustained scholarly attention to the roles and incentives of key public and private industry stakeholders. Part II provides a fine-grained analysis of correctional officers (as represented by their unions) and private prison management, highlighting the incentives of these key groups and their shared preference for the further growth of prisons. Part III builds on this close examination of prison industry incentives, highlighting four modes of resistance by prison industry stakeholders to decarceration-era goals. Part IV identifies some countertendencies and proposes further reforms to align industry incentives with decarceration-era goals. Ultimately, the Article argues that policymakers committed to reform must develop an affirmative strategy for decreasing opportunities for prison industry resistance and for co-opting prison industry actors as part of a decarceration coalition. The success of any such strategy will require taking into account the underlying incentives of key private and public prison industry stakeholders.

I. MASS INCARCERATION AND THE POSSIBLE TURN TO DECARCERATION

Part I details the shifting incarceration patterns and policies that have characterized both the lengthy period of mass incarceration, which began in the early 1970s, and recent decarceration efforts. After describing reasons for the unprecedented crisis of mass incarceration, it highlights recent shifts in priorities, budgetary and otherwise, that have created momentum for decarceration. It also discusses the current scholarship on the political economy of mass incarceration and its limitations, highlighting gaps in the literature that this Article begins to fill.

A. Mass Incarceration and its Consequences

The United States prison population experienced an explosion beginning in the 1970s, and the United States currently incarcerates a higher percentage of its population than any other country in the world.³⁵ There were approximately 200,000 people incarcerated in the

35. John Schmitt et al., *The High Budgetary Cost of Incarceration*, CENTER FOR ECONOMIC AND POLICY RESEARCH 1 (June 2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf> [<http://perma.cc/99FQ-PU48>]; see also PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 5 (2008), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf [<http://perma.cc/G95D->

United States in 1973,³⁶ and the prison population surpassed 2 million in 2002.³⁷ During this time, the per capita incarceration rate soared from 100 per 100,000 to more than 750 per 100,000.³⁸ At its peak in 2009, the U.S. prison population exceeded 2.4 million,³⁹ with more than 1% of the country's adult population behind bars.⁴⁰ The phenomenon of mass incarceration has disproportionately affected men and people of color, with black males experiencing the highest rates of incarceration; approximately one in nine black men age twenty to thirty-four is currently incarcerated, and one in three black men will at some point spend time in jail or prison.⁴¹

Rising crime explains only a small fraction of this exponential increase in incarceration levels. While levels of violent crime and property crime rose in the 1970s and 1980s, peaking in the early 1990s, both violent crime and property crime declined after 1992.⁴² By contrast, incarceration rates continued to skyrocket, suggesting that rising crime is an insufficient explanation for the explosion of the prison population.

The drastic increase in incarceration levels can better be explained by a bipartisan political movement beginning in the 1970s that was characterized by “tough on crime” rhetoric and the “war on drugs.”⁴³ Republican and Democratic politicians seized on widespread

NZZ9] (finding that the United States has 5% of the world's population and 25% of the world's prison population).

36. JEREMY TRAVIS ET AL., *THE GROWTH OF INCARCERATION IN THE UNITED STATES* 2 (2014).

37. Paige Harrison & Allen Beck, *Prisoners in 2001*, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (July 2002), <http://www.bjs.gov/content/pub/pdf/p01.pdf> [<http://perma.cc/X7SZ-D2EN>].

38. Schmitt et al., *supra* note 35, at 1. The international disparity is particularly stark when U.S. incarceration rates are compared with those of other OECD countries, whose median rate is 102 per 100,000 people. *Id.* at 3.

39. Joan Petersilia, *Beyond the Prison Bubble*, 35 WILSON Q. 52, 52 (2011). By contrast, from 1930 through the early 1970s, the rate of incarceration was relatively stable, which gave rise to the “stability of punishment hypothesis.” Alfred Blumstein & Soumyo Moitra, *An Analysis of the Time Series of the Imprisonment Rate in the United States: A Further Test of the Stability of Punishment Hypothesis*, 70 J. CRIM. L. & CRIMINOLOGY 376, 376 (1979).

40. PEW CENTER ON THE STATES, *ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS* (2009), <http://www.convictcriminology.org/pdf/pew/onein31.pdf> [<http://perma.cc/7SCY-AQHN>] (documenting the percentage of Americans under correctional supervision in 2008—more broadly construed to include not only incarceration but also probation and parole—as one of every thirty-one adults (3.2 percent of the population or 7.3 million people)).

41. *Id.*

42. Schmitt et al., *supra* note 35, at 8 (explaining that, by 2008, violent crime levels had returned to the 1980 levels, and property crime levels had fallen well below the 1980 levels); see also Solomon Moore, *Prison Spending Outpaces All but Medicaid*, N.Y. TIMES (Mar. 2, 2009), http://www.nytimes.com/2009/03/03/us/03prison.html?_r=0 [<http://perma.cc/6EYF-N6ER>] (discussing the social and economic effects of high crime levels in previous years).

43. See, e.g., John Conyers, *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 379 (2013) (discussing the causes of America's high incarceration rate).

concern about increasing crime rates and supported far-reaching legal reforms. One contributing factor was the rise of powerful economic interests benefiting from the growth of prisons, which boosted these political trends and capitalized on the public's fear of crime and their resulting openness to draconian criminal laws. These reforms included the abolition of parole and the adoption of harsher sentencing laws, including guideline schemes and statutory mandatory minimums.⁴⁴ For example, "truth in sentencing" laws, which required that offenders convicted of violent crimes serve at least 85% of their sentence,⁴⁵ not only produced their intended goal of uniform sentences but also dramatically increased the length of prison terms.⁴⁶ So too did new "repeat offender" laws, such as California's "Three Strikes" law that imposed a mandatory life sentence for a third offense.⁴⁷

As increasingly punitive mandatory sentencing regimes became popular, the function of parole (in those jurisdictions that retained the early release option) also began to change. In 1976, Maine abolished parole for all inmates and, by 1998, fourteen states had followed suit.⁴⁸ Even in states that did not abolish parole, many restricted its use and significantly reduced parole boards' discretionary authority.⁴⁹ While parole and probation were once imagined as providing an alternative, community-based forum for transitioning back to society, and only parole violators perceived as dangerous would be returned to prison, increasingly, offenders found in violation of administrative procedures

44. *Id.* at 379–80; Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 492 (1999), http://canatx.org/rrt_new/professionals/articles/PETERSILIA-PAROLE%20AND%20PRISONER%20REENTRY.pdf [<http://perma.cc/TZ4K-RMM3>] ("The pillars of the American corrections systems—indeterminate sentencing coupled with parole release, for the purposes of offender rehabilitation—came under severe attack and basically collapsed during the late 1970s and early 1980s."). Additionally, some increase in the prison population can be attributed to the creation of new crimes and increased enforcement. Stuntz, *supra* note 24, at 513–14, 526.

45. For an in-depth discussion of truth in sentencing laws and their impact on criminal justice stakeholders, see Joanna Shepherd, *Police Prosecutors, Criminals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509, 511 (2002).

46. *Id.*

47. Anne Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 430 (2013) (noting that, by 1999, twenty-seven states and the District of Columbia had established "truth-in-sentencing" laws and twenty-four states had enacted "three strikes, you're out!" laws).

48. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 65 (2003). Federal parole was eliminated once the U.S. Sentencing Commission's guidelines took effect in 1987. Conyers, *supra* note 43, at 380.

49. Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 CRIME & JUST. 63, 102 (1999) (explaining that "[t]he function of channeling people to prison increasingly took precedence over the provision of rehabilitative services"); Jeremy Travis & Sarah Lawrence, *Beyond the Prison Gates: The State of Parole in America*, THE URBAN INST. 12 (Nov. 5, 2002), http://www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf [<http://perma.cc/HJ8Q-YQRD>].

were returned to prison.⁵⁰ In fact, the rate of incarceration due to parole violations and revocation—what some scholars refer to as “back-end sentencing”⁵¹—has grown even faster than rates of incarceration over the last four decades. By 2007, the United States annually sent more people to prison for parole violations than it sent to prison for all reasons combined in 1980.⁵² Thus, the high rates of mass incarceration are not merely the result of new crimes; they also result from parolees returning to prison.⁵³

To address the soaring number of inmates, states and the federal government began contracting with private prison corporations,⁵⁴ further increasing the reach of the prison industry. Between 1990 and 2009, the private prison industry grew by more than 1600%.⁵⁵ The two largest private corporations—Corrections Corporation of America (CCA) and the GEO Group (GEO)—are traded on the New York Stock Exchange,⁵⁶ and their most prominent investors include Fidelity and Vanguard mutual funds.⁵⁷ While they have been touted as “one of the best investments,”⁵⁸ providing “exceptional long-term returns,”⁵⁹

50. Caplow & Simon, *supra* note 49, at 108. In 1972, just .04% of parolees returned to prison for technical violations (such as missed appointments and breaking curfew); by 1987, 10% of parolees were reincarcerated for technical violations. *Id.* Additionally, the shift from discretionary decisionmaking by the parole board to mandatory release may have increased the likelihood that parolees are not adequately prepared for release and are more likely to “fail” parole and be reincarcerated. Travis & Lawrence, *supra* note 49, at 7.

51. Jeffrey Lin et al., “Back-End Sentencing” and Reimprisonment: Individual, Organizational, and Community Predictors of Parole Sanctioning Decisions, 48 CRIMINOLOGY 759, 760 (2010). Unlike “front-end sentencing” in court for the original crime, “back-end sentencing” does not impose a new court sentence; it merely re-imposes the original sentence. *Id.*

52. Jeremy Travis, *Back-End Sentencing: A Practice in Search of a Rationale*, 74 SOC. RES. 631, 631 (2007).

53. See Lin et al., *supra* note 51, at 761.

54. See, e.g., Byron Price & John Morris, *The Environment of Private Prisons*, in PRISON PRIVATIZATION: THE MANY FACETS OF A CONTROVERSIAL INDUSTRY 1, 4 (Byron Price & John Morris eds., 2012) (attributing the growth of private prisons to a synchronicity between “the continuous growth in the United States prison population and the neoliberal policies of the Reagan era, with its emphasis on free market solutions as the panacea to address government failure”).

55. Am. Civil Liberties Union & Am. Civil Liberties Union of Tex., *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*, 17 (June 2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf> [<http://perma.cc/5H78-KGC2>].

56. NYSE:CXW (CCA); NYSE:GEO (GEO Group).

57. Ray Downs, *Who’s Getting Rich off the Prison-Industrial Complex?*, VICE (May 17, 2013), <http://www.vice.com/read/whos-getting-rich-off-the-prison-industrial-complex> [<http://perma.cc/XKK4-3KSS>].

58. Ben Kramer-Miller, *2 Prison Stocks That Look Good: Corrections Corp, Geo Group*, THE CHEATSHEET (Apr. 7, 2014), <http://wallstcheatsheet.com/business/2-prison-stocks-that-look-good-corrections-corp-geo-group.html?a=viewall> [<http://perma.cc/85RF-NZDU>] (“Over the past several years, one of the best investments has been in shares of prison owners and operators.”).

59. *Id.*

private prisons have also come under attack as “warehousing human beings for profit”⁶⁰ and as unaccountable to oversight due to their exemption from many of the regulations of government-operated prisons.⁶¹ Private prison boards of directors often include former state and federal corrections administrators.⁶² Private prison companies highlight the expertise that this provides to the private sector.⁶³ Detractors raise concerns about a revolving door, noting that private prisons may be gaining undue influence with politicians that could enable them to push their corporate agendas at the expense of public welfare.⁶⁴ Aside from the two publicly traded companies, there are a number of smaller private companies, many of which have a regional focus.⁶⁵ Despite their explosive growth, private prisons currently house only about 9% of U.S. inmates.⁶⁶ However, the private sector also plays a substantial role in the operation of many public prisons; many aspects of prison life have been privatized, such as medical care, transportation,

60. Todd K., Comment to *750 Activists Occupy Wells Fargo Branch in D.C.*, CARE2 (May 22, 2012, 5:34 AM), <http://www.care2.com/causes/750-activists-occupy-wells-fargo-branch-in-d-c.html> [<http://perma.cc/CW3F-BTX5>]; see also *Warehousing for Profit*, PRISONEDUCATION.COM (July 2, 2014), <http://www.prisoneducation.com/prison-education-news/warehousing-for-profit.html> [<http://perma.cc/WHP9-73W5>] (describing how private prison companies profit off of high incarceration rates in the United States).

61. David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1461–62 (2010).

62. See, e.g., *Board of Directors*, CORRECTIONS CORPORATION OF AMERICA, <http://www.cca.com/board-of-directors> [<http://perma.cc/ZCE6-6U7V>] (including board member Thurgood Marshall, Jr., former Cabinet Secretary to President Clinton; Chief Corrections Officer Harley Lappin, former Director of the Federal Bureau of Prisons; and Chief Development Officer Tony Grande, former Tennessee Commissioner of Economic and Community Development).

63. *Id.*

64. Inman, *supra* note 3, at 103.

65. E.g., LASALLE CORRECTIONS, <http://www.lasallecorrections.com/> (last visited Oct. 17, 2015) [<http://perma.cc/NRM7-JJ78>].

66. E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012 40 (2013), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf> [<http://perma.cc/GMU8-ZJBA>]. This aggregated statistic includes about seven percent of state inmates and eighteen percent of the federal inmate population. *Id.*

and food service,⁶⁷ leading to the perception of a contemporary “prison-industrial complex.”⁶⁸

As the prison population has soared, there is increasingly a national market for prisoners. Inmates may be sent hundreds or even thousands of miles away from their families to wherever there happens to be beds available, a practice that takes its toll both on incarcerated individuals and on their families and communities.⁶⁹ Indeed, mass incarceration has been shown to damage social networks, starting at the family level with financial and social costs, and then reverberating throughout entire communities.⁷⁰ Of course, there is a complicated cost-benefit analysis associated with imprisonment.⁷¹ In addition to the negative consequences, incarceration may reduce crime through deterrence as well as incapacitation.⁷² However, there is a growing consensus among policymakers and scholars that the growth of U.S. prisons has gone too far,⁷³ and many policymakers are seeking to find ways to reduce incarceration.⁷⁴ This Article assumes that some degree

67. Carol Black, *Grassroots Efforts Against Private Prisons*, in 3 PRISON PRIVATIZATION, *supra* note 3, at 127, 131 (documenting the larger “pay to stay” phenomenon in prisons). Another example of the private-sector involvement in prisons is that, increasingly, money transfers to prisoners are handled through a private company. Thus, when family members want to deposit money for a prisoner, for example, so the inmate can pay for such necessities as toothpaste or toilet paper (which they increasingly are charged for), they now must make such transactions through JPay, a private company, which charges a \$5 transaction fee for each \$100 deposited to the inmate’s account. *Id.*

68. See, e.g., Mike Davis, *The Politics of Super Incarceration*, in CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS 73, 73 (Elihu Rosenblatt ed., 1996) (describing a recent expansion of the California state prison system).

69. Jeremy Travis et al., *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, URBAN INSTITUTE 1 (Oct. 2003), http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf [<http://perma.cc/ZJB7-X5RC>] (describing the severe toll of incarceration on both the inmate and the inmate’s family members and dependents).

70. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004).

71. See, e.g., David Abrams, *The Prisoner’s Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 907–08 (2013) (illustrating that harm to society may be caused both by excessive incarceration as well as by insufficient imprisonment).

72. *Id.* at 913. Weighing the costs and benefits of incarceration is beyond the scope of this Article.

73. See, e.g., ALEXANDER, *supra* note 1, at 8 (arguing that prisons create rather than prevent crime); SIMON, *supra* note 16, at 5 (arguing that mass incarceration constitutes “cruel and unusual punishment” in violation of the Eighth Amendment); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 191 (2006) (finding that mass imprisonment has “sealed the social immobility of poor blacks” and subtracted from the civil rights gains previously achieved by African Americans).

74. See, e.g., *How to Safely Reduce Prison Populations and Support People Returning to Their Communities*, JUST. POLY INST. 6 (June 2010), http://www.justicepolicy.org/images/upload/10-06_FAC_ForImmediaterelease_PS-AC.pdf [<http://perma.cc/GV4S-T7LY>] (advocating methods to safely reduce prison populations).

of decarceration is a desirable goal. It leaves to other scholars the question of what level of incarceration is socially optimal.

B. The Beginnings of Decarceration

As crime rates have fallen, public discourse has shifted and a preoccupation with crime and fear of criminals has given way to widespread concerns about the astronomical financial and human costs of mass incarceration.⁷⁵ For the first time since the United States prison population began its dramatic spike in the 1970s, the prison population decreased for three consecutive years, beginning in 2010.⁷⁶ Some have proclaimed that the United States has entered the “beginning of the end of mass incarceration.”⁷⁷

Each of the three branches of government has played a role in building momentum for decarceration. Largely in response to fiscal crises, and capitalizing on political will,⁷⁸ some legislatures have enacted early release bills and have begun to decriminalize low-level offenses such as marijuana possession.⁷⁹ The Justice Department under President Obama proposed specific platforms to reduce overcrowding, such as revamping the system of mandatory minimum sentences to give more discretion to judges to mete out reduced sentences in some low-level drug cases.⁸⁰ And the United States Supreme Court ruled that

75. *Smart Reform is Possible*, THE AM. C.L. UNION 6 (Aug. 2011), <https://www.aclu.org/files/assets/smartreformispossible.pdf> [<http://perma.cc/2ZWU-EPLD>]; see also SIMON, *supra* note 16, at 159 (referring to the “new common sense,” in which “the urge to imprison is counterbalanced” by fiscal and humanitarian concerns).

76. King et al., *supra* note 2. According to the most recent Bureau of Justice Statistics report, in 2013, the state prison population increased by 4,300 prisoners (0.3%), but this increase was partially offset by a decrease in the federal prison population by 1,900 prisoners (0.9%), the first such decrease since 1980. CARSON, *supra* note 2, at 1.

77. Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES (July 25, 2013), http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html?_r=0 [<http://perma.cc/M8EG-QX69>] (quoting Natasha Frost). Such optimism, however, may be premature. This era of decarceration could be very brief—perhaps only until the dawn of better economic times or until the crime rate begins to rise again—and it might not ultimately involve a substantial reduction in the prison population. This section thus details the factors that have contributed to the beginnings of decarceration without suggesting that this trend, without further intervention, is destined to continue.

78. See, e.g., Cohen interview, *supra* note 28 (describing “a backlash against ‘tough on crime’” and a preference for “right on crime,” sparked by the bipartisan concern that “we’ve gone too far”); see also Mary D. Fan, *The Political Climate Change Surrounding Alternatives to Incarceration*, 38 HUM. RIGHTS 6, 6 (2011) (noting that the recession made avoiding discussion of the costs of incarceration unavoidable).

79. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1070 (2015).

80. Ryan J. Reilly, *Eric Holder Outlining New Justice Department Drug Sentencing Reforms*, HUFFINGTON POST (Aug. 12, 2013, 12:39 AM), <http://www.huffingtonpost.com/2013/08/12/eric>

overcrowding in California prisons—the largest state prison system in the country—was unconstitutional.⁸¹ The combination of legislative concerns about the fiscal pressures of mass incarceration in a period of economic crisis and judicial concerns about the humanitarian consequences of prison overcrowding,⁸² such as substandard inmate medical care,⁸³ has resulted in a spate of reforms.

Some states have embarked on broad-based sentencing and corrections reform, including reconsideration of the use of mandatory penalties.⁸⁴ Twenty-three states have passed laws repealing mandatory minimums or revising them downward for certain offenses.⁸⁵ Most of these changes affect nonviolent offenses, the vast majority of which are drug-related.⁸⁶ There is some evidence that states that have revised or eliminated mandatory minimums, as well as applying these changes retroactively to those already serving their sentences, have seen reductions in prison population and costs.⁸⁷ Additionally, some states

holder-drug-sentencing_n_3741524.html [http://perma.cc/BB9Q-ZGK2]; see also Sari Horwitz, *U.S. to Push for Early Release of More Federal Prisoners*, WASH. POST (Jan. 30, 2014), https://www.washingtonpost.com/world/national-security/us-to-push-for-early-release-of-more-federal-prisoners/2014/01/30/cead046e-89c5-11e3-a5bd-844629433ba3_story.html [http://perma.cc/CHM8-DQMK] (discussing the administration’s call for the early release of more nonviolent drug offenders).

81. *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

82. Justice Kennedy, who authored the 5-4 majority opinion, expressly referred to the “human dignity” owed prisoners, concluding that “[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity.” *Id.* at 1928.

83. *Id.* at 1923.

84. Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, 26 FED. SENT’G REP. 198, 198 (2014).

85. See *Mandatory Minimums: Reforms in Other States*, FAMM 1–2 (July 10, 2015), <http://famm.org/wp-content/uploads/2015/07/Mandatory-Minimums-Reforms-in-other-states-7-10-15.pdf> [http://perma.cc/3FJV-AEYG]. States have taken one of three different approaches to reforming mandatory penalties. These approaches include: (1) enhancing judicial discretion by creating “safety valve” provisions that keep the mandatory minimum penalty in place but allow a judge to bypass the sentence if he or she deems it inappropriate and if certain factual criteria are satisfied; (2) narrowing the scope of automatic sentence enhancements—laws that trigger sentence increases in specified circumstances, such as an offense occurring within a certain distance from a school or whether an offender has previous felony convictions; and (3) repealing the mandatory minimum laws or revising them downward for specified offenses, particularly in relation to drug offenses or first- or second-time offenders. Austin, *supra*, at 12–13; Eisen & James, *supra*, at 25–26.

86. See Austin, *supra* note 85, at 12–13 (cataloging states that have relaxed mandatory minimum sentencing laws).

87. See, e.g., Stanford Law Sch. Three Strikes Project & NAACP Legal Def. & Educ. Fund, *Progress Report: Three Strikes Reform (Proposition 36): 1,000 Prisoners Released 2–3*, <http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/441702/doc/slspublic/Three%20Strikes%20Reform%20Report.pdf> [http://perma.cc/85M8-Y5SC] (evaluating California’s Proposition 36 of 2012, which revised the state’s 1994 Three Strikes Law, limiting the imposition of a life sentence to when the third felony conviction is serious or violent and

have increased opportunities for early release,⁸⁸ such as by reinstating good-time credits that were eliminated in the “tough on crime” era.⁸⁹ States have also taken steps to reduce parole revocation.⁹⁰

On the federal level, Congress passed the Fair Sentencing Act in 2010, reducing the controversial weight ratio of the amount of crack and powder cocaine needed to trigger mandatory sentencing from 100:1 to 18:1, and eliminating the five-year mandatory minimum for first-time possession of crack.⁹¹ And in a speech to the American Bar Association in August 2013, Attorney General Eric Holder instructed U.S. Attorneys to refrain from using “draconian mandatory minimum sentences” in response to certain low-level, nonviolent drug offenses.⁹²

Alternative or “specialized” courts have also grown popular in recent years. These courts are designed to prioritize treatment and rehabilitation over incarceration, and they have attained widespread bipartisan support.⁹³ There currently exist approximately three thousand such courts ranging from drug courts, which dominate the specialized court landscape, to domestic violence courts and mental health courts.⁹⁴

While a bird’s-eye view of the national prison population trends suggests reasons for optimism, a closer look at individual jurisdictions complicates the decarceration narrative, revealing tremendous variety. For example, while the fifty-state incarceration rate decreased for three consecutive years, the federal incarceration rate increased during this

authorizing courts to resentence those serving life sentences under the old law). Since California’s Proposition 36 took effect, more than one thousand people have been released from prison, and, in the first nine months of implementation, the state saved more than \$10 million. *Id.*

88. See, e.g., N.Y. CORRECT. LAW §§ 270–73 (McKinney 2015) (allowing for the conditional release of certain inmates); 61 PA. CONS. STAT. §§ 4504–06 (2014).

89. See, e.g., Dawson Bell, *Plan for Early Release in Granholm’s Budget to Face Steep Opposition*, DETROIT FREE PRESS (Feb. 16, 2010, 11:00 AM), <http://archive.wzzm13.com/news/story.aspx?storyid=118547> [<http://perma.cc/T4MU-NNJC>] (describing Michigan’s early release reforms that estimated cost savings of \$130 million).

90. Jeremy Travis & Kirsten Christiansen, *Failed Reentry: The Challenges of Back-end Sentencing*, 13 GEO. J. ON POVERTY L. & POL’Y 249, 254 (2006).

91. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

92. Eric Holder, *Remarks at the Annual Meeting of the American Bar Association’s House of Delegates* (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> [<http://perma.cc/T7RR-CSDM>].

93. Robert Wolf, *A New Way of Doing Business: A Conversation About the Statewide Coordination of Problem-solving Courts*, 2 J. OF CT. INNOVATION 191, 191, 206 (2009). *But see* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 783 (2008) (criticizing drug courts for “provid[ing] particularly poor results for the very defendants that they are intended to help most”).

94. Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1605–06 (2012).

time.⁹⁵ Moreover, progress among states was uneven: for example, while incarceration decreased in New Jersey and New York, it increased in Louisiana and Alabama.⁹⁶

A state-by-state examination of incarceration trends also reveals the significance of the “California factor.” The Supreme Court’s recent holding that California’s prison system was unconstitutionally overcrowded⁹⁷ resulted in a “realignment” plan that called for the diversion of thousands of nonviolent felons to county jails instead of state prisons.⁹⁸ As a consequence of realignment, the state’s prison population has dropped considerably.⁹⁹ While California was unable to meet the Court’s requirement that its prison occupancy rate be reduced to 137.5% of design capacity by 2013,¹⁰⁰ the state was singlehandedly responsible for more than 50% of the recent prisoner population decrease.¹⁰¹ Because the current rate of decline in nationwide incarceration is so heavily driven by a single state’s response to an extraordinary court order (which may amount to a one-time decline), it is far from obvious that we should expect it to continue. Furthermore, even including the drop in California’s prison population, at the current rate of decline, the Sentencing Project estimates that it would take until the year 2101 to return to the incarceration rate that existed in 1980.¹⁰² However, given decades of skyrocketing incarceration rates, a decarceration trend of any magnitude is notable and should motivate

95. LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 3, tbl.1 (2013), <http://www.bjs.gov/content/pub/pdf/cpus12.pdf> [<http://perma.cc/4ES7-AZRW>]. However, recent statistics reveal that in 2013 these federal and state trends were reversed. CARSON, *supra* note 2. Importantly, even as there has been movement to decrease sentences for low-level drug offenses, there has been a dramatic rise in immigration-related sentences in federal courts. Michael T. Light et al., *The Rise of Federal Immigration Crimes*, PEW RES. CTR. (Mar. 18, 2014), <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/> [<http://perma.cc/5W3B-AR2F>].

96. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, PRISONERS IN 2011 3 (2012), <http://www.bjs.gov/content/pub/pdf/p11.pdf> [<http://perma.cc/7LRN-QPF3>].

97. *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

98. ASSEMB. B. 109, 2011 Assemb., 1st Exec. Sess. (Cal. 2011) (legislation signed by Governor Brown in response to the court order to reduce California’s prison population to 137.5% of capacity); GLAZE & HERBERMAN, *supra* note 95, at 5.

99. CARSON & SABOL, *supra* note 96.

100. Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL’Y REV. 327, 333–34 (2014). At their overcrowding peak, California’s prisons were operating at more than 200% of their design capacity. Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 203 (2013).

101. For a comprehensive review of state prison population trends, see Peter Wagner, *Tracking State Prison Growth in 50 States*, PRISON POLY INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/overtime.html> [<http://perma.cc/8ZWJ-JY7G>].

102. King et al., *supra* note 2.

academics, policymakers, and reformers to investigate the ongoing financial, political, and cultural factors that could either enhance or thwart the continuation of this trend.

C. The Political Economy of Mass Incarceration

Scholarly accounts of the politics of incarceration tend to overlook the role of the prison industry. The dominant explanation used to account for the expansion of criminal liability and the growth of incarceration rates in the United States focuses on the role of policymakers and prosecutors.¹⁰³ William Stuntz, among others, explored the incentives of these actors, demonstrating how legislators enact criminal laws in response to voter demand¹⁰⁴ and how fear of crime has resulted in a dramatic increase in criminal liability and harsher sentences.¹⁰⁵ Meanwhile, prosecutors respond to particular crimes, exercising their discretion to choose among tools provided by the legislature.¹⁰⁶ Stuntz suggested that, because legislators and prosecutors together are incentivized to increase the reach of criminal law, the tide was unlikely to turn.¹⁰⁷ However, countervailing concerns—such as state fiscal crises—complicate this picture and, as demonstrated above, policymakers have already taken steps to curb the prison population.¹⁰⁸ Stuntz's analysis neither anticipated the resulting spate of decarceration legislation nor addressed the role of the prison industry and possible bottom-up resistance to the legislative pursuit of decarceration-era goals.

Meanwhile, the existing literature on the prison industry oversimplifies the picture in four key ways. First, many accounts approach changes in incarceration rates as though they were signs of a uniform trend,¹⁰⁹ ignoring key differences among state prison systems

103. See, e.g., Stuntz, *supra* note 24, at 510 (describing the incentives for prosecutors and legislators to form an alliance).

104. *Id.*

105. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 75 (2007).

106. *Id.* at 35–36; see also Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 532 (1970) (discussing the uncontrolled discretion of prosecutors); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862 (1995) (discussing the prosecutor's decision to charge).

107. Stuntz, *supra* note 24, at 599.

108. See *supra* Section I.B.

109. By contrast, some advocacy groups, most notably the Prison Policy Initiative, have synthesized information on incarceration rates and have highlighted the significantly different trajectories of various states and the federal government. See, e.g., Wagner, *supra* note 101.

and between state and federal prisons.¹¹⁰ Second, when scholars discuss “incentives” in the prison industry, the discussion tends to focus disproportionately on the private sector, minimizing the role of public-sector stakeholders.¹¹¹ This approach, which highlights tensions between the duties of private prison executives to their shareholders and to the state,¹¹² also fails to account for significant distinctions among private-sector prisons. In this way, it allows the incentives of two large corporations, which are structured as real estate investment trusts, to overshadow those of small, regional companies.¹¹³ This myopic focus has obscured the range of potential private-sector involvement in prisons beyond large corporate ownership and management.¹¹⁴

Third, even accounts that discuss prison industry resistance focus largely on the industry’s efforts to defeat reforms at the legislative or policy level,¹¹⁵ while ignoring stakeholders’ ability to frustrate

110. For a breakdown of changes in the federal prison population as well as state-by-state graphs, see *id.*

111. See, e.g., DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 254–55 (1995) (debating the value of private prisons); Dolovich, *supra* note 18, at 441–42 (rejecting comparative efficiency as a method for evaluating the privatization of prisons); Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 650 (1987) (analyzing the constitutionality of prison privatization); Ira Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 815 (1987) (presenting both sides of the debate surrounding prison privatization); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151 (2010) (arguing that prison privatization undermines the institution of criminal justice); Ahmed White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112 (2001) (providing a jurisprudential critique of privatization).

112. Many scholars and advocates have criticized private management and operations of prisons as an affront to human dignity and as an improper delegation of state responsibility. See, e.g., Field, *supra* note 111, at 662 (arguing that the profit maximization goals of private prisons stand in contrast to social welfare goals); Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749, 777 (2011) (categorizing prisons as an inherently governmental function); Sigler, *supra* note 111, at 156 (indicating that democratic accountability and political legitimacy might be problematic for private prisons). For an international example, see Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT. J. CONST. L. 690, 690 (2010) (analyzing the Israeli Supreme Court’s recent decision invalidating legislation that would have established a privately run prison).

113. See, e.g., Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 607 (2012) (detailing large campaign contributions by the two biggest private prisons companies).

114. The range of services provided by private companies in the prison context is vast, and prisons that are managed and operated by the public sector are likely to contract with the private sector for such services as transportation, food, or medical care. See *supra* note 67.

115. See, e.g., CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS, 211–20 (1990) (discussing the potential for corruption within private prisons); MARTIN P. SELLERS, THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS 94–103 (1993) (discussing the relationship between prison privatization and public policy); Alexander Volokh, *Privatization and*

implementation through more subtle means.¹¹⁶ Fourth, existing accounts ignore the ways in which the industry (or constituent groups within it) might be inclined to adapt to a new decarceration-era landscape, and they may also overlook institutional design reforms that could motivate cooperation by prison industry stakeholders with decarceration-era goals.

Relying on a theoretical model, Alexander Volokh takes preliminary steps to disentangle incentives in the public and private prison sectors, describing privatization as “a form of antitrust” that should make the public sector less powerful.¹¹⁷ He correctly observes that, like their private counterparts, “actors in the public sector already lobby for changes in substantive law.”¹¹⁸ But Volokh’s analysis overlooks significant distinctions *between* public-sector unions,¹¹⁹ as well as the range of approaches to prison privatization. These distinctions are crucial both for understanding the incentives of actors in their respective sectors and for assessing proposals to better align these incentives with decarceration-era goals.

The following fine-grained analysis delves into these comparatively neglected distinctions within public and private sectors and also reveals unexpected parallels between these groups.¹²⁰ This close examination of the incentives of prison industry actors is a prerequisite to understanding and combating prison industry resistance to decarceration-era reforms and to envisioning ways in which stakeholder incentives might be better aligned with the goals of prison reformers.

the Law and Economics of Political Advocacy, 60 STAN. L. REV. 1197, 1221 (2008) (debating whether prison privatization will increase pro-incarceration advocacy).

116. See *infra* Section III.B. For example, Volokh’s model accounts for lobbying by the public and private sectors but does not address the other means of resistance that are relevant to the success or failure of decarceration efforts. Volokh, *supra* note 115.

117. Volokh, *supra* note 115, at 1253.

118. *Id.* at 1197 (asserting that “the ‘extra voice’ of the private sector will not necessarily increase either the amount of industry-increasing advocacy or its effectiveness,” even suggesting that “privatization may well reduce the industry’s political power”).

119. *Id.* at 1204 (“[T]he largest actor—the actor that profits the most from the system—tends to be the public sector union, because the public sector provides the lion’s share of prison services The smaller actor is the private prison industry.”). But see *infra* Section III.C. While this is true in the aggregate, it ignores intrastate differences. Some state politicians have close ties with private prison leaders, whereas in other states, unions are so powerful that privatization is a losing battle. This analysis also ignores the very real possibility of public-private collusion. *Infra* Section III.C.

120. Importantly, even where there are notable areas of overlap between public and private sectors, the levers for reform may at times be different. For example, while direct contracting with private actors may provide opportunities for reform, similar reforms in the public sector may be subject to administrative or procedural requirements.

II. THE PRISON INDUSTRY: KEY PLAYERS AND THEIR INCENTIVES

This Part introduces two of the key players in the prison industry—correctional officers (as represented by their unions) and private prison management¹²¹—and highlights their shared preference for prison industry expansion.¹²² These players represent the loci of resistance to decarceration-era reforms in their respective sectors. In the private sector, resistance is most likely to come from management, whose profits are at stake; private-sector officers may also have reasons to favor prison expansion, but, because they are not unionized, they are a less powerful political force. Conversely, in the public sector, top-level executives are political appointees who often favor reforms; in such cases, the likely source of resistance is labor. The following analysis lays the groundwork for better understanding how and why prison industry stakeholders are likely to resist decarceration-era reforms.

A. Correctional Officers and Their Unions

Correctional officers rely on the continued strength of the prison industry for their job security. Officers in many states are members of unions that are sometimes part of a larger public employees union. Because these unions act on behalf of officers, and officers generally assert their interests through these unions, this Article discusses the incentives of officers as reflected through the prism of their unions.¹²³

121. While these are not the only groups that are invested in the existence and continued growth of the prison industry, they are important and underexplored contingents whose financial wellbeing is directly related to prisons. They thus serve as a useful starting point. By contrast, while sheriffs and prosecutors are key on-the-ground implementers of policy, their motivations are more in sync with the traditional literature on the political economy of the “tough on crime” era, as described by Stuntz, *supra* note 24, and others. Furthermore, as elected officials, their motivations are more diverse, and their financial interests (in many states) may not be directly correlated with an increase in the prison population. Sheriffs and prosecutors, while crucial players, are therefore beyond the scope of this Article.

122. While a focus on these two groups may at first blush appear asymmetrical—i.e. some may wonder why the Article does not isolate officers in the public and private sectors or management in the public and private sectors—I argue that these two groups, representing the strongest interests in their respective sectors, shed light on important synergies and distinctions between public and private prison sectors. Comparisons between, for example, public and private officers—which do exist in the literature, focusing on such issues as compensation and turnover—are limited because, while their day-to-day jobs may be similar, their influence on prison policy and reforms are profoundly different.

123. Some public sector officers are not unionized in right to work states, and in a few Southern states (e.g., Louisiana and Alabama), there are no unions to represent officers. Fontenot interview, *supra* note 28. Since officers working in the private sector are not part of a union and therefore have no collective bargaining power, this section focuses on officers in the public sector. However, while private prison officers are not unionized, their interest in job security is not significantly different from those of public officers. Other than the issue of privatization, the

Unions representing correctional officers historically have preferred more punitive criminal laws and longer sentences.¹²⁴ They may justify these preferences as necessary to punish “the bad guys.”¹²⁵ The preference for more punitive criminal laws also relies on a few basic assumptions. First, when the number of prisoners increases (and/or the length of prisoners’ sentences is extended), more prisons will be built. Second, an increase in the number of prisons will result in more jobs for correctional officers.¹²⁶ Even if new prisons are not built, an increase in prisoners would require prisons to house more prisoners, which might still require hiring more officers, resulting in a net gain of officer jobs. Ultimately, prison expansion likely means job security (and perhaps promotion opportunities) for officers, whereas prison contraction likely means that officers will be laid off.¹²⁷ Because the union’s job is to advance the interests of its members, and because job security is of paramount importance to correctional officers, the union is invested in expanding the reach of criminal law and the length of prison sentences.¹²⁸

Unions historically have also opposed the privatization of prisons,¹²⁹ and they have lobbied against political candidates that favor

positions taken by unions representing officers may be a reasonable proxy for both public and private officer interests. One practical difference between the two sectors is that, while the turnover rate in the public sector is high, the turnover rate of private officers is higher still, and private-sector officers generally receive less training and pay.

124. See, PAGE, *supra* note 10 (describing the leanings of correctional officer unions).

125. See, e.g., Cantrell interview, *supra* note 28.

126. Tim Kowal, *The Role of the Prison Guards Union in California’s Troubled Prison System* (2011), <http://ordinary-gentlemen.com/blog/2011/06/05/the-role-of-the-prison-guards-union-in-california-s-troubled-prison-system> [<http://perma.cc/5AQW-EFEG>]; see also, Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 224–25, (2008).

127. See, e.g., Schrantz interview, *supra* note 28; see also Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands*, 27 FED. SENT’G REP. 33, 35–39 (2013).

128. Perverse incarceration incentives are not limited to correctional officers’ unions. For instance, in Michigan, until recently, the powerful psychologists’ union fought to keep prisoners ineligible for parole unless the prisoners participated in a six-month anger management program that employed union members. Schrantz interview, *supra* note 28. The anger-management program requirement applied to all inmates convicted of a violent offense, yet there were not sufficient program options for all of the relevant inmates to complete the required programs. Thus, the interests of the prisoners were held hostage in the battle between the psychologists’ union and prison administrators.

129. See, e.g., Jack Spencer, *Union Lobbying Helps Keep Prison Privatization Bill Locked Up*, MICH. CAPITOL CONFIDENTIAL (May 4, 2012), <http://www.michiganconfidential.com/16860> [<http://perma.cc/WKT6-RPSB>]; Press Release, Am. Fed’n of Gov’t Emps., Union for Federal Prison Officers Strongly Opposes Privatization Initiative in Elkton, Ohio (Sept. 12, 2013), <http://www.prnewswire.com/news-releases/union-for-federal-prison-officers-strongly-opposes-privatization-initiative-in-elkton-ohio-223508811.html> [<http://perma.cc/54XZ-SRJH>]; AFSCME *Helps Close Dangerous Private Prisons*, 16 NEWS FROM AFSCME CORRS. UNITED 1 (Fall 2013),

privatizing prisons.¹³⁰ One union representative described privatization as “our biggest challenge” alongside “the challenge of getting a pay raise.”¹³¹ Private prisons hire outside the union and pay lower wages,¹³² so every contract that goes to the private sector is a lost opportunity for more public-sector union jobs.

Furthermore, if the private sector is successful in saving money while offering comparable services, then questions inevitably will arise about the viability of public-sector officer jobs and about whether their self-image as uniquely capable of dealing with a difficult population is justified. Officers pride themselves on being “tough.” They describe controlling prisons as “the toughest beat,”¹³³ as “walk[ing] the toughest blocks,”¹³⁴ and as “patrolling the toughest precincts.”¹³⁵ The notion that officer jobs are especially demanding, and that officers are uniquely qualified to work in such a challenging environment, figures prominently in their collective self-image as depicted on union websites.¹³⁶

Related to the “toughness” trope that permeates officers’ self-image is the pervasive “us versus them” rhetoric used to separate themselves from the inmates under their watch.¹³⁷ According to correctional officer representatives, officers frequently refer to inmates as “bad guys”¹³⁸ or “thugs”¹³⁹ and are quick to reject proposed reforms aimed at improving inmate conditions.¹⁴⁰ One corrections expert stressed that anything that could be construed as indulging inmates

<http://www.afscme.org/news/publications/newsletters/afscme-corrections-united/pdf>
[<http://perma.cc/PW48-HZM4>].

130. For example, when California state assembly incumbent Phil Wyman advocated for private prisons in 2002 as part of his re-election campaign, CCPOA contributed \$200,000 to his opponent’s campaign, and Wyman lost the election. PAGE, *supra* note 10.

131. Blackmer interview, *supra* note 28.

132. Volokh, *supra* note 18, at 142.

133. See, e.g., *About Us*, CAL. CORRECTIONAL PEACE OFFICERS ASS’N, <http://www.ccpoa.org/about-us/> (last visited Oct. 17, 2015) [<http://perma.cc/VSC4-7FWN>] (describing the work correctional officers do as “the toughest beat”); see also R.I. BROTHERHOOD OF CORRECTIONAL OFFICERS, <http://www.ri-brotherhood.com/> (last visited Oct.. 17, 2015) [<http://perma.cc/3QJUVZ3P>] (same).

134. *Miscellaneous Information*, AFSCME LOCAL 543 (Allentown, PA), <http://www.afscme543.com/info.html> (last visited Aug. 23, 2014) [<http://perma.cc/NYC2-MHQ9>].

135. See, e.g., CORRECTION OFFICERS’ BENEVOLENT ASS’N, INC., <http://www.cobany.org/> (last visited Oct. 17, 2015) [<http://perma.cc/T5UT-KFU8>].

136. See *supra* notes 133–35 and accompanying text.

137. Cohen interview, *supra* note 28 (describing the interpersonal dynamic in prisons as “designed to be us versus them”); see also Lowry interview, *supra* note 28; Suval interview, *supra* note 28.

138. Cantrell interview, *supra* note 28.

139. Lowry interview, *supra* note 28.

140. *Id.*

“disturbs” correctional officers, many of whom believe that prison should be “a state of deprivation” where there is “no pleasure.”¹⁴¹

Officers often come from the same neighborhoods as inmates,¹⁴² so separating themselves using the rhetoric of “us versus them” may fill a psychological need.¹⁴³ Indeed, officers and inmates are often linked “by common interests, cultural and social values and experiences and by common deprivations.”¹⁴⁴ The narrow gap between officers and prisoners could motivate officers to distance themselves from the prisoners under their watch, occasionally asserting their superiority even to the point of abuse.¹⁴⁵

B. Private Prison Management

Private prison management tends to prefer more punitive criminal laws and longer sentences because the more prisoners who need beds (and the more cash-strapped the states), the more likely private prisons will be relied upon. Because private prisons are paid per prisoner, per day, private prison companies will want to ensure that, once constructed, a prison will be filled to capacity, or at least that the prison will be subsidized if the prison population decreases, because otherwise the company will lose money. Thus, to avoid risk, private prison companies contract for a guaranteed occupancy rate over a period of many years, while preserving room to negotiate in order to increase the rates over time. In other words, states promise that regardless of underlying crime rates, they will incarcerate a specified number of their citizens in these prisons. At present, many private prison contracts provide for a guaranteed occupancy rate of 95% or higher for a period of twenty years.¹⁴⁶

141. Lewen interview, *supra* note 28.

142. See e.g., Suvall interview, *supra* note 28; Jeffrey Toobin, *This Is My Jail*, THE NEW YORKER (Apr. 14, 2014), <http://www.newyorker.com/magazine/2014/04/14/this-is-my-jail> [<http://perma.cc/XDR3-PPPM>].

143. See Toobin, *supra* note 142 (highlighting situations in which inmates have power over officers, specifically where male inmates manage to seduce female officers, gaining power over them).

144. Alison Liebling, *Prison Officers, Policing and the Use of Discretion*, 4 THEORETICAL CRIMINOLOGY 333, 338 (2000).

145. PAGE, *supra* note 10, at 202. Alternatively, this narrow gap between officers and inmates may make officers more prone to bribery, influence by inmates, and even romantic affairs. See Toobin, *supra* note 142; see also Bernie Tafoya, *Corrections Officer, Two Others Charged in Smuggling Operation at Cook County Jail*, CBS CHICAGO (June 30, 2014), <http://chicago.cbslocal.com/2014/06/30/corrections-officer-two-others-charged-in-smuggling-operation-at-cook-county-jail/> [<http://perma.cc/ECH5-49KQ>].

146. See, e.g., In the Public Interest, *Criminal: How Lockup Quotas and “Low-Crime Taxes” Guarantee Profits for Prison Corporations*, 1, 15–16 (Sept. 19 2013)

However, while these contract terms ensure that the private company will be subsidized if the prison population decreases, a subsidy is not a long-term solution because, if prisons begin to empty out, their contracts risk not being renewed.¹⁴⁷ Consequently, beyond achieving a particular set of generous contract terms, private companies prefer an expanding prison population because more contracts for more prisons is in their financial interest.

Private prisons may even build prisons speculatively and without any government contract under the philosophy that, “if you build it, they will come.” In California, this strategy has already proven successful. Following the recent court order to reduce California prison overcrowding, the California governor has developed a plan to use a prison that was built “on spec” by a private company.¹⁴⁸

If the dominant self-image among correctional officers in the public sector is “toughness” and the notion that they are uniquely qualified for the most challenging jobs, that of the private sector is cost-savings and the idea that they are uniquely equipped to offer services at a lower cost than the public sector. For example, one private prison shareholder statement boasted, “Our competitive cost structure offers prospective customers a compelling option for incarceration.”¹⁴⁹ It noted further, “The unique budgetary challenges states are facing may cause states to further rely on us to help reduce costs, and also cause those states that have not previously utilized the private sector to turn to the private sector to help reduce their overall costs of incarceration. We are pursuing these opportunities.”¹⁵⁰

Private prison executives have strong incentives to offer a cheaper alternative to public-sector prisons¹⁵¹ and to offer data that

<http://www.inthepublicinterest.org/criminal-how-lockup-quotas-and-low-crime-taxes-guarantee-profits-for-private-prison-corporations/> [<http://perma.cc/3HQY-VG9J>] (using Arizona, Louisiana, Oklahoma, and Virginia as examples of states locked in contracts with quotas requiring between 95% and 100% occupancy).

147. Critics have also noted that some CCA and GEO Group facilities receive subsidies from local, state, or federal government sources as part of “an economic development strategy.” See Philip Mattera et al., *Jail Breaks: Economic Development Subsidies Given to Private Prisons*, INST. ON TAX’N & ECON. POL’Y, (2001), <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/jailbreaks.pdf> [<http://perma.cc/GH5A-TH5G>] (finding that forty-three of sixty private prisons studied were subsidized by government sources).

148. Fathi interview, *supra* note 28.

149. Corrs. Corp. of Am., Annual Report (Form 10-K) (Dec. 31, 2012), <http://www.sec.gov/Archives/edgar/data/1070985/000119312513080296/d452767d10k.htm> [<http://perma.cc/PVG3-NX4Y>].

150. *Id.*

151. Private prison executives also have incentives to structure their companies in whatever way will prove most financially viable, in some instances, preferring a REIT structure for its tax benefits. Both CCA and the GEO Group recently converted from a regular corporate structure to a REIT structure as a way to increase shareholder value and to reduce their federal tax liability

documents their claims of cost savings.¹⁵² When states are fiscally constrained, the private sector's claims of cost savings along with comparable services are attractive. Private prisons get paid a certain amount—as per their contract—and they then have strong incentives to operate the prison for even less than that amount because the difference (i.e. any further costs they are able to save) is their profit.¹⁵³ The primary economic incentives for private prison executives are thus to limit costs and increase revenues.¹⁵⁴ When the prison privatization movement began in the 1980s, supporters heralded the private sector as capable of demonstrating efficiency that public bureaucracies lacked.¹⁵⁵

The bulk of a prison's costs, once constructed, is labor-related. Private prisons generally hire non-union officers, allowing them to pay lower wages.¹⁵⁶ Private prisons may also reduce the number of correctional officers so as to reduce costs. According to Russell Boraas, a private prison administrator in Virginia, “The secret to low-cost operations is having the minimum number of officers watching the

to zero, thus increasing their liquidity. Since maintaining a REIT structure requires that 80% of the corporation's assets be in real estate, critics have suggested that the prospect of decarceration is directly antithetical to the interests of the private sector as the two largest prison companies rely on warehousing for their bottom line. Friedmann interview, *supra* note 20 (questioning, “if you begin with the assumption that we imprison too many people, does it make sense to have a model where the bottom line is premised on maintaining and growing the prison population?”). It is worth considering the special concerns raised by how a private corporation is structured and whether it is publicly traded, since a company's duty to shareholders may run in tension with social welfare goals.

152. See, e.g., Press Release, The Geo Grp., Inc., Study by Temple University Professors Finds Private Operated Prisons Can Substantially Cut Costs at Equal or Better Levels of Quality (2013), http://www.geogroup.com/temple_university_study_findings [<http://perma.cc/R5DP-FXVY>] (highlighting, on the GEO Group website, a 2013 study by Temple University economics professors Simon Hakim and Erwin Blackstone). *But see* Susan Snyder, *Temple Probing Funding of Two Professors' Research*, THE PHILA. INQUIRER (June 10, 2014), http://articles.philly.com/2014-06-10/news/50451738_1_research-funding-professors-funding-source [<http://perma.cc/3XPG-BJBY>] (“Temple University is investigating an ethics complaint that two of its professors did not properly disclose funding from the private prison industry for their research on the cost of incarceration.”).

153. Bates, *supra* note 6; see also Michael Montgomery, *Performance Measures and Private Prisons*, in 3 PRISON PRIVATIZATION, *supra* note 3, at 203 (“Since a company's profit margin is considered proprietary information, private prison companies may not be required to disclose the actual cost of their operations.”).

154. While increasing revenue and decreasing costs is of paramount importance to executives across the private prison industry, unlike the two publicly traded private corporations—CCA and the GEO Group—other private prison firms have more flexibility in their business approaches since they are less likely to be challenged for business decisions that do not have a clear benefit for shareholders.

155. Bates, *supra* note 6 (quoting Thomas Beasley, a CCA executive, who quipped, “the government can't do anything very well”).

156. CODY MASON, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 7 (Jan. 2012), http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf [<http://perma.cc/LW72-K22J>].

maximum number of inmates.”¹⁵⁷ As another way to reduce costs, all but the most indispensable—or contracted for—training and services may be eliminated, including staff training and inmate treatment programs.¹⁵⁸ Additionally, so long as private prisons are paid a flat rate per day, per inmate, they will prefer to house inmates who require the least medical or other care.

The two largest corporations, Correctional Corporation of America and the GEO Group,¹⁵⁹ are structured as real estate investment trusts (REITs), requiring that 80% of their investment be in real estate. Unlike most publicly traded corporations, companies structured as REITs are not required to pay corporate income tax. This choice of corporate structure also requires companies to minimize investments not related to the physical buildings they operate, which may result in decisions to cut costs on supervision, treatment, and medical care, among other inmate services. Another way publicly traded private prisons save money is by substituting pensions earned by correctional officers in state prisons with stock ownership plans. Employees are thus invested in the company’s bottom line. According to one officer, “Being a stockholder yourself, you monitor things closer. . . . You make sure you don’t waste money on things like cleaning products. Because it’s your money you’re spending.”¹⁶⁰

The leadership at some of the smaller private prison companies has tried to distinguish their companies from “the duopoly” of CCA and the GEO Group.¹⁶¹ They stress that many in their ranks hail from the education sector, and they take pride in their educational offerings.¹⁶² For example, LeeAnn Prince, the Director of Corrections Programs at Management & Training Corporation (MTC), described MTC’s “emphasis on education.” However, even if a private prison’s mission is to promote “rehabilitation through education,” as is MTC’s motto, the ability of the private sector to innovate and offer programming is directly dependent on the state’s willingness to contract for expanded services. While Prince noted that her company prides itself on its

157. Bates, *supra* note 6.

158. Christopher Hartney & Caroline Glesmann, *Prison Bed Profiteers: How Corporations are Reshaping Criminal Justice in the U.S.*, NAT’L COUNCIL ON CRIME & DELINQUENCY 12 (May 2012).

159. See Nicole Goodkind, *Top 5 Secrets of the Private Prison Industry*, DAILY TICKER (Aug. 6, 2013), <http://finance.yahoo.com/blogs/daily-ticker/top-5-secrets-private-prison-industry-163005314.html> [<http://perma.cc/Y4VD-WK2F>] (noting that these two corporations have been referred to as “a duopoly” because of their dominance in the private corrections industry).

160. Bates, *supra* note 6 (describing CCA’s juxtaposition on a prominent bulletin board inside the front entrance of its headquarters of the words “C.C.A. Excellence in Corrections” at the top, and “Yesterday’s Stock Closing,” followed by a price, at the bottom).

161. See, e.g., Prince interview, *supra* note 28; Fretz interview, *supra* note 28.

162. Fretz interview, *supra* note 28.

capacity for educational offerings, she was quick to add, “where contracts allow.”¹⁶³ Ultimately, MTC, like all private prison providers, is bound by the provisions of state contracts and, “in this economy, it’s usually cost-based.”¹⁶⁴

The MTC leadership would like to see “the results of needs assessments,”¹⁶⁵ but this would require that states pay for a placement test and share the results with the private prison custodians. Without either more flexibility to budget as they see fit or contract specifications that provide for tests and placement services, private prisons may not be in a position to innovate, or to use tools and resources that could make programs more efficacious and have positive effects on an inmate’s rehabilitation. Prince reported that the rehabilitative resources provided “depends on who the client is” and that, especially when Immigration and Customs Enforcement (ICE) or the Bureau of Prisons is the client, “there is not too much rehabilitation” involved.¹⁶⁶

Leaders at Community Education Centers (CEC), another smaller private prison company, also highlighted the tension between two priorities: (1) quality assurance, which is driven by a desire for effectiveness in their mission of reducing recidivism and (2) cost savings, which is crucial to obtaining state contracts.¹⁶⁷ Ralph Fretz, Director of Assessment and Research at CEC, remarked that “we get thrown in with the other [private prison corporations]” and that fighting this categorization is “an uphill battle.”¹⁶⁸ CEC attempts to distinguish itself as primarily a “correctional treatment organization,” as opposed to being in “the business of private prisons,”¹⁶⁹ yet it competes with other private companies on the basis of which firm can save the state the most money. Ultimately, cost savings reign supreme. Yet the desire for cost savings, while dominant for private companies, is not absolute. Private firms also want to maintain order and avoid scandalous, publicized incidents, which would harm their reputation and jeopardize their ability to obtain future contracts.¹⁷⁰

163. Prince interview, *supra* note 28.

164. *Id.*

165. *Id.*

166. *Id.*

167. Fretz interview, *supra* note 28.

168. *Id.*

169. *Id.* (remarking that “we don’t think of ourselves as private prisons,” and stressing that, “in the end, if people are showing improvement, and they are treated humanely, that is our job”).

170. That said, so long as the prison sector as a whole has a steady stream of critics, private prisons may be less concerned about individual allegations. Moreover, while a scandal in one private prison may reflect poorly on all private prisons (as it may be framed as endemic to the private-sector control of the state function of punishment), it may also render other private prison companies virtually immune since none would stand out as uniquely poor. And so long as *public*

Both public and private prison industry stakeholders have demonstrated preferences for an expansion of the prison industry, and both sectors expend significant resources to support its further growth. The next Part examines responses by industry stakeholders to a new landscape, in which decarceration-era goals are gaining prominence and threaten the further expansion of the prison industry.¹⁷¹

III. RESISTANCE TO DECARCERATION

Recent policies—such as those that provide more opportunities for early release and diversionary options—have been lauded for attempting to reduce the prison population, ushering in a new era of decarceration.¹⁷² However, while crime rates have been decreasing and recent polls show that people are less concerned about crime than about the economy,¹⁷³ there remain strong loci of resistance to decarceration-era goals. This Part focuses on how prison industry stakeholders have responded to changes afoot that are designed to reduce the prison population, promote rehabilitation of inmates, and improve conditions in prisons.

Several corrections leaders emphasized that, even apart from self-interested resistance to specific policy reforms, a general resistance to change may be endemic in the prison industry.¹⁷⁴ In the words of one union representative whose prior experience included work in law enforcement, “I’ve never seen an occupation that resists change more than corrections.”¹⁷⁵

prisons fail to demonstrate that their conditions are “minimal[ly] adequate,” *see, e.g.*, *Brown v. Plata*, 131 S.Ct. 1910, 1924 (2011), the hurdle for (and expectations of) *private* prisons likely will remain similarly low.

171. While this trend can be seen in a number of states, it is by no means the case that every state is seriously considering wide-scale prison reform efforts. In Arizona, for example, the prisons are over capacity and more prisons are being constructed. Blackmer interview, *supra* note 28 (noting the seriousness of the overcrowding problem in Arizona prisons and also the lack of vocal opposition to further prison construction in the state).

172. *See supra*, notes 79–80.

173. *Economy, Jobs Trump All Other Policy Priorities*, PEW RES. CTR. (Jan. 22, 2009), <http://www.people-press.org/2009/01/22/economy-jobs-trump-all-other-policy-priorities-in-2009/> [<http://perma.cc/MGU3-CB7N>] (finding that, in 2009, the nation’s highest policy priority was the economy, while crime was rated as twelfth in importance).

174. *See, e.g.*, Lowry interview, *supra* note 28.

175. *Id.* One factor that may contribute to institutional actors’ resistance to reform is a belief that the status quo represents the “appropriate ordering of society.” TREBILCOCK, *supra* note 14, at 47. In the prison industry context, the similar backgrounds of many officers and inmates, which contributes to the “us versus them” mentality, may also make the status quo “ordering” essential to the officers’ identity, thus making them particularly resistant to change. The larger question of what industries are more and less resistant to reform, and why, is an area ripe for future research.

A. Political Activism as Resistance

Even as the U.S. system of mass incarceration is increasingly under fire, prison industry stakeholders remain politically vocal, resisting efforts to close prisons, reform sentences, and increase opportunities for early release. Stakeholders in both sectors have also continued to expand their influence by finding overlap between the interests of businesses, community groups, legislators, other government workers, and their own financial interests.¹⁷⁶

For example, the correctional officers' union in Illinois was particularly vocal in opposing Governor Quinn's order to close Tamms Supermax.¹⁷⁷ This maximum-security prison in Southern Illinois was notorious for its brutal treatment of prisoners with mental illness,¹⁷⁸ which included isolating them for years, often indefinitely, in solitary confinement.¹⁷⁹ The American Federation of State, County, and Municipal Employees (AFSCME) union worked to stall the closure order through the courts, taking the position that conditions at Tamms were necessary to maintain prison safety and security as well as to keep jobs in Southern Illinois.¹⁸⁰ The union, which was described as "the

176. These efforts, however, are not always successful. For example, in the case of New York's McGregor prison, despite forging an alliance with Senator Kathleen Marchione, who explained that the proposed prison closure "would cost our community 320 public safety positions and hurt the local economy," the union lost its battle. Kelly Fay, *Prison Closures Going Forward As Planned, Despite Lawmaker Opposition*, THE LEGIS. GAZETTE (Feb. 10, 2014), <http://www.legislativegazette.com/Articles-Top-Stories-c-2014-02-10-86735.113122-Prison-closures-going-forward-as-planned-despite-lawmaker-opposition.html> [<http://perma.cc/2R7Q-SABZ>]

177. See, e.g., *Hundreds Oppose Tamms Closure at Packed COGFA Hearing*, AFSCME Council 31 (Apr. 3, 2012), <http://www.afscme31.org/news/hundreds-oppose-tamms-closure-at-packed-cogfa-hearing> [<http://perma.cc/7XQB-C2NB>]. Tamms was opened in 1998 with the express purpose of providing disruptive inmates with shock treatment to make them more compliant. Laurie Lo Reynolds & Stephen F. Eisenman, *Tamms is Torture: The Campaign to Close an Illinois Supermax Prison*, CREATIVE TIME REPORTS (May. 6, 2013), <http://creativetimereports.org/2013/05/06/tamms-is-torture-campaign-close-illinois-supermax-prison-solitary-confinement/> [<http://perma.cc/EGM4-93AM>] (noting that, while Tamms was designed to house inmates for a year, many prisoners were left there indefinitely, and describing the "sensory deprivation" at Tamms, which was built "without a yard, cafeteria, classrooms or chapel," and allowed "[n]o phone calls, communal activities or contact visits").

178. See Reynolds & Eisenman, *supra* note 177.

179. James Ridgeway & Jean Casella, *Solidarity and Solitary: When Unions Clash with Prison Reform*, SOLITARY WATCH (Feb. 21, 2013), <http://solitarywatch.com/2013/02/21/solidarity-and-solitary-when-unions-clash-with-prison-reform/> [<http://perma.cc/R9BN-RSVD>]

180. *Id.* This stance was directly in opposition to the position of prison reformers. See, e.g., Laurie Jo Reynolds & Stephen Eisenman, *Is This America's Worst Prison? The Inspirational Campaign to Close Tamms Supermax*, ALTERNET (May 9, 2013), <http://www.alternet.org/activism/americas-worst-prison-inspirational-campaign-close-tamms-supermax> [<http://perma.cc/5AKZ-344G>] (describing the conditions at Tamms as "cruel, inhuman, and degrading").

major force that had opposed the closure,”¹⁸¹ was also instrumental in mounting a public campaign to keep the prison open. Ironically, despite its pro-prison stance, AFSCME has bragged about closing *private* prisons; an AFSCME Bulletin from Fall 2013 boasted, “AFSCME Helps Close Dangerous Private Prisons,” referring to the closing of Dawson State Jail in Texas, which was managed by the Correctional Corporation of America.¹⁸²

Public unions spend political capital (and, in some cases, millions of dollars) to advocate in favor of policies that would support the continued growth of the prison industry; they lobby in favor of eliminating parole for violent felons¹⁸³ and against proposals to overhaul mandatory minimum sentences.¹⁸⁴ For example, the California Correctional Peace Officers Association (CCPOA), which is widely regarded as the most powerful such union due both to its size and independence,¹⁸⁵ employs twenty full-time individuals to handle its public relations and legal matters and spends roughly \$8 million per year on lobbying.¹⁸⁶ California is not the only state where officers, through their union representation, lobby extensively and possess significant political clout.¹⁸⁷ Unions representing officers in many states

181. AFSCME, the union that was at the forefront of this political battle, which represents 62,000 officers and 23,000 employees nationally, has not taken a definitive position on solitary confinement. Ridgeway & Casella, *supra* note 179.

182. *AFSCME Helps Close Dangerous Private Prisons*, *supra* note 129.

183. Mike Riggs, *Public Sector Prison Unions Are Spending Almost as Much on Campaigns as Private Prison Companies*, REASON: HIT AND RUN BLOG (Aug. 22, 2012, 4:53 PM), <https://reason.com/blog/2012/08/22/what-does-it-mean-that-public-sector-pri> [<http://perma.cc/93ZM-9D6D>]; Nathaniel Heggins Bryant, *The Prison-Industrial Complex and Organized Labor: Union Complicity in the Corrections Industry*, Presentation at Stony Brook University How Class Works – 2014 Conference 6 (2014), http://www.stonybrook.edu/workingclass/images/2014conference_papers/bryant2.pdf [<http://perma.cc/N3RG-EPRZ>].

184. See Julie Falk, *Fiscal Lockdown Part II: Will State Budget Cuts Weaken the Prison-Industrial Complex—Or Strengthen It?*, DOLLARS & SENSE, Nov./Dec. 2003, at 32 (discussing the potential outcomes of state budget cuts on prisons).

185. Putting CCPOA’s dominance into context, a Texas union leader remarked, “In Texas, I have to play politics; in California, they own politics.” Lowry interview, *supra* note 28. Rhode Island’s correctional officers’ union is also independent and considered a very powerful force in the state, though given the small size of the state it does not have a comparable national presence. Wall interview, *supra* note 28.

186. *The Role of the Prison Guards Union in California’s Troubled Prison System*, PRISON ACTIVIST RESOURCE CTR. (May 18, 2014), <https://www.prisonactivist.org/alerts/role-prison-guard-union-california%E2%80%99s-troubled-prison-system> [<https://perma.cc/5VCZ-EZAR>]; *About the CCPOA*, PRISON TALK (Nov. 11, 2013, 11:12 PM), <http://www.prison-talk.com/forums/archive/index.php/t-33069.html> [<http://perma.cc/YR62-USPE>].

187. This Article thus highlights examples from both California and other states, noting differences between the unions where relevant. By contrast, much of the existing scholarship on correctional officers’ unions focuses almost exclusively on the California union. *E.g.*, AMY LERMAN, *THE MODERN PRISON PARADOX: POLITICS, PUNISHMENT, AND SOCIAL COMMUNITY* (2013); PAGE, *supra* note 10.

have endorsed candidates¹⁸⁸ and policies that support their “tough on crime” philosophy.¹⁸⁹

In jurisdictions where officers are part of a larger umbrella union, they are often a very influential contingent.¹⁹⁰ Union leaders may feel pressure to placate correctional officers by advocating for measures that would advance their interests.¹⁹¹ For example, in Maryland, where correctional officers account for about one-quarter of the statewide membership of AFSCME, the union recently pushed through a Correctional Officers Bill of Rights (COBR), which added significant procedural protections for officers facing administrative discipline and made punishment “only a ‘very’ remote possibility.”¹⁹² The Maryland legislature enacted COBR in an election year after correctional officers had been punished for “savagely beating” inmates.¹⁹³ COBR was extremely controversial and widely criticized, with an FBI affidavit describing the COBR internal review process as “ineffective as a deterrent,” but union support was decisive.¹⁹⁴

Unions have gained further political clout by finding allies in community groups, businesses, and victims’ groups that also advocate for increased imprisonment. In “one-industry towns” where prison work is a dominant source of income for residents, the concentrated pressure of local voters and union leadership is politically powerful. A leader of the Florida Teamsters described the “outcry” that followed the Florida Department of Corrections decision to close the Jefferson Correctional Institution in Monticello.¹⁹⁵ Community groups joined forces with the union to successfully oppose the proposed closure of Jefferson prison,

188. Press Release, R.I. Bhd. of Corr. Officers, Rhode Island Brotherhood of Correctional Officers Endorses Whitehouse (Aug. 25, 2006) (on file with author).

189. Leading examples include unions in Florida, New York, Rhode Island, and Michigan. See, e.g., Aaron Deslatte, *Crist Courts Voters with Positive Focus*, FLORIDA TODAY, Aug. 16, 2006, at A1; Falk, *supra* note 184, at 32; Bryant, *supra* note 183, at 6; Press Release, R.I. Bhd. of Corr. Officers, *supra* note 188.

190. Of crucial significance is the percentage of union members that are correctional officers. Where this percent is small, the larger union forces that tend toward progressive policies may prevail, whereas when the percent is large, then the union may need to accommodate the correctional officers and their pro-incarceration preferences.

191. Charles Lane, *Baltimore Behind Bars: Public-Union Power Enabled Scandalous Corruption Among the City’s Correctional Officers*, CITY JOURNAL (Spring 2014), http://www.city-journal.org/2014/24_2_baltimore-correctional-services-corruption.html [<http://perma.cc/VQX7-A572>].

192. *Id.*

193. *Id.*

194. COBR included a provision that allowed prison administrators to impose “emergency suspensions [of correctional officers] in the best interest of the inmates, the public, and the correctional facility” but required that such suspensions come with pay. *Id.* (internal quotation marks omitted).

195. Cantrell interview, *supra* note 28.

which was the “largest employer in the county.”¹⁹⁶ Jefferson County’s board ultimately passed a resolution documenting “[t]he loss of jobs and the impact on the local economy and community . . . estimated to have a \$19 million impact on local economic activity and uprooting longtime residents who must move elsewhere to find new jobs.”¹⁹⁷ A Florida correctional officer elaborated further, “Closing Jefferson [would] cost me my job. I have ties to this community and I can’t afford to move somewhere else in Florida.”¹⁹⁸ Patricia Caruso, former Director of the Michigan Department of Corrections explained the phenomenon of one-industry prison towns: “In the 1980s, we created this problem. Communities either wanted jobs, or they didn’t have the political influence to keep prisons away from their towns. [Now their] livelihood depends on people being incarcerated.”¹⁹⁹

Correctional officers’ unions have also allied themselves with businesses that risk losing cheap labor if prisons are closed. Businesses in many states profit from cheap inmate labor; for example, in Washington, inmates fight fires and clean up litter and graffiti for fifty cents an hour (at a maximum of \$55 per month).²⁰⁰ One local employer explained, “They are a tremendous asset. When you have guys . . . eager to do work that others might not want to do . . . it’s really an advantage.”²⁰¹ The Florida union worked with community businesses and the county council to avoid the closure of a local prison.²⁰² One business leader explained that inmates “do everything from staking, picking and weeding to landscaping and carpentry work. And we pay them \$2 per hour as opposed to around \$9, which we’d have to pay for outside laborers.”²⁰³ In New York, the union found an ally in the Highway Superintendent who also opposed prison closures, asserting

196. *Id.*; see also *Correctional Officers Applaud Jefferson County Resolution Against Prison Closure*, PR NEWSWIRE (Jan. 19, 2012), <http://www.prnewswire.com/news-releases/correctional-officers-applaud-jefferson-county-resolution-against-prison-closure-137731038.html> [<http://perma.cc/4P3M-6XVW>].

197. *Id.*

198. *Id.*

199. Caruso interview, *supra* note 28 (noting further that the increase in incarceration rate has led to an increase in one-industry towns where standard arguments against prison closure include not only public safety concerns but also loss of jobs and even concerns about the sustainability of the local school system, i.e. how many kids will be lost if the prison is closed).

200. Joe English, *Opposition Deepens to Larch Mountain Closure*, KATU (Feb. 2, 2010), <http://www.katu.com/news/local/83399582.html?mobile=y> [<http://perma.cc/V3WM-M5KL>].

201. *Id.*

202. Cantrell interview, *supra* note 28.

203. Lois Kindle, *Activists, Lawmakers Lobbying to Keep Prison Open*, THE TAMPA TRIBUNE (Mar. 19, 2013), <http://www2.tbo.com/south-shore/activists-lawmakers-lobbying-to-keep-prison-open-350502> [<http://perma.cc/Z4WN-Q9VJ>].

that the highways benefit from the cheap maintenance work provided by inmates.²⁰⁴

In California, the officers' union has allied itself with victims' groups, going so far as to create and sponsor victims' rights organizations,²⁰⁵ most notably the Crime Victims United of California (CVUC)—a strong advocate for longer sentences and reduced parole. The union provides 100% of CVUC's political action committee money and both the union and the victims' rights organization often employ the same lobbyists. The victims' rights organization is understood to provide moral authority for pro-incarceration policies, which supplements the union's financial resources. Explaining the success of this approach, Jeff Thompson, who has served as a lobbyist for both the union and the victims' rights group, noted, "nobody feels empathetic for prison guards, but everyone's got sympathy for crime victims."²⁰⁶ Furthermore, when politicians want to show that they are tough on crime, the victims' rights organization is a convenient ally—which further augments the influence of the union.²⁰⁷

In California, the correctional officers' union, through CVUC, its victims' rights organization, has opposed decarceration-era reforms, most notably attempts to reform California's sentencing laws.²⁰⁸ Even in the "tough on crime" era, the moral authority provided by the union's alliance with the victims' rights organization was a public relations boon to the union.²⁰⁹ In more ambivalent times (and especially as fiscal

204. Lucas Willard, *Lawmakers, Union Hope to Prevent Closure of Saratoga County Prison*, WAMC NE. PUB. RADIO (Sept. 26, 2013), <http://wamc.org/post/lawmakers-union-hope-prevent-closure-saratoga-county-prison> [<http://perma.cc/PE9H-RUVU>].

205. CCPOA employees themselves acknowledge that it is "hard to argue that victims' groups do not act as proxies since they even use the same lobbyists." PAGE, *supra* note 10, at 103.

206. *Id.* at 222. CVUC has effectively become the voice of victims in California. Thanks to CCPOA funding and support as so-called "puppet master," the voice of CVUC "drowns out" the other victims' groups, marginalizing voices that "promote reconciliation . . . and prefer treatment and rehabilitation over vengeful penal sanctions." *Id.* at 82.

207. *Id.* at 109. Meanwhile, the portrait drawn by CVUC fits the stereotype of the "prototypical crime victim": white, middle-class family members of homicide victims, despite the fact that a mere .3% of crimes in California are homicides. *Id.*

208. For example, the victims' rights group lobbied against laws to allow early parole for critically ill prisoners, including those who are comatose, and against legislation that would allow some of those sentenced as juveniles to life without parole to have their terms reduced. *Id.* at 390. As part of his speech opposing the reform of California's Three Strikes laws, Marc Klaas, who became a victim advocate after the highly publicized murder of his twelve-year old daughter, delivered an impassioned speech about the role of prison and prisoners: "They don't need GEDs; what they need is a slap"; "they don't need a program, they don't need a law library; they don't need a weight set; they don't need TVs; . . . what they need is 10 more years." "What they need to do is understand what they have done, and take the punishment like the men they will never be . . ." *Id.* at 95–96.

209. Baumann interview, *supra* note 28.

woes in California escalate), the victims' rights group is an invaluable ally because the union can funnel money through the victims' rights organization while avoiding criticism that it is acting irresponsibly and solely out of self-interest.²¹⁰ Indeed, while CCPOA and CVUC both contributed extensively to campaigns in the 1990s and early 2000s, in more recent years, CCPOA direct contributions decreased somewhat, while the victims' groups contributed more money to pro-incarceration campaigns.²¹¹ Recently, the fair political practices commission insisted that CVUC's main political action committee change its name from CVUIEC (Crime Victims United Independent Expenditure Committee) to "CVUIEC Sponsored by the CCPOA."²¹²

The private prison industry is also politically vocal, with three corporations spending more than \$45 million in the last decade on pro-incarceration lobbying.²¹³ They have backed legislators who support an increase in prison privatization and harsher immigration policies. For example, thirty of the thirty-six legislators who co-sponsored an immigration law in Arizona, which would result in a significant increase in the number of detainees, received campaign contributions from private prison corporations.²¹⁴ Private prison companies helped to draft and pass key immigration bills such as the Support Our Law Enforcement and Safe Neighborhoods Act immigration bill in Arizona²¹⁵ and Georgia's Illegal Immigration Reform and Enforcement Act of 2011.²¹⁶ Corporations that manage and operate federal detention centers have much to gain from these bills because they would result in an increase in the number of individuals placed in the federal custody

210. See PAGE, *supra* note 10, at 82.

211. See *id.* at 87; see also Baumann interview, *supra* note 28.

212. PAGE, *supra* note 10, at 390.

213. The Associated Press, *Private Prison Companies Making Big Bucks on Locking Up Undocumented Immigrants*, DAILY NEWS (Aug. 2, 2012), <http://www.nydailynews.com/news/national/private-prison-companies-making-big-bucks-locking-undocumented-immigrants-article-1.1127465> [<http://perma.cc/P8J5-XPZS>].

214. *Id.*

215. S. 1070, 49th Legis., 2d Reg. Sess. (Ariz. 2010), <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf> [<http://perma.cc/NV7Q-XYU9>]; Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Aug. 28, 2010), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law> [<http://perma.cc/9KBT-A9SY>].

216. H.R. 87, 151st Gen. Assemb., 1st Reg. Sess. (Ga. 2011), <http://www.legis.ga.gov/Legislation/20112012/116631.pdf> [<http://perma.cc/5LDA-TQAX>]; see Gwynedd Stuart, *Cashing in on a Crackdown: Georgia's Thriving Private Prison Industry Will Get a Boost From New Immigration Law*, CREATIVE LOAFING ATLANTA (July 28, 2011), <http://clatl.com/gyrobase/georgias-thriving-private-prison-industry-boost-from-new-immigration-law/Content?oid=3700500&showFullText=true> [<http://perma.cc/E4BA-NWL9>] (documenting CCA contributions in 2009 and 2010 to eleven state senators, seventeen state representatives, and the state governor, all of whom voted in favor of H.B. 87).

of Immigration and Customs Enforcement.²¹⁷ Private corporations have also lobbied to reclassify misdemeanors as felonies; for example, in Oklahoma, they lobbied to convert the crime of introducing a cell phone into prison, which traditionally was a misdemeanor, into a felony, raising the minimum sentence to two years and the maximum to seven years.²¹⁸

The public relations campaigns of the publicly traded prison corporations are most discernible through their shareholder statements. Recently, Corrections Corporation of America assured investors that demand for beds would continue,²¹⁹ while GEO Group executives conveyed to investors that they could count on a “growing offender population.”²²⁰ One former private prison executive elaborated: “I don’t think we have to worry about running out of product. It’s unfortunate but true.”²²¹ CCA’s recent shareholder statement specified, “We are pursuing a number of initiatives intended to increase our occupancy and revenue.”²²² Some have highlighted the close relationships between private-sector leaders and state officials as a partial explanation for the success of private prison companies.²²³ For example, in Florida, Governor Rick Scott recently headlined a \$10,000 per person fundraiser at the home of George Zoley, CEO of the Boca

217. Fulcher, *supra* note 113, at 607.

218. Jones interview, *supra* note 28.

219. See Corrs. Corp. of Am., *supra* note 149 (forecasting increased demand for bed capacity).

220. Nicole Flatow, *Private Prison Profits Skyrocket, as Executives Assure Investors of “Growing Offender Population”*, THINK PROGRESS (May 9, 2013), <http://thinkprogress.org/justice/2013/05/09/1990331/private-prison-profits-skyrocket-as-executives-assure-investors-of-growing-offender-population/> [<http://perma.cc/KML9-34PK>] (transcribing remarks of John Hurley, GEO’s Senior Vice President, as part of a 2013 conference call for investors).

221. Eric Bates, *Private Prisons*, THE NATION (1997), http://www.druglibrary.org/schaffer/media/thenation_0105bate.htm [<http://perma.cc/33BW-QEMK>] (quoting Kevin Myers, warden at a CCA-run prison).

222. Corrs. Corp. of Am., Annual Report (Form 10-K) (Dec. 31, 2014), <http://www.sec.gov/Archives/edgar/data/1070985/000119312515061839/d853180d10k.htm> [<http://perma.cc/4C7E-F9T3>].

223. See, e.g., Craig Harris, *Arizona Private Prison Contract Awarded to Tenn. Firm*, THE ARIZ. REPUBLIC (Aug. 31, 2012), <http://www.azcentral.com/news/articles/2012/08/31/20120831arizona-private-prison-contract-awarded-firm.html> [<http://perma.cc/ZYV8-DFVL>] (highlighting ties between Arizona Governor Jan Brewer and lobbyists for CCA); Bob Libal, *Humpday Hall of Shame: NJ Governor Chris Christie & Community Education Centers*, GRASSROOTS LEADERSHIP (June 20, 2012), <http://grassrootsleadership.org/blog/2012/06/humpday-hall-shame-nj-governor-chris-christie-community-education-centers> [<http://perma.cc/PBR8-SLD5>] (noting that Christie was formerly employed as a lobbyist for CEC).

Raton-based GEO Group.²²⁴ Governor Scott has supported prison privatization and a plan to expand the GEO Group's role in the state.²²⁵

Private prison corporations have also found allies to join them in opposing the closure of prisons, even when extra bed space is unnecessary. Recently, Colorado paid millions of dollars to CCA to keep open a prison "in order to protect the economic base of small, rural communities that have become dependent on the jobs that for-profit prisons provide."²²⁶ The private sector was able to capitalize on the need of local politicians to retain the support of voters in their communities and avoided prison closure by virtue of this political alliance.

Private corporations continue to demand minimum occupancy contracts for up to twenty years, further thwarting decarceration-era goals, and they frequently use the legislative process to achieve these contract terms. Of sixty private prison contracts recently released as part of a public records request, nearly two-thirds of the contracts included an occupancy guarantee; most of these contracts included a provision mandating an occupancy rate of 90% or more.²²⁷ Justin Jones, a former Director of the Oklahoma Department of Corrections, recalled an occasion when CCA, which had already secured a 94% minimum occupancy requirement, demanded that the occupancy requirement in its contract be increased to 98%.²²⁸ When this demand was refused, CCA went to the Oklahoma State Capitol and threatened to close the facility, which would have cost the local community 400 jobs.²²⁹ Despite Jones's assurance that "they were bluffing," and that CCA would not dare follow through on this threat as it would jeopardize their standing with shareholders, Oklahoma legislators refused to "call CCA's bluff" and agreed to the private company's demands.²³⁰

Aside from actively resisting prison closures and demanding minimum-occupancy requirements, the private prison sector has turned its advocacy efforts toward ensuring that the growing federal

224. Nicole Flatow, *Private Prison CEO Will Host Florida Governor at \$10K-A-Plate Fundraiser*, THINK PROGRESS (July 20, 2014), <http://thinkprogress.org/justice/2014/07/20/3462058/rick-scott-will-headline-fundraiser-at-private-prison-firm-ceos-home/> [<http://perma.cc/X5TX-DV49>]; Cantrell interview, *supra* note 28.

225. Flatow, *supra* note 224.

226. John Dannenberg, *Colorado Pays for Unneeded Private Prison Beds to Subsidize Local Jobs*, PRISON LEGAL NEWS (Apr. 15, 2013), <https://www.prisonlegalnews.org/news/2013/apr/15/colorado-pays-for-unneeded-private-prison-beds-to-subsidize-local-jobs/> [<http://perma.cc/ZB84-R6LS>].

227. *See supra* note 27 (contracts on file with author); *see also* Friedmann interview, *supra* note 20.

228. Jones interview, *supra* note 28.

229. *Id.*

230. *Id.*

detention market continues to prosper. The market for immigration detention centers has been a boon to the private sector,²³¹ and private companies are increasingly drawn to federal contracts.²³² Federal contracts may be more stable than state contracts,²³³ and this preference has informed private-sector advocacy efforts.²³⁴

The detention market may be particularly profitable (and thus desirable) to the private sector because detention is cheaper than imprisonment, in part because there is no requirement of providing educational or other programs.²³⁵ Thus, private detention centers may reap outsized profits. Furthermore, detention centers are more likely to house detainees who are younger and healthier for the short term, making them even more desirable to corporations concerned with generating revenue for shareholders.²³⁶ This is among the reasons why private prisons, seeing more consistent upward trajectory in the federal immigration context,²³⁷ have focused their political activism on ensuring that the immigration sector continues to grow,²³⁸ and on resisting immigration reforms that would disrupt the growth of the federal detainee population.

231. See, e.g., The Associated Press, *supra* note 213 (reporting that private prisons holding immigrants are generating lucrative profits); see also Mauer interview, *supra* note 28.

232. See, e.g., Corrs. Corp. of Am., *supra* note 149 (“BOP, ICE, and USMS, accounted for 43% of our total revenues for the fiscal year.”).

233. *Id.* (expressing concern about “[l]egislation . . . proposed in numerous jurisdictions that could lower minimum sentences for some non-violent crimes and make more inmates eligible for early release based on good behavior”).

234. While this could be understood as a means of adaptation (along the lines of the private prison industry’s investments in surveillance, see *infra* Section IV.A.), coupled with its push for more draconian immigration policies that would serve to increase the federal prison population, it is more appropriately understood as resistance to the broader decarceration enterprise. See, e.g., Halimah Abdulah, *Tech Giants, Private Prisons Big Players on Immigration Reform*, CNN (Mar. 11, 2013), <http://www.cnn.com/2013/03/11/politics/immigration-lobbying/> [<http://perma.cc/2B6V-QZBS>] (explaining that private prison companies “have contributed heavily to the campaigns of lawmakers who take tough stances on [immigration]”).

235. See, e.g., Prince interview, *supra* note 28.

236. Petrella interview, *supra* note 28.

237. *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*, ACLU (June 2014), https://www.aclu.org/sites/default/files/field_document/060614-aclu-car-reportonline.pdf [<http://perma.cc/6D6B-HMSN>] (documenting the expanding role of private prisons in the current detention crisis).

238. See, e.g., Abdulah, *supra* note 234 (noting that big businesses have lobbied in favor of issuing more H-1B visas).

B. Discretionary Decisions as Resistance

Corrections officers make countless discretionary disciplinary decisions per day, and there is scant oversight of these decisions.²³⁹ When an inmate is disciplined by an officer, that inmate generally loses accrued “good time credit” toward early release. This is highly significant because an inmate’s sentence minus “good time” determines when the inmate is released from custody. Discretionary decisions by officers also affect *where* an inmate serves his or her sentence, which may also affect the inmate’s accrual of good time. Officers’ decisions may have the effect of sending inmates to administrative segregation, colloquially termed “ad seg.”²⁴⁰ As one corrections department director explained, “disciplinary infractions result in disciplinary confinement, which results in the loss of earned time.”²⁴¹ Even where the prison’s warden is required to sign off on an officer’s disciplinary decision, this may involve mere “rubber-stamping.”²⁴² In such cases, there is no meaningful oversight of officers’ disciplinary decisions.

In the private prison context, “every day [of early release credit] a prisoner loses is a day of extra income for the company.”²⁴³ An inmate sent to administrative segregation loses thirty days of accumulated good time. In the case of the Corrections Corporation of America, a placement in administrative segregation would result in an added bonus to the company of nearly \$1,000 in profit.²⁴⁴ One account suggests that in Tennessee, CCA correctional officers are encouraged to document minor infractions by prisoners and send them to administrative segregation.²⁴⁵ While comparisons between private and

239. See, e.g., Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1762 (2010).

240. This Article uses the terms “administrative housing,” “solitary confinement,” and “restrictive housing” interchangeably. Notably, there are significant distinctions between solitary confinement conditions in different facilities. See, e.g., Fontenot interview, *supra* note 28.

241. Wall interview, *supra* note 28 (adding, however, that he did not see evidence of any abuse of discretion among Rhode Island correctional officers).

242. See, e.g., Lewen interview, *supra* note 28.

243. Bates, *supra* note 28.

244. *Id.* For analogous examples in the context of traffic stops by police, see Thomas Garrett & Gary Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J. LAW & ECON. 71, 71 (2009) (finding that the issuance of traffic tickets is “used as a revenue-generation tool rather than solely a means to increase public safety”); Michael Makowsky & Thomas Stratmann, *Political Economy At Any Speed: What Determines Traffic Citations?*, 99 AM. ECON. REV. 509, 509–26 (2009) (demonstrating empirically that the budget maximizing hypothesis helps to explain police officer behavior in the context of traffic stops).

245. Bates, *supra* note 28 (quoting an officer in Nashville’s Davidson County, “We will put ‘em in seg in a hurry”).

public facilities are hindered by many variables,²⁴⁶ one state study in New Mexico found that inmates at a CCA facility lost good time at a rate nearly eight times higher than at a state-run facility.²⁴⁷ Discretionary decisions that result in longer periods of incarceration may not necessarily be motivated by an affirmative desire to thwart decarceration-era goals, but when these decisions are motivated for reasons other than maintaining order, they may represent a broader resistance to the goals of rehabilitation and reentry. It is very difficult to assess whether inmates are being disciplined appropriately or not. Nevertheless, if an officer wanted to punish the inmate, there are obvious avenues the officer could pursue through disciplinary measures that would result in administrative segregation and/or increase the inmate's time in prison.²⁴⁸

Staff may use “ad seg” as “retaliation,” and some claim that officers “fabricate evidence,” though these allegations are rarely substantiated because individual discretionary decisions are difficult to challenge.²⁴⁹ Nonetheless, these discretionary decisions may have drastic ramifications. For example, in California, a “validated gang member” is subject to a six-year minimum sentence in the Solitary Housing Unit (known as “the SHU”).²⁵⁰ A validated gang member can be released from the SHU only if he “debriefs” or provides information about other associates.²⁵¹ Simply put, “the only way to prove that you’re not in a gang is to rat out your friends.”²⁵² And, while there are designated criteria to “validate” gang membership, many have suggested that this highly important decision with serious consequences is itself a discretionary, “pseudo-legal process” that involves neither a right to a hearing nor other due process considerations.²⁵³ Under the Security Threat Group classification system, the California Department of Corrections “must compile at

246. Volokh, *supra* note 19, at 342–64.

247. Mechthild Nagel, *Prisons, Big Business, and Profit: Whither Social Justice?*, in DIVERSITY, MULTICULTURALISM AND SOCIAL JUSTICE, 361, 370 (Seth N. Asumah & Ibipo Johnston-Anumonwo eds., 2002).

248. Friedmann interview, *supra* note 20 (explaining that the only way to find out about abuse of discretion is if reported by an inmate, but, since inmates are rarely believed in these instances, there is essentially no check on abuse in this area).

249. Lewen interview, *supra* note 28.

250. Jenny Jiang, *CDCR’s Revised Gang Validation or “Security Threat Group” Classification System, WHAT THE FOLLY?!* (Mar. 25, 2013), <http://www.whatthefolly.com/2013/03/25/analysis-cdcrs-revised-gang-validation-or-security-threat-group-classification-system/> [<http://perma.cc/657J-6NRM>].

251. *Id.*

252. Lewen interview, *supra* note 28.

253. *Id.*

least 3 independent source items that add up to 10 points.”²⁵⁴ These source items could include contact information for a gang member, “distinctive clothing,” and the all-important “information supplied by confidential and non-confidential informants.”²⁵⁵ These determinations, while part of a designated classification system, are essentially discretionary decisions—because the criteria are so broad—and could significantly delay an inmate’s release. Thus, staff attuned to a prison’s financial incentives could overtly thwart reform efforts; others inclined to retaliate against a particular inmate, or to otherwise showcase their authority, could inadvertently subvert prison reform goals.

C. Collusion as Resistance

Collusion by public and private industry stakeholders could also undermine policy purposes. For example, while correctional officers’ unions and private prison corporations historically have been at odds, these groups are united by a common desire to grow the prison industry, and they may find common ground at the expense of decarceration-era goals.

Historically, when states have floated the idea of privatizing part of the prison system in order to alleviate overcrowding in public sector prisons, correctional officers’ unions have vociferously opposed this idea,²⁵⁶ concerned about a threat to their jobs. However, if a privatization scheme sufficiently integrated public-sector employees, unions could be persuaded to join forces with private companies as a means of preserving their members’ job security. Such a scheme could thus invigorate political opposition to decarceration by merging the political clout of union workers and the corporate lobby.

In California, Governor Brown recently proposed a plan that would increase the private prison presence in the state but staff private facilities with union officers.²⁵⁷ This arrangement would radically disrupt what has been a traditional alliance—that between the California officers’ union and prison reformers *against* privatization.²⁵⁸ Yet state officials managed to avoid union outcry by suggesting that

254. Jiang, *supra* note 250.

255. *Id.*

256. As Volokh suggests, in the privatization context, union and private prison lobbyists may cancel each other out by competing with one another. Volokh, *supra* note 115, at 1221–25. However, the collusive possibilities discussed in this section threaten any antitrust benefits.

257. Paige St. John, *Jerry Brown Eyes Putting State Guards in Private Prison*, L.A. TIMES (Aug. 22, 2013), <http://articles.latimes.com/2013/aug/22/local/la-me-ff-jerry-brown-eyes-putting-union-guards-in-private-prison-20130822> [<http://perma.cc/3F5J-6N3H>].

258. *See supra*, Section II.A.

union employees would staff the private prison. State officials also managed to avoid public outcry about spending more money for prison construction at a time when California was in a fiscally desperate situation;²⁵⁹ while the state would not be saving money in labor costs (because it would be paying union wages), at least it would not be expending funds on prison construction. This proposal invited public and private sectors to harness their shared incentives to resist decarceration-era goals.²⁶⁰ Importantly, while the interests of both factions were already aligned toward expanding the prison industry, for the first time, they also shared opportunities to benefit from privatization.²⁶¹

Prison reformers have described this unlikely public-private alliance as “a politically powerful model,” speculating, “there will be nothing temporary about this growth.”²⁶² While prison reformers traditionally have counted on the support of unions in their opposition to private prisons, unions cannot be counted on as a consistent ally if their own financial interests would be enhanced through privatization. While California is the first state to consider this public-private alliance, described as “a détente between former foes,”²⁶³ as both public and private prison sectors face increased cutbacks due to decarceration measures, such alliances among the public and private sectors may gain traction in other jurisdictions.

D. Culture as Resistance

Aside from the economic interests described above, public and private sector actors may resist decarceration-era goals by propagating

259. See, e.g., Baumann interview, *supra* note 28 (describing it as a “win-win”). Some prison reformers expressed concern that the momentum supporting decarceration is so closely tied to states’ fiscal woes such that once the economic crisis is averted, states will likely revert to “business as usual.” See, e.g., Friedmann interview, *supra* note 20. This example of public-private collusion supports the notion that, without a broader cultural shift, the successes of the decarceration movement may be limited.

260. This phenomenon is in direct opposition to claims that “privatization is a form of antitrust” and that a happy consequence of privatizing industries, such as the prison industry, is the *reduction* of political influence. Volokh, *supra* note 115, at 1253.

261. Ultimately, the state leased the prison from CCA, staffing it with union workers. Doing so fulfilled CCA’s prophecy: “if we build it they will come,” as the prison in question was built on spec. Daniel Wood, *Private Prisons, Public Doubts*, THE CHRISTIAN SCI. MONITOR (July 21, 1998), <http://www.csmonitor.com/1998/0721/072198.us.us.1.html> [<http://perma.cc/2TT6-QFGL>] (quoting David Myers).

262. Chris Kirkham & Saki Knafo, *For-Profit Prisons Are Big Winners of California’s Overcrowding Crisis*, THE HUFFINGTON POST (Oct. 25, 2013) http://www.huffingtonpost.com/2013/10/25/california-private-prison_n_4157641.html [<http://perma.cc/7EJN-N6TY>] (quoting Glenn Backes, lobbyist for Drug Policy Alliance).

263. *Id.*

an “us versus them” mentality that undermines efforts to improve prison conditions and to promote successful reentry.²⁶⁴ The architecture of prison life accentuates this separation between staff and inmates.²⁶⁵ Prisoners are referred to by number rather than by name,²⁶⁶ and they are classified by “level of risk” based on their offense.²⁶⁷ Dress codes, prohibitions against fraternizing among inmates and officers, and the designation of publicly accessible amenities, such as restrooms and water fountains, as “staff only” may also contribute to this cultural separation in prisons.²⁶⁸ Seizing on the racialized aspects of mass incarceration, Jody Lewen, Executive Director of the Prison University Project at San Quentin, described practices such as delineating that a coffee machine is only for staff use as “taking the psychology of Jim Crow and superimposing it” in the prison context.²⁶⁹

Officers, who are the individuals that interact most directly and frequently with inmates, may not support rehabilitative goals such as education.²⁷⁰ In fact, they may embrace the “us versus them” paradigm

264. Derrick Bell discussed a related paradigm in the school desegregation context, highlighting the similar needs of poor whites and blacks and the tension between these groups. Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–26 (1979). Bell’s discussion resonates with this Article’s discussion of the similar backgrounds of correctional officers and inmates in the prison context. These similarities may also contribute to antagonism (or collusion) between these groups and resistance to rehabilitative efforts or other attempts to transform the lives of prisoners.

265. See, e.g., LERMAN, *supra* note 187, at 125 (describing the “military-style discipline” in prisons and the emphasis on “the maintenance of order and security through the use of force when necessary”); see also Philip Zimbardo, *Revisiting the Stanford Prison Experiment: A Lesson in the Power of Situation*, http://www.lucifereffect.com/about_reviews_chronicle.htm [<http://perma.cc/L7XG-PA5U>] (describing the simulated prison environment as a “dominating behavioral context whose power grossly frayed the seemingly impervious values of compassion, fair play, and belief in a just world”).

266. See, e.g., Elizabeth Gudrais, *The Prison Problem*, HARV. MAG. (Mar. 2013), <http://harvardmagazine.com/2013/03/the-prison-problem> [<http://perma.cc/3WAL-TZ48>] (noting that this was one reason why European visitors to American prisons may perceive that inmates in the United States are “treated as subhuman”).

267. See, e.g., James Austin, *Findings in Prison Classification and Risk Assessment*, NAT’L INST. OF CORRECTIONS 4 (June 25, 2003), http://www.jfa-associates.com/publications/pcras/10_Findings_2003.pdf [<http://perma.cc/CH5D-TPMA>].

268. Lewen interview, *supra* note 28. It is, however, important to disaggregate the separation of prisoners and officers and the underlying goals of the system—presumably, the separation itself would not be as problematic if the underlying goals were such that officers were invested in treating inmates humanely and preparing them to reintegrate. Ultimately, different roles and responsibilities (and even access to amenities) can be distinguished from a situation in which some individuals are treated as second-class citizens.

269. *Id.*

270. Notably, to be an officer in most states one needs only a GED or high school diploma. The lack of higher education of most officers may help to explain their resistance to higher education opportunities for inmates. However, this sentiment is not limited to correctional officers. Federal (and most state) funding for higher education in prisons has been discontinued, demonstrating popular resistance to providing educational opportunities for prisoners. See, e.g., Gregory A. Knott,

to such an extent that they are unwilling to acknowledge shared interests with inmates. The ongoing controversy involving air conditioning in Texas prisons is illustrative. Among corrections officers in Texas, where summer temperatures can soar well into triple digits, there was significant resistance among correctional officers to improving prison conditions by installing air conditioning.²⁷¹ A popular response by officers was, “we are going to help them?”²⁷² This proposed improvement was also derided as amounting to a “hug a thug” program.²⁷³ And yet, when polled anonymously, 87% of the corrections officers in Texas claimed to want air-conditioned prisons, illustrating a tension between officers’ personal preferences and their desire to appear tough and to publicly distance their own needs from those of the inmates under their watch.²⁷⁴

But officers may actually have much in common with inmates. Many of them come from the same neighborhoods and low-income backgrounds, and their jobs are widely considered undesirable.²⁷⁵ A common refrain during interviews with corrections leaders was that “no one working as a correctional officer grew up wanting to be one.”²⁷⁶ In fact, the job of “prison guard” consistently is ranked as one of the worst jobs in the United States—just below that of dishwasher.²⁷⁷ Studies have shown that working as a correctional officer is more likely to result in post-traumatic stress disorder (PTSD) than spending time in

Cost and Punishment: Reassessing Incarceration Costs and the Value of College-in-Prison Programs, 32 N. ILL. U. L. REV. 267, 281–82 (2012) (noting that at one time there were 350 college programs in U.S. prisons but now, because of the Violent Crime Control and Law Enforcement Act of 1994, there are only three).

271. Lowry interview, *supra* note 28.

272. *Id.*

273. *Id.* (describing the “light bulb” that went on when he would explain to officers that they too would benefit from this reform).

274. The Texas correctional officers’ union eventually adopted a platform supporting air conditioning in prisons, and they recently joined pending litigation challenging the lack of air conditioning in Louisiana prisons. Mike Ward, *Guards to Join Convict Litigation Over Hot State Prisons*, STATESMAN.COM (Aug. 29, 2013), <http://www.statesman.com/news/news/guards-to-join-convict-litigation-over-hot-state-p/nZgSD> [<http://perma.cc/NZJ4-CYBM>]; see also Lowry interview, *supra* note 28; Teetz interview, *supra* note 28.

275. Lewen interview, *supra* note 28.

276. See, e.g., Lowry interview, *supra* note 28 (observing, “they know their jobs are bad, but they don’t know why”).

277. See, e.g., *Best and Worst Jobs 2010*, WALL ST. J. (Jan. 5, 2010), http://online.wsj.com/public/resources/documents/st_BESTJOBS2010_20100105.html [<http://perma.cc/9V56-RGNY>]. Other countries, such as Norway, offer contrasting paradigms. In Norway, prison work is respected and considered social work; to be eligible for a job as a correctional officer in Norway, one needs extensive post-graduate training. Conway interview, *supra* note 28.

combat.²⁷⁸ Life expectancy for correctional officers is low, and suicide rates are high,²⁷⁹ as are divorce rates.²⁸⁰

Just as prison reformers described the high level of discretion in disciplinary matters by correctional officers and their arbitrary (sometimes cruel) treatment of prisoners, so too union representatives described a similar unfettered discretion and associated arbitrariness by wardens and other prison management toward correctional officers.²⁸¹ Union leaders described “heavy-handed” disciplining of employees, “hypocrisy” when wardens who were discovered in violation of prison rules were not subject to disciplinary measures,²⁸² and the “power trip” enjoyed by some wardens who were likely to “intimidate employees” or discipline an officer for no stated reason, perhaps because “they may just not like an employee.”²⁸³ One union representative explained further that, if an officer questions what appears to be an arbitrary disciplinary measure, the warden may see this as challenging his authority, thus exacerbating an already tenuous relationship.²⁸⁴ Another union leader noted that wardens, who have “aspirations to move up higher in the ranks,” sometimes “ask staff to cut corners.”²⁸⁵ And when special treatment is afforded to wardens or where prison

278. A study by the Desert Water Institute on PTSD and corrections officers showed that rates of PTSD for corrections officers is on par with Vietnam veterans and higher than for Gulf War veterans. Natasha Lennard, *31 Percent of Correctional Officers Have PTSD*, SALON (Dec. 4, 2012, 3:37 PM), http://www.salon.com/2012/12/04/31_percent_of_correctional_officers_have_ptsd/ [<http://perma.cc/VJW2-ZH8W>].

279. See generally Steven Stack & Olga Tsoudis, *Suicide Risk Among Correctional Officers: A Logistic Regression Analysis*, 3 ARCHIVES OF SUICIDE RES. 183 (1997) (finding that “the risk of suicide among guards i[s] 39% higher than that of the rest of the working age population”).

280. Oscar Lopez, *Prison Officers Need Help, but They Won't Ask for It*, NEWSWEEK (May 27, 2014), <http://www.newsweek.com/2014/06/06/prison-officers-need-help-they-wont-ask-it-252439.html> [<http://perma.cc/HEG7-8LGV>].

281. See, e.g., Baumann interview, *supra* note 28.

282. For example, when an Arizona warden was found responsible in a sexual harassment case, the warden was not removed or seriously disciplined, but rather given “a slap on the wrist.” Blackmer interview, *supra* note 28. By contrast, correctional officers had been dismissed for what was widely perceived to be “the same infraction.” *Id.*

283. In a survey of staff members at a private prison, in answer to the question, “What is the reason for the number of people quitting?” nearly twenty percent of employees cited “treatment by supervisors,” and seventeen percent listed “money.” Bates, *supra* note 6. Importantly, the two concerns expressed most by correctional officers’ unions were 1) pay (and how low pay resulted in turnover whenever the economy picked up); and 2) treatment of officers. See, e.g., Cantrell interview, *supra* note 28. Apparently these twin concerns pervade both public and private sectors.

284. Lowry interview, *supra* note 28; see also Blackmer interview, *supra* note 28; Teetz interview, *supra* note 28.

285. Blackmer interview, *supra* note 28. Officers explained that wardens are under a lot of pressure to perform so that they can move up the ranks, which may mean moving from a remote state prison to a more central location, or to promotion as a Deputy Director. *Id.* (noting that in Arizona a warden might imagine—quite correctly—that “if I screw up here, I’ll be stuck in Winslow and never make it back to Phoenix”).

management is understood to be above the law, this will “affect morale.”²⁸⁶ Cultural norms in prisons may begin with management, and when correctional officers perceive themselves to be mistreated and the victims of abuses of discretion, they may be more inclined to behave cruelly and to abuse their discretion in their interactions with inmates.²⁸⁷ This may further dehumanize inmates, jeopardizing their reentry prospects and thwarting decarceration-era goals.

Meanwhile, one cannot expect the private prison culture to be more decarceration-friendly than that of the state with which it contracts. When inmates are routinely shipped hundreds or even thousands of miles away from their families and communities, despite evidence that doing so is highly disruptive to these families and communities, as well as to the inmate’s prospects for successful reentry,²⁸⁸ decarceration-era goals are thwarted. Further evidence of an anti-decarceration culture is the “race to the bottom,” which results when the state solicits bids from the private sector and prioritizes cost savings to such a degree that inmate services are essentially left out of the equation.²⁸⁹ Importantly, the state—through its institutional design choices—sets parameters in which the private sector must operate. Recalling one private prison executive’s analogy between selling hamburgers and selling prisons,²⁹⁰ there is a dominant strain of prisoner commodification that may be rampant in the private sector and reinforced by state contracts. Requirements of the private sector to

286. *Id.* Others remarked that, in some prisons, nepotism is pervasive, describing a system of “good ol’ boy politics and nepotism” where “the warden’s son gets promoted.” Lowry interview, *supra* note 28. Union leaders were quick to point out that “we’ve had really good wardens too” and that these problems are not always present, but rather that the culture of prison management is highly impactful. *Id.*

287. *See, e.g.,* Michael Gilbert, *The Illusion of Structure: A Critique of the Classical Model of Organization and the Discretionary Power of Correctional Officers*, 22 CRIM. JUST. REV. 49, 53 (1997) (emphasizing the importance of interpersonal interactions in prisons); Liebling, *supra* note 144, at 340 (discussing the need for management role modeling such that staff can reflect their principles and expertise in their interactions with inmates).

288. Johnna Christian, *Riding the Bus: Barriers to Prison Visitation and Family Management Strategies*, 21 J. CONTEMP. CRIM. JUST. 31, 32–33 (2005).

289. This “race to the bottom” is characterized by private and public sectors competing against each other with each striving to cut costs most, often at the expense of habitable facilities, let alone rehabilitative programs or services. *See, e.g.,* Bates, *supra* note 6 (describing a race to the bottom in Tennessee where “the prison companies kept offering [the state] bigger and better deals,” and “[g]iven an opportunity to submit cost estimates anonymously, firms offered fantastic savings ranging from 30 percent to 50 percent. Threatened by the competition, even the state Department of Corrections went bargain basement, offering to slash its own already low cost by \$70 million a year”); *see also*, Prince interview, *supra* note 28 (noting that the staffing pattern is set by the Request for Proposal (RFP) and determines, for example, how many inmates each case manager is assigned to, often upwards of one hundred offenders).

290. *See* notes 6–7 and accompanying text.

provide programs are generally minimal, and there is rarely meaningful oversight or recourse if contract terms are not met, because state facilities are already overcrowded so there is nowhere else for private-sector inmates to go. These design features exacerbate cultural resistance to decarceration-era goals.

IV. OPPORTUNITIES FOR COOPERATION

While there are powerful strains of resistance to reform among industry stakeholders, simplistic accounts of the monolithically hostile prison industry are incomplete. In fact, some industry actors have already begun adapting to the prospect of a new decarceration-era landscape, and even occasionally aligning with reformers. After examining early signs of adaptation and cooperation, this Part explores institutional design and cultural changes that would further promote decarceration-era goals.

A. Early Examples of Adaptation

1. Seizing New Business Opportunities

Prison industry stakeholders could move away from the resistance model and instead assume an adaptive approach to a new decarceration-era landscape by exploring business opportunities in the broader corrections industry that create new streams of revenue, protecting them against a drop in incarceration. This would require industry stakeholders to anticipate trends in corrections. Ultimately, this approach may be particularly attractive to the private sector, which has strong incentives to be “one step ahead of policy” and the capacity to be “creative.”²⁹¹ While the public sector has little choice regarding what markets to enter, the private sector will consider which subset of the corrections industry has the most growth potential.

Private industry stakeholders have begun adapting to changing times by investing in surveillance, reentry, non-criminal detention, and probation,²⁹² “looking at all streams to generate revenue” and pursuing the strategy of “grow or die.”²⁹³ For example, the GEO Group recently

291. Mauer interview, *supra* note 28.

292. While CCA and the GEO Group are tied to real estate by virtue of their corporate structure and therefore might be imagined less likely to diversify, as shown below, these corporations have already begun to pursue diversification strategies. *See infra* notes 294–96 and accompanying text.

293. Cohen interview, *supra* note 28.

acquired Behavioral Interventions,²⁹⁴ a GPS monitoring company,²⁹⁵ and CCA acquired Correctional Alternatives, a reentry service.²⁹⁶ Some private companies have also begun providing probation supervision.²⁹⁷ In the immigration context, private-sector supervision programs have been used as an alternative to detention. For example, the GEO Group “uses a combination of ankle GPS monitoring systems and home visits to keep tabs on a suspected illegal immigrant.”²⁹⁸

Electronic monitoring is increasingly popular as an alternative to incarceration for states that seek cost savings and a solution to overcrowded prisons.²⁹⁹ Some states have already enacted or are considering bills that would provide electronic monitoring for parolees as a way to save money and reduce overcrowding in prisons and jails.³⁰⁰

294. Press Release, The GEO Grp., The GEO Group Closes \$415 Million Acquisition of B.I. Incorporated (Feb. 11, 2011), <http://www.businesswire.com/news/home/20110211005372/en/GEO-Group-Closes-415-Million-Acquisition-B.I.#.VAc8x2Swtl-8> [<http://perma.cc/2S7X-NFP9>] (noting that Behavioral Interventions is “the largest provider of comprehensive electronic monitoring services, tracking more than 60,000 offenders on behalf of approximately 900 federal, state and local correctional agencies located in all 50 states” and that the company is “the sole provider of monitoring and supervision services for U.S. Immigration and Customs Enforcement (ICE) through the Intensive Supervision and Appearance Program (ISAP), which is a core component of ICE’s Alternatives to Detention program”).

295. *Id.* George Zoley, Chairman and CEO of GEO, has stressed his company’s efforts to diversify: “This important milestone further diversifies GEO and positions our company to meet the demand for increasingly diversified correctional, detention and treatment services in every state and for every federal detention and corrections agency in the United States.” *Id.*

296. Press Release, Corrs. Corp. of Am., CCA Acquires Corrections Alternatives, Inc. (Aug. 5, 2013), <http://cca.com/press-releases/cca-acquires-correctional-alternatives-inc#.U78US61dXDE> [<http://perma.cc/3SUU-HN3K>]. CCA described this “strategic acquisition” of CAI as a way to “grow and expand upon the community corrections business that CAI has developed.” *Id.*

297. *See, e.g.,* PRIV. PROB. SERVS., <http://www.privateprobationservices.com/> [<http://perma.cc/KG59-R5AR>] (last visited Sept. 13, 2015); SATILLA PROB. MGMT. CORP., <http://www.satillaprobation.com/> [<http://perma.cc/EQ5W-RAV3>] (last visited Sept. 13, 2015).

298. Aubrey Pringle, *The Winners in Immigration Control: Private Prisons*, THE ATLANTIC (Aug. 28, 2013), <http://www.theatlantic.com/national/archive/2013/08/the-winners-in-immigration-control-private-prisons/279128/> [<http://perma.cc/95NG-QJPQ>].

299. *See, e.g.,* Erika Slife, *More Non-Violent Offenders Getting Home Monitoring in Cook County*, CHI. TRIB. (Oct. 5, 2011), http://articles.chicagotribune.com/2011-10-05/news/chi-more-nonviolent-offenders-getting-home-monitoring-in-cook-county-20111005_1_home-monitoring-house-arrest-defendants [<http://perma.cc/9AJ8-LLXC>]. Patricia Caruso noted that part of Michigan’s strategy for decreasing the prison population involved significantly expanding the use of EM technologies; she described the \$10 million investment in GPS as very successful in enhancing the comfort level of the parole board. Caruso interview, *supra* note 28 (relating that 100% of sex offenders who are paroled in Michigan are now on GPS; that whereas the parole rate for sex offenders when she began her tenure with the Michigan Department of Corrections in 2003 was 11%, it was 50% when she left in 2011; and that fewer than 5% of those paroled have been reincarcerated and none has been reincarcerated for a sex offense). *Id.*

300. *See, e.g.,* Rob Moritz, *More Electronic Monitoring Could Relieve Prison Overcrowding, Prison Officials Say*, ARK. NEWS BUREAU (Sept. 2, 2013), <http://arkansasnews.com/sections/news/arkansas/more-electronic-monitoring-could-relieve-prison-overcrowding-prison-officials> [<http://perma.cc/XB7Z-SFN6>] (discussing Arkansas’ Act 570, which, in part, “made some

Approximately 200,000 individuals in the United States currently wear an electronic monitor (generally an ankle bracelet) as a condition of probation, parole, house arrest, or bail.³⁰¹ The market for electronic monitoring continues to expand. In 2009, Behavioral Interventions signed a five-year, \$372 million contract with U.S. Immigration and Customs Enforcement (ICE) to monitor nearly 30,000 immigrants awaiting asylum or deportation hearings.³⁰²

This diversification ensures that private prison companies will flourish even if the decarceration trend continues and U.S. prisons experience a further decline.³⁰³ At the same time, some private sector efforts to diversify may merely be an outgrowth of other efforts to thwart decarceration-era goals and should be closely scrutinized. For example, some private companies offering probation supervision tempt counties and municipalities with “a deal that sounds too good to be true—they will offer probation services in misdemeanor cases without asking for a single dime of public revenue.”³⁰⁴ In return, they demand “the right to collect fees from the probationers they supervise and that courts make probationers’ freedom contingent on paying those fees.”³⁰⁵ While such offers may appeal to cash-strapped states, these states ultimately bear the responsibility for conflicts of interest that may arise when the profits of private companies are directly related to the fines they impose on probationers.³⁰⁶ In the absence of meaningful oversight to prevent abuse, such arrangements should be disfavored.

nonviolent offenders eligible for parole earlier, with electronic monitoring as a condition of early release in some cases”).

301. James Kilgore, *Electronic Monitoring: Some Causes for Concern*, PRISON LEGAL NEWS (Mar. 15, 2012), <https://www.prisonlegalnews.org/news/2012/mar/15/electronic-monitoring-some-causes-for-concern/> [<http://perma.cc/E4J8-4AXH>]. In California alone, 7,900 parolees designated as “high-risk,” most of whom are suspected gang members or on the sex offender registry, wear ankle bracelets. Paige St. John, *Blind Spots in Electronic Monitoring of Sex Offenders*, PORTLAND PRESS HERALD (Mar. 31, 2013), http://www.pressherald.com/2013/03/31/blind-spots-in-electronic-monitoring_2013-04-01/ [<http://perma.cc/226W-6C2Z>].

302. Kilgore, *supra* note 301. The surveillance market has also infiltrated high schools. For example, iSECUREtrac, an electronic monitoring firm, recently funded a pilot monitoring project for high school students with truancy records in a predominantly black and Latino school district in Dallas, Texas. *Id.*

303. While this adaptation may be seen as a form of cooperation, there are also negative ramifications to consider. Diversification by the private prison sector may result in the corrections industry’s expansion, even if certain inmate populations continue to decrease.

304. HUMAN RIGHTS WATCH, *Profiting from Probation* (Feb. 5, 2014), <http://www.hrw.org/reports/2014/02/05/profitting-probation-0> [<http://perma.cc/8EST-TTYJ>].

305. *Id.*

306. This conflict of interest is further exacerbated where the same private company manages the jail to which the probationer is sent, creating a win-win situation for the corporation.

2. Improving Working Conditions

Unions have begun to realize that, while a stable prison population is in their interest, they also have much to gain from improved prison conditions. Problems associated with prison overcrowding affect inmates and prison industry professionals alike. Prison overcrowding has serious repercussions for the officers responsible for overseeing the facility, who may be increasingly subjected to violence when staffing ratios are low and conditions are poor.³⁰⁷ Thus, while officers would not want to see prisons empty out so much that there is a risk of closure, neither would they prefer the unlimited expansion of the prisoner population without an assurance that this increase is accompanied by the construction of additional facilities to house them and the hiring of additional officers. Rather, their preference for more prisoners is dependent on sufficient space and appropriate staffing ratios.

Some officers may adapt to the new decarceration-era landscape by joining with prison reformers to address overcrowded conditions in prisons. In California, for example, the correctional officers' union recently filed a brief in *Brown v. Plata*, alleging that prison overcrowding adversely affected those who work in California prisons as well as prison inmates.³⁰⁸ According to the brief, "CCOPA members' daily work experiences reveal an overcrowded, inadequately staffed system that cannot deliver adequate medical care in spite of the best efforts of prison employees."³⁰⁹ Officer Gary Benson explained that there were "way too many inmates in that small of a space to do the job."³¹⁰ Many California prisons were also short staffed; one union representative reported that, at the time of the *Brown v. Plata* litigation, the inmate population of the Norco prison where he worked was at 300% of capacity, and there was "no static staffing ratio," meaning that when more inmates were added to the prison, there was no increase in staffing.³¹¹ While the focus of prison reformers tends to

307. Reforming solitary confinement is another area that has garnered support from officers (through their unions), since solitary is widely understood to increase prisoner violence, which has a direct, negative effect on staff. *See, e.g.*, Fathi interview, *supra* note 28 (describing the "gratuitous isolation" that reformers are trying to roll back in Texas, where everyone with a death sentence is put in solitary, and the union's support for this reform).

308. Brief for Appellee Intervenor Cal. Corr. Peace Officers' Ass'n at 1–2, *Schwarzenegger v. Plata*, 130 S.Ct. 3413, (2010) (No. 09-1233) 2010 WL 4253495 at *1–2, *Schwarzenegger v. Plata* (2010) (No. 09-1233) (intervening on behalf of the 35,000 correctional officers in California).

309. *Id.* at *11.

310. Ridgeway & Casella, *supra* note 179.

311. Baumann interview, *supra* note 28 (further adding that, at the start of the litigation, there were nine hundred mental health inmates at Norco and "not a single psychologist").

be conditions for inmates, increasingly the deleterious effects of prison overcrowding on correctional officers and other prison workers has come to light,³¹² exposing opportunities for cooperation and coalition-building.

3. Co-opting Unions

In some states, prison reformers have been able to reduce union pressure by absorbing correctional officer jobs into other related industries. The Michigan Department of Corrections' recent efforts to reduce its prison population in the face of a powerful correctional officers' union are illustrative.

Michigan closed twenty prisons and, for the first fifteen closures, there was no need to lay off any officers and therefore no significant outcry from the union. How was this possible? According to Patricia Caruso, former Director of Michigan's Department of Corrections who supervised these efforts for seven years, the Michigan corrections department anticipated these closures and stopped filling vacancies unless absolutely necessary. Dennis Schrantz, who oversaw the implementation of the Michigan Prisoner Reentry Initiative, which resulted in a 12% decrease in Michigan's prison population, further explained that when filling a vacancy was necessary, the Department staffed that position with an officer who was already employed by the Department.³¹³

When Michigan prisons eventually closed, any remaining officers on staff were given the opportunity to continue working with the Department in another capacity, sometimes as probation or parole officers.³¹⁴ Perhaps most surprisingly, given the tensions that often pervade management-union relations,³¹⁵ the Department alerted the union sufficiently in advance so that union leaders could stand with

312. While private prison corporations have not taken a public stand on prison conditions litigation, they too may benefit from court mandates (such as that in California) that require states to reduce prison overcrowding. While such court orders may result in some amount of decarceration, states may also find themselves more inclined to contract with the private sector as a way to fulfill the court mandate without risking public outcry related to the release of inmates (especially near an election year). Some have speculated that the primary motivation of the CCPOA for aligning with reformers in *Brown v. Plata* was to "get a seat at the table." McDonald interview, *supra* note 28. By contrast, the Rhode Island union was entirely absent from recent negotiations about prison reform. Wall interview, *supra* note 28.

313. Schrantz interview, *supra* note 28.

314. Caruso interview, *supra* note 28 (noting that resistance was minimal because, "when people know they can put food on the table, it's easier").

315. See generally PAUL BLYTON AND PETER TURNBULL, *THE DYNAMICS OF EMPLOYEE RELATIONS* (3d ed. 2004) (exploring the nature of employee relationships).

Department representatives for the public announcement.³¹⁶ While the union may not have affirmatively supported these prison closings, Caruso noted that the transitions were relatively smooth and union leadership “never violated [the DOC’s] confidence.”³¹⁷ The ultimate success of similar efforts to close prisons elsewhere may also depend on management-union relations, as well as on the ability of the state to absorb officers into other government jobs in that same community.

B. Implications for Future Institutional Design Reform

Some interests between reformers and prison industry stakeholders may already be positively aligned. Early examples of adaptation to the prospect of decarceration suggest that at least some stakeholders understand the writing on the wall—that a further decline in incarceration is likely and that it would behoove them to look for ways to profit from this new landscape. The challenge for policymakers who favor decarceration-era goals, and for reform advocates, is to determine how to most productively build on these synergies.

This section offers some preliminary suggestions. It identifies and assesses institutional design reforms that might better align prison industry incentives with efforts to reduce the prison population, improve prison conditions, and promote rehabilitation—three cornerstone goals of contemporary prison reform. While these proposals are top-down approaches and would require political will, they take prison industry professionals’ incentives into account, thus avoiding some pitfalls of recent reform efforts.

1. Decoupling Profit from Number of Prisoners

At present, prison contracts follow a hotel model,³¹⁸ so that the more prisoners housed by a private prison, the more profit for the corporation.³¹⁹ Any effort to change the incentives of private prison corporations must begin by changing this model, which ties the fate of the prison industry to the number of people imprisoned by the state. So long as prisons operate on the same model as hotels, they will be driven by the same overriding motivation to maximize occupancy.

316. Caruso interview, *supra* note 28.

317. *Id.* But see Schrantz interview, *supra* note 28 (noting that, when Standish, the sixteenth prison to close during this time, was closed—and for all subsequent closures that involved layoffs—there was picketing by the union and substantial outcry).

318. As discussed previously, this hotel model may be modified by minimum occupancy guarantees. See *supra* notes 227–30 and accompanying text.

319. *Id.* Even in a modified hotel model, private prisons have strong incentives to prefer more prisoners when they are paid per prisoner.

Instead, private prisons should be compensated based on a more realistic estimate of the fixed and marginal costs of running a prison. They should be guaranteed a certain amount per prison facility, regardless of how many inmates it contains. This facility fee should be supplemented by per-prisoner fees to compensate for the marginal cost of housing additional inmates. The crucial difference from the current situation is that these supplemental fees would only cover the marginal cost, thus substantially reducing or even eliminating the incentive to imprison as many inmates as possible.

In addition, prisons should be compensated less for low-risk prisoners and more for adding prisoners with special needs.³²⁰ Again, this would eliminate the incentive for private prisons to skim off low-cost, low-risk prisoners and to shun prisoners who might impose extra costs on a prison.³²¹ If prisons were compensated more for higher-risk prisoners, perhaps they could devise better ways to house and treat them.³²² This approach would also enable a fairer comparison between costs in different prisons by making the cost of housing different inmate populations more transparent.³²³ Finally, this approach would eliminate the danger that an average per-prisoner fee, combined with private prison efforts to skim off the lowest-cost prisoners, may

320. At present, compensation in neither sector varies according to the needs of particular prisoners, their educational attainment or vocational training while in prison, or whether they end up back in prison within a day, a month, or a year of release. For a contrasting example in the medical field, see JUDITH MISTICHELLI, DIAGNOSIS RELATED GROUPS (DRGs) AND THE PROSPECTIVE PAYMENT SYSTEM: FORECASTING SOCIAL IMPLICATIONS 2 (1984) (describing the system of Diagnosis Related Groups in medicine, whereby patients are divided into “medically meaningful” groups according to their treatment needs and for purposes of Medicare reimbursement).

321. The private sector has been widely criticized for cherry-picking those prisoners that are least expensive to house. See, e.g., Julia Bowling, *Are Private Prisons Good Investments for States?*, BRENNAN CTR. FOR JUST. (Apr. 15, 2014), <http://www.brennancenter.org/blog/are-private-prisons-good-investments-states> [<http://perma.cc/V4KN-9G39>]. The educational sector provides a helpful analogue here: one concern raised about charter schools is their tendency to siphon off students that are wealthier and have fewer special needs. MARK WEBER & JULIA RUBIN, NEW JERSEY CHARTER SCHOOLS: A DATA-DRIVEN VIEW 4–5 (Oct. 29, 2014), http://www.saveourschoolsnj.org/save/corefiles/wp-content/uploads/2014/10/NJ-Charter-School-Report_10.29.2014.pdf [<http://perma.cc/45ZZ-P3Q8>]. As a result of these dissimilar student populations, it is difficult to compare the performance of charter schools to their public counterparts. A better approach would calibrate vouchers to charter schools based on the expected difficulty of educating particular students in these schools.

322. For example, if prisons were paid more to house mentally ill prisoners—assuming that there was also a requirement to provide treatment—this would provide an incentive to diagnose prisoners properly. To avoid over-diagnosis, a state psychologist could be responsible for diagnosing prisoners and would commit the prison to treatment programs as a condition of receiving extra funds.

323. This approach is in harmony with Volokh’s suggestion that better performance measures be developed to determine the relative strengths and weaknesses of public and private-sector prisons. Volokh, *supra* note 20, at 375–77.

overcompensate private prisons for new inmates and encourage those prisons to maximize capacity.

Of course, any change in modes of compensation might result in increasing overall payments to private prisons—particularly if private prisons end up being paid for half-empty prisons, or if private prisons change their focus to gain fees from more lucrative, high-risk prisoners.³²⁴ Conversely, this approach could save money if private prisons remain filled with low-risk prisoners. To the extent that prison reform advocates are concerned about the treatment of prisoners, a single-minded focus on limiting compensation for private prisons may be counterproductive, as discussions about how to warehouse people for the least possible cost are not conducive to the kind of reforms that are likely to lead to better prison conditions.

Although these changes are most directly applicable to private prisons, which explicitly operate on a model where more prisoners means more income, they should be part of a shift that transforms public prisons as well. At present, public prisons are also viewed through the lens of cost-per-prisoner, irrespective of individual prisoner needs.³²⁵ For example, county jails have increasingly been tasked with housing overflow inmates from state prisons, and these counties are compensated on a per-prisoner basis.³²⁶ Furthermore, public corrections administrations may be assessed on their comparative efficiency in terms of cost-per-prisoner.³²⁷ Thus, reforming the cost-per-prisoner model could also improve the incentives of public prisons, moving them away from a warehousing paradigm.

In some ways, these changes would move the industry toward a cost-plus model: compensating private prisons for their true costs to avoid encouraging them to increase incarceration. It would thus follow the lead of states that have applied the “decoupling model” to electricity and natural gas industries. Traditional utility rates compensate

324. But even if this approach increased up-front costs, if it reduced incarceration rates by changing the incentives of private prison companies, it could save money by decreasing the number of prisoners, not to mention reducing the collateral consequences of prison for inmates, their families and communities. *See supra* Section I.A.

325. *See, e.g.*, BUREAU OF JUST. STATS., SPECIAL REPORT, STATE PRISON EXPENDITURES, 2001 (2004), <http://www.bjs.gov/content/pub/pdf/spe01.pdf> [<http://perma.cc/6622-GTQ9>].

326. *See, e.g.*, NAT'L ASS'N OF COUNTIES, STATE PRISONERS IN COUNTY JAILS (2010), <http://www.naco.org/newsroom/pubs/Documents/Health,%20Human%20Services%20and%20Justice/State%20Prisoners%20in%20County%20Jails%20Updated.pdf> [<http://perma.cc/ZDE2-LLEE>] (noting, for example, that in Montana, “the state reimburses both county and regional jails for room, board, and routine medical expenses” and that “the per diem rate ranges by county from \$48.00 - \$56.00 for local jails”).

327. CHRISTIAN HENRICHSON & RUTH DELANEY, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9–10 (2012), http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisoners_updated_version_072512.pdf [<http://perma.cc/R7GY-KGJ9>].

utilities per unit of electricity or gas delivered, which means that utilities receive outsized profits when energy use unexpectedly increases.³²⁸ This model encourages utilities to maximize energy use, undercutting energy efficiency goals. Reformers have moved to roll back any excess profits due to increased energy, “decoupling” utility profits from energy use.³²⁹ This change means compensating utilities more for their fixed costs and less for their marginal costs, and the same approach could reduce private prisons’ incentive to incarcerate.

Another analogous use of the “decoupling model” comes from the health-care sector and involves decoupling profits from the number of medical procedures performed. The fee-per-service model in the health-care context has led to increased costs and overuse of medical procedures; recent Medicare reforms that decouple profits from the number of procedures are designed to promote an efficient use of services, rather than a maximizing use.³³⁰ Of course, efforts to increase efficiency and decouple profits from service provision in any of these contexts require new mechanisms for measuring outcomes, and the next section explores the possibility of using outcome metrics to compensate prisons to further improve their incentives.

2. Paying for Performance

Changes in compensation schemes would also drastically affect the orientation of institutional actors.³³¹ In the prison context, the incentives of stakeholders would shift if the prison industry were compensated according to performance metrics. By connecting compensation to outcome measures, states could better align the incentives of prison industry stakeholders with decarceration-era goals.³³²

328. James Coleman, *Importing Energy, Exporting Regulation*, 83 *FORDHAM L. REV.* 1357, 1368 n.68 (2014).

329. *Id.*

330. *See, e.g.*, Christopher Cheney, *Medicare Unveils Alternative Payment Models*, HEALTHLEADERSMEDIA (Jan. 27, 2015), <http://healthleadersmedia.com/page-1/HEP-312576/Medicare-Unveils-Alternative-Payment-Models> [<http://perma.cc/2MCV-3R6J>].

331. *See* SHAHID BURKI & GUILLERMO PERRY, *BEYOND THE WASHINGTON CONSENSUS: INSTITUTIONS MATTER* 5 (1998).

332. Pay for performance measures might meet with union opposition (as in the teachers union context), *see, e.g.*, Kevin Sieff, *For Va.’s Proposed Teacher Merit-Pay Program, Few Hands in the Air*, WASH. POST (June 22, 2011) https://www.washingtonpost.com/local/education/for-vas-proposed-teacher-merit-pay-program-few-hands-in-the-air/2011/06/22/AGzsZVgH_story.html [<http://perma.cc/LH2W-HHWA>], but it might also provide unions with leverage to negotiate higher salaries. Furthermore, unions should not object to calibrating vouchers to the private system based on the students in that system. Similarly, correctional officers should, if anything, prefer that

There are various models of “pay for performance,” which include partnerships between the state, private investors, and prisons.³³³ One approach that could be used in both the public and private sectors is a social impact bond.³³⁴ Using this approach, investors provide funds to a prison or associated non-profit that invests them in a prison reform project, such as reducing recidivism, and the government pays the investors back at a premium if the goals of the project are met.³³⁵ Social impact bonds arose in this context with a project in the United Kingdom at the Peterborough prison.³³⁶ Beginning in 2010, investors provided capital to be managed by a non-profit,³³⁷ which contracted with a social work group to run anti-recidivism services.³³⁸ For this anti-recidivism program to be considered a success, the reconviction rate must be 7.5% less than the matched comparison group.³³⁹ If the program “works,” the British government repays the capital plus 9% interest.³⁴⁰ The likelihood of success and the price of the bonds were determined based on the prior success rate of the service organization.³⁴¹ If the project is unsuccessful, the investors receive nothing and the taxpayers pay nothing.³⁴² As of 2013, the Ministry of

distinctions are made between high- and low-cost inmates, and that payment is calibrated accordingly.

333. For a proposal that would use prisoner feedback through a voucher system to determine market success, see Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779 (2012). However, giving prisoners that degree of choice is likely politically infeasible and Volokh acknowledges various weaknesses of this proposal that may be dispositive, e.g., market failure arguments suggesting that prison quality would not likely improve, and market success arguments suggesting that satisfying prisoner preferences may harm society, for example, by allowing gang members to choose the same prison. *Id.* at 824, 838–40. A pay for success model does not suffer from these same limitations.

334. See *Social Impact Bonds: An Overview*, SOCIAL FINANCE 4–5 (2012) (exploring how social impact bonds can mobilize private capital to advance social good).

335. Alan Travis, *Will Social Impact Bonds Solve Society's Most Intractable Problems?*, THE GUARDIAN (Oct. 6, 2010), <http://www.theguardian.com/society/2010/oct/06/social-impact-bonds-intractable-societal-problems> [<http://perma.cc/38QS-43ZR>].

336. *Private Backers Fund Scheme to Cut Prison Reoffending*, BBC NEWS (Sept. 10, 2010), <http://www.bbc.com/news/uk-11254308> [<http://perma.cc/D8TT-N4DM>].

337. *Social Impact Bonds: An Overview*, *supra* note 334, at 8.

338. *Id.*

339. *Id.* at 9. The measure under comparison is reconviction rate for twelve months after each prisoner is released. *Prison Payment-by-Results Schemes See Reoffending Cut*, BBC NEWS (June 13, 2013), <http://www.bbc.com/news/uk-22886395> [<http://perma.cc/U57D-ZXQD>].

340. Judith Rodin, President of the Rockefeller Foundation and a strong supporter of social impact bonds, explained, “the government could pay 9 percent because the recidivism rate would be reduced so significantly [it would still save the government money].” Paul Solman, *How Modern Finance Promises to Break the Cycle of Recidivism*, PBS NEWSHOUR (Mar. 14, 2013), <http://www.pbs.org/newshour/making-sense/how-modern-finance-promises-to/> [<http://perma.cc/AXB5-782C>].

341. *Id.*

342. *Social Impact Bonds: An Overview*, *supra* note 334, at 10–12.

Justice announced interim figures showing a 6% decline in recidivism among a cohort of one hundred Peterborough prisoners.³⁴³ By contrast, recidivism increased 16% nationally.³⁴⁴

Social impact bonds modeled after the Peterborough experiment were recently introduced in the United States. In September 2013, the U.S. Department of Labor announced that it would fully fund similar “Pay for Success” programs in Massachusetts and New York.³⁴⁵ The New York experiment involves a collaboration between private investors—most notably Bank of America Merrill Lynch, which raised \$13.2 million of the \$13.5 million—and the Center for Employment Opportunities, which is providing employment training and job placement assistance services to two thousand individuals with a high risk of recidivism.³⁴⁶ Success requires that recidivism is reduced by 8% in the test group or that employment increases by 5%,³⁴⁷ with more successful outcomes leading to higher returns for investors.³⁴⁸

Massachusetts is the other beneficiary of a U.S. Department of Labor grant. Its program funds a non-profit, Roca, in its attempts to serve 929 men in Massachusetts through “intensive outreach, life skills and employment training that will reduce recidivism.”³⁴⁹ The investment totals \$27 million,³⁵⁰ with Third Sector Capital Partners raising \$18 million in private financing.³⁵¹ Success will be determined based on reductions in the number of days the men spend in jail, as well

343. Isabelle de Grave, *Social Impact Bond Has Reduced Reoffending Says Ministry of Justice*, PIONEERS POST (June 14, 2013), <http://www.pioneerspost.com/news/20130614/social-impact-bond-has-reduced-reoffending-says-ministry-of-justice> [<http://perma.cc/362F-PJWB>].

344. *Id.*

345. News Release, U.S. Dep’t of Labor, U.S. Labor Department Awards Nearly \$24 Million in Pay For Success Grants (Sept. 23, 2013), <http://www.dol.gov/opa/media/press/eta/ETA20131936.htm> [<http://perma.cc/9GQP-ZS57>].

346. Press Release, Andrew M. Cuomo, Governor of N.Y., Governor Cuomo Announces New York the First State in the Nation to Launch Pay for Success Project in Initiative to Reduce Recidivism (Dec. 30, 2013), <http://www.governor.ny.gov/press/12302013-pay-for-success-project> [<http://perma.cc/X96V-K2JD>].

347. *Id.*

348. *Id.* (explaining further that the state raised funds for the potential payout through appropriations and through a \$12 million grant from the Department of Labor).

349. Press Release, Office of Governor Deval L. Patrick, Mass. Exec. Dep’t, Massachusetts Launches Landmark Initiative to Reduce Recidivism Among At-Risk Youth (Jan. 29, 2014), <http://archives.lib.state.ma.us/bitstream/handle/2452/207401/ocn795183245-2014-01-29.pdf?sequence=1> [<http://perma.cc/WS3N-QFLU>].

350. A thorough cost-benefit analysis of the Department of Labor grant is beyond the scope of this Article. However, questions of comparative cost (as well as concerns about how to fund future such partnerships) are central to the viability of social impact bonds and a subject for future research.

351. Press Release, Office of Governor Patrick, *supra* note 349; Elkins interview, *supra* note 28 (noting that Roca was inspired by the Peterborough Project).

as improvements in their “employment and job readiness.”³⁵² The project will last seven years, and the “success payments,” if any, will be funded by money appropriated by Massachusetts, as well as \$11.7 million from the Department of Labor grant.³⁵³ If the project is successful, Roca will add an additional 391 men over nine years.³⁵⁴ Goldman Sachs was an early funder—the bank’s involvement is part of its impact investing initiative—and Roca leadership noted that the private investment in this instance had “little to do with corrections.”³⁵⁵ Another partner in this investment is the Arnold Foundation, a government accountability group seeking transparency and changing “business as usual.”³⁵⁶ Notably, this partnership may have had more to do with building an “impact investing” field and increasing transparency than with prison reform.³⁵⁷ This suggests that potential buy-in for future social impact bonds in the prison context may be broader than one might initially imagine, even if a broad-based cultural shift is lagging.³⁵⁸

Expanding the use of social impact bonds would require that (1) there are workable strategies for stakeholders to achieve prison reform goals, and (2) achievement of these goals could be measured. Even when workable strategies are theoretically possible, they may not be feasible due to a lack of local expertise. For example, while there was much interest on the part of the Department of Corrections when the possibility of social impact bonds was broached in Rhode Island, ultimately there was no traction because the non-profit corrections sector was deemed insufficiently robust, and there was no organization with sufficient capacity to support the initiative.³⁵⁹

In addition to social impact bonds, other innovative compensation schemes could also reward positive outcomes while mitigating stakeholder preferences for an expansion of the prison population. For example, states could experiment with paying bonuses to prisons for outcomes such as lowered recidivism and better employment outcomes for former inmates. These bonuses would, of course, need to compensate for differences in the population of each prison to set an appropriate baseline for measuring improvement.

352. Press Release, Office of Governor Patrick, *supra* note 349.

353. *Id.*

354. *Id.*

355. Elkins interview, *supra* note 28.

356. *Id.*

357. *Id.*

358. *See supra* Section III.D.

359. Wall interview, *supra* note 28.

The health care context provides a useful analogue. Accountable care organizations (ACOs), which are “networks of physicians and other providers that could work together to improve the quality of health care services and reduce costs for a defined patient population,”³⁶⁰ are “given financial incentives to cooperate and save money by avoiding unnecessary tests and procedures,”³⁶¹ and compensation is provided according to performance. ACOs are entitled to keep part of the Medicare savings they generate through more efficient management of health care for their patients,³⁶² and an initial measurement of expected cost of service provision for each patient enables a determination of whether the ACO managed to meet or even surpass expectations.

3. Encouraging Diversification by Industry Stakeholders

Another way to promote cooperation between prison industry stakeholders and reformers would be to encourage private prison corporations and unions to diversify their expertise into such related markets as treatment, rehabilitation, education, and diversionary approaches.³⁶³ Diversified stakeholders would be less adamantly opposed to decarceration because they would also benefit from alternative programs designed to reduce incarceration.³⁶⁴ For example, just as some private companies are already investing in electronic monitoring,³⁶⁵ they could also be motivated to invest in rehabilitative and reentry programs, such as step-down approaches³⁶⁶ and treatment for substance abuse or mental illness. Coalition builders looking to accomplish prison reform should encourage prison industry stakeholders to invest in these related markets.

360. Mark Merlis, *Accountable Care Organizations (Updated)*, HEALTH AFFAIRS (Aug. 13, 2010), http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=23 [<http://perma.cc/4ZAA-LGTY>].

361. Jenny Gold, *FAQ on ACOs: Accountable Care Organizations, Explained*, KAISER HEALTH NEWS (Apr. 16, 2014), <http://khn.org/news/aco-accountable-care-organization-faq/> [<http://perma.cc/V62G-9HW4>].

362. *See* 42 U.S.C. § 1395j(j) (2012).

363. In the private-sector context, policymakers are in regular contact with private industry leaders and could suggest that companies looking to outlast their decarceration policies will need to diversify their business by investing in anti-recidivism and other programs that could expand consistent with decarceration initiatives. According to the chief executive of the Corrections Corporation of America, government clients are already “pushing CCA and other private operators to save them money by reducing recidivism,” and CCA plans to respond by expanding its rehabilitation programs and reentry services. Devlin Barrett, *Prison Firm CCA Seeks to Reduce Number of Repeat Offenders*, WALL ST. J. (Sept. 12, 2014), <http://online.wsj.com/articles/prison-firm-cca-seeks-to-reduce-number-of-repeat-offenders-1410561176> [<http://perma.cc/BX45-G3DZ>].

364. *See supra* Section IV.A.

365. *See supra*, notes 293–94 and accompanying text.

366. *See infra*, notes 368–71 and accompanying text.

Early examples of diversification by the electricity industry in distributed solar provision are illustrative. The industry may, of course, strive to eliminate competition from distributed solar despite its environmental benefits. Yet established industry stakeholders, including Edison International and Duke Energy, perhaps seeing what the future could hold, have already begun investing in distributed solar companies.³⁶⁷ This investment among established utilities companies in new forms of electricity could serve as a model for prison industry stakeholders considering an investment in rehabilitative programs that would complement governmental efforts to reduce the U.S. prison population.

Step-down programs provide one possible avenue for increased prison industry investment and alternative employment for corrections officers.³⁶⁸ In step-down programs, inmates are moved gradually from more secure facilities (and more isolation and dependency) to less secure facilities where they have more autonomy.³⁶⁹ Such programs provide further opportunities for private-sector management and correctional officers to be employed in developing more innovative approaches than mere warehousing. These programs may be particularly crucial in the administrative segregation context, where the practice of releasing inmates directly from solitary confinement has led to tragic consequences. In one such case, Tom Clements, the former Executive Director of the Colorado Department of Corrections, was murdered by a parolee “who had spent almost his entire eight-year prison term in solitary confinement before being released directly onto the streets.”³⁷⁰ In Texas, more than one thousand inmates each year are

367. See, e.g., *SEPA Comments on Utility Investments in Distributed Solar Companies*, SEPA, <https://www.solarelectricpower.org/about-sepa/sepa-news/press-releases/sepa-comments-on-utility-investments-in-distributed-solar-companies.aspx> [<http://perma.cc/E44N-HP6W>]:

The investments of Edison International, Duke Energy and NextEra in distributed solar companies demonstrate that these forward-looking companies recognize the important role that solar will play in the future of the energy industry. Customers are increasingly being presented with energy choices, including solar, which foreshadow that the role of the electric utility is likely to shift. Utility holding companies are getting in front of the change and preparing their businesses for continued success.

368. Importantly, policymakers and reformers in favor of decarceration-era goals should prefer diversification in both private and public sectors; in the private sector, this diversification would take the form of *market* diversification, while in the public sector, it would take the form of *labor* diversification. In the public-sector context, this may require providing further training for correctional officers (who generally are required only to possess a high school diploma or GED) to prepare them for other jobs in corrections. See *infra* Section IV.B.4.

369. See, e.g., Step Down Program, CAL. DEPT OF CORRS. AND REHAB., <http://www.cdcr.ca.gov/rehabilitation/step-down-program.html> [<http://perma.cc/CU3G-BXVQ>] (last visited Sept. 10, 2015).

370. Christopher Moraff, *Can Europe Offer the U.S. a Model for Prison Reform?*, NEXT CITY, (June 19, 2014), <http://nextcity.org/daily/entry/us-prisons-reform-european-prisons-model>

released directly from administrative segregation onto the street.³⁷¹ Step-down programs may also play an important role when an inmate transitions from the general prison population to community supervision or release.

Some states have begun experimenting with step-down programs to aid the reentry process.³⁷² New Jersey recently invested in transitional facilities to ease the move from prison to parole, partnering with Community Education Centers (CEC), a private company, to develop an innovative parole diversionary program.³⁷³ New Jersey requires all individuals to spend time in a CEC transitional facility before being transferred to a halfway house.³⁷⁴ According to a member of the CEC Executive Team, the nomenclature—which focuses on “education” as opposed to “corrections”—is not accidental. Employees of CEC are expected to refer to “residents,” not “inmates,” and to address each resident formally, e.g., “Mr. Smith.” CEC facilities house residents for sixty to ninety days. The first thirty days are designated as an orientation period, which includes individual assessment. Each resident is assigned to a counselor as well as to a more senior resident or “big brother.” Residents participate in programs that address such issues as anger management and domestic violence. The programs are named to deemphasize the negative aspects of these needs and to accentuate the positive, hoped-for outcomes, such as the course on

[<http://perma.cc/6G2S-4CA3>] (noting that, in a cruel, ironic twist, Clements had returned barely a month before from a trip sponsored by the Vera Institute to study prison systems in Germany and the Netherlands, countries known for their rehabilitative approaches and low recidivism rates).

371. Lowry interview, *supra* note 28. This phenomenon also raises broader concerns about the use of administrative segregation, including when it should be used, for how long, and what necessary procedural protections and opportunities for review should exist. The American Corrections Association, deeming this issue of pressing concern, devoted four recent plenary sessions to discussion of the issue at its annual meetings. American Corrections Association, Annual Conference Schedule (2014) (on file with author).

372. As in medicine, where step-down units are widely used, cost savings are key. In the prison context, cost savings could result from a need for less security on the front end or lower recidivism rates on the back end. One private company has claimed both front-end savings (i.e. \$70 per day as compared with \$112.50 per day in a public facility) and back-end savings (i.e. a 30% reduction in recidivism rate within one year of release). Press Release, Cmty. Educ. Ctrs., CEC Expands Services at Bo Robinson (June 26, 2006), http://www.cecintl.com/news_2006_29.html [<http://perma.cc/5CGN-RQ3E>]. Presumably, step-down approaches will be viable long-term only if cost savings are documented. For a related example of the front-end cost savings model in the medical context, see Elizabeth Douglas, *Patients With Sleep Apnea Monitored Safely in Step-Down Unity*, 31 ANESTHESIOLOGY NEWS 10 (Oct. 2005), http://www.anesthesiologynews.com/ViewArticle.aspx?d_id=1&a_id=2800 [<http://perma.cc/H3RP-ZQCP>].

373. Fretz interview, *supra* note 28.

374. *Id.*; see also Caren Chesler, *Ready for Reentry?*, NEW JERSEY MONTHLY (Oct. 11, 2010), <http://njmonthly.com/articles/lifestyle/ready-for-re-entry.html> [<http://perma.cc/L8MB-5ZDE>].

“healthy relationships.”³⁷⁵ Approximately five hundred residents are divided into three units, which bear the names Serenity, Tranquility, and Harmony.³⁷⁶ Among the staff are psychologists, social workers, and drug and alcohol counselors, as well as former residents.³⁷⁷ CEC supports an alumni program that sponsors regular meetings and a popular annual alumni picnic, which routinely attracts more than one thousand current and former residents.³⁷⁸

Another business opportunity for prison corporations and officers’ unions is mental illness and substance abuse programs. While the problem of mental illness in prisons is pervasive,³⁷⁹ correctional officers receive scant training in dealing with mental health patients.³⁸⁰ Improving and increasing training for staff about mental illness is a necessary first step.³⁸¹ So is ensuring that mentally ill inmates receive the appropriate medications. While many inmates with mental illnesses can function well when medicated, when off their medication, they may act out in dangerous ways, threatening not only their own lives but also the lives of other inmates and the correctional officers.³⁸² In the words of one former correctional officer, “psychotropic meds make these guys normal and nice; if you take them off meds, they turn into

375. Fretz interview, *supra* note 28.

376. *Id.*

377. *Id.*

378. Townes interview, *supra* note 28.

379. *See, e.g., Inmate Mental Health*, NAT’L INST. OF MENTAL HEALTH (2004), <http://www.nimh.nih.gov/health/statistics/prevalence/inmate-mental-health.shtml> [<http://perma.cc/A2NV-2ZJD>] (finding that more than half of state prison inmates suffered from mental illness). The problem of mentally ill inmates was also mentioned in nearly every interview conducted with corrections department leaders and corrections officers as one of the most significant impediments to reform. *See, e.g., McDonald* interview, *supra* note 28.

380. *See, e.g., Teetz* interview, *supra* note 28 (noting that, in Texas, officers used to receive three hours of mental health training, but in recent years, this training has been cut back to 1.5 hours); *see also Lewen* interview, *supra* note 28 (describing the lack of training for officers about dealing with people in a psychotic state and a devastating example when an inmate who was undergoing a psychotic episode grabbed a pen and lunged at an officer, later to be charged with attempted murder and sent to solitary confinement for three years); *Lowry* interview, *supra* note 28 (referring to the Harris County jail as “the largest treatment center in Texas”).

381. A conventional prison environment may be particularly detrimental to those who suffer from mental illness, all the more so where officers lack even rudimentary training about this population. As one former correctional officer observed, in the “free world,” if an individual talks to himself, it might not attract much attention; conversely, in the “rule-based” prison context, that same individual might be placed in solitary confinement for continued rule violations. *Lowry* interview, *supra* note 28. While solitary confinement is often considered a place for only the most violent offenders, in practice, it is used more widely and often houses many mentally ill inmates. *Jeffrey Metzner, Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY L. 104, 104 (2010), <http://www.jaapl.org/content/38/1/104.full> [<http://perma.cc/NJ4M-QMYX>].

382. *Lowry* interview, *supra* note 28.

Hannibal Lector.”³⁸³ Yet even where inmates are regularly taking their medications, psychotropic drugs are heat-reactive, rendering them ineffective if subjected to extreme heat.³⁸⁴ This is of particular concern in states like Texas and Louisiana, which routinely experience high levels of heat and humidity and have prisons that are not air-conditioned.³⁸⁵ Staff members have particularly strong incentives to prefer temperate conditions in prisons and appropriate medications for those under their supervision, as these factors may be crucial to their personal safety.³⁸⁶

4. Changing Prison Culture

Mitigating resistance to decarceration-era goals may require more than merely changing the financial incentives of prison industry stakeholders. The warehousing mentality in the private sector and the “us versus them” conception of correctional officers may prevent both sectors from pursuing opportunities that align with the goals of prison reformers.³⁸⁷ For executives thinking about inmates as undifferentiated product,³⁸⁸ it may be difficult to imagine how they could profit by treating prisoners as individuals capable of rehabilitation and contributing productively to society. Similarly, the “us versus them” mentality of correctional officers may impede them from seeing areas, such as prison conditions, where their interests are already aligned with inmates. To overcome these cultural roadblocks, the prison industry may need to move to a service model, like those long practiced in the educational, medical, and social work professions.³⁸⁹ Each of these fields has significant experience with the characteristic promise

383. *Id.*

384. *Id.*; see also Jeff Strickler, *Unrelenting Heat Can Wither Your Meds, Too*, STAR TRIB., (July 22, 2012), <http://www.startribune.com/lifestyle/health/163361126.html> [<http://perma.cc/BP2F-LFUY>].

385. See *supra*, notes 271–74 and accompanying text.

386. Without a court order, however, improving conditions in prisons is unlikely to be a high priority for politicians. See, e.g., Baumann interview, *supra* note 28 (“We need litigation for everything.”).

387. In red and blue states alike, prison industry stakeholders, including those who had spent time in law enforcement, referred to prisons as particularly resistant to change. See, e.g., Baumann interview, *supra* note 28; Lowry interview, *supra* note 28.

388. See *supra*, note 7 and accompanying text.

389. See, e.g., *Serving a Diverse Public*, AM. PSYCHOL. ASS’N (Mar. 2013), <http://www.apa.org/pi/lgbt/resources/policy/diversity-preparation.aspx>; Kim Jones, *What is the Purpose of Education?*, FORBES.COM (Aug. 15, 2012), <http://www.forbes.com/sites/sap/2012/08/15/what-is-the-purpose-of-education/> [<http://perma.cc/QKX5-EXL3>]; *NASW Standards for the Practice of Clinical Social Work*, NAT’L ASS’N OF SOC. WORKERS (June 1984), https://www.socialworkers.org/practice/standards/clinical_sw.asp [<http://perma.cc/EN3G-6NAD>].

and pitfalls of public and private approaches. However, unlike these contexts, a more fundamental shift in norms and aims of the prison industry may be necessary to change the institutional culture of prisons.³⁹⁰

Reimagining and humanizing inmates is a necessary first step for prison industry stakeholders, who could eventually benefit from a service model in the prison context. Corrections leaders have remarked that an ability to imagine people in prison as family members (or friends' family members) is crucial to changing prison culture.³⁹¹ One union leader explained that, when he addresses correctional officers, he asks them to keep in mind that "the person next to you probably has a relative in prison."³⁹² Another corrections leader suggested that one perversely "positive" result of high incarceration rates is that "people know people who have been incarcerated," and they may increasingly be able (and willing) to distinguish between "a bad decision" and "a bad person."³⁹³ Some have attributed subtle, progressive shifts in the policies of California's correctional officers' union to the tenure of a new union president whose teenage son had run-ins with law enforcement and the criminal justice system.³⁹⁴ Reimagining prisoners as "related" may also be crucial to continuing and expanding momentum for decarceration-era goals among a broader audience. One reformer described the need to "rehumanize prisoners in the public imagination," and to break apart the "psychic function of prisoners" as lower than ourselves.³⁹⁵

Aside from recontextualizing prisoners as "one of us," another complementary approach would be to fundamentally transform the role

390. The utilities sector may have required a shift almost as great because of the historic presumption of industry stakeholders that their mission was to increase consumption of electricity. The entrance to the Seattle City Light Building once showcased a mural suggesting that power should be used as though it were free. It read: "That Man May Use It Freely as the Air He Breathes, the Waters of the Rivers, the Winds of Heaven." Seattle Art & Seek, *Water Into Electricity*, WAYMARKING (Aug. 6, 2008), http://www.waymarking.com/waymarks/WM4CJ7_Water_Into_Electricity [<http://perma.cc/K737-NW6M>]. Yet while providing power is a priority (and of obvious benefit), it is also a priority to decrease the use of electricity because of the high cost of production as well as the pollution associated with power production and consumption.

391. Fretz interview, *supra* note 28 (noting that, if someone had a personal experience—such as a family member in the system—"it hits home").

392. Lowry interview, *supra* note 28.

393. Caruso interview, *supra* note 28 (observing, however, the persistence of a strain of discourse that insists there should be no redemption for inmates, including for those who committed crimes as juveniles, and that "they need to die in prison").

394. Sasha Abramsky, *Walk the Line: Mike Jimenez's Personal Turning Point Puts His Corrections Union at a Crossroads*, NEWSREVIEW.COM (June 26, 2008), <http://www.newsreview.com/sacramento/walk-the-line/content?oid=684901> [<http://perma.cc/U8CD-R7UK>].

395. Lewen interview, *supra* note 28.

(and thus the interests) of correctional officers, such as by involving them more as part of a correctional team.³⁹⁶ Officers have a unique perspective regarding the needs of individual inmates, and they may be well-situated to advise management regarding which inmates are most likely to succeed upon release and whose sentences might reasonably be commuted. In Michigan, for example, where the former governor was open to commuting sentences, correctional officers were asked about particular inmates, and some reported “this is a waste of a bed” based on their experience.³⁹⁷ According to Caruso, former Director of the Michigan Department of Corrections, drawing on officer expertise was crucial to distinguishing between “people we’re afraid of” and “people we’re mad at.”³⁹⁸

Ideally, prison work would be entirely reconceptualized as social work.³⁹⁹ Officers would be given more responsibility (and taught the necessary skills to effectively exercise such responsibility), such that they would take pride in their work. As in medicine and education, the goal would be excellence in service provision as assessed by outcome measures. While it is unrealistic to expect such a dramatic shift overnight, if, over time, there were fewer prisoners, it would be possible to invest more money in rehabilitating each prisoner and in training for officers. Such training could be geared toward helping officers develop particular reentry-related expertise and equipping them with the necessary skills to successfully implement new programs.

Specific training and the resulting expertise is necessary for correctional officers to feel comfortable in an environment that demands more than mere warehousing. Such expertise is often lacking in the United States, where government employees may be viewed as interchangeable across sectors and are transferred regularly between them. For example, the former director of Caltrans, the California Department of Transportation, recently moved across sectors to become the rehabilitation point person at San Quentin State Prison.⁴⁰⁰

396. By analogy, in the medical context, there is an expectation of a “health care team” and the idea that a focus on the development and coordination of this team can improve the quality of treatment while also saving money for the hospital. See, e.g., *Primary Care for the 21st Century: Ensuring a Quality, Physician-led Team for Every Patient*, AM. ACAD. OF FAMILY PHYSICIANS (Sept. 18, 2012), http://www.aafp.org/dam/AAFP/documents/about_us/initiatives/AAFP-PCMHWhitePaper.pdf [<http://perma.cc/4GGQ-RZMQ>].

397. Caruso interview, *supra* note 28.

398. *Id.*

399. Some prison reform advocates analogized prisons to other sectors involving the provision of social services, for example foster care and mental health, where “the key is changing people’s circumstances.” See, e.g., Cohen interview, *supra* note 28.

400. Lewen interview, *supra* note 28.

A comparative lens reveals that a more professionalized, sector-specific model for corrections workers has already gained traction elsewhere in the world. For example, in Germany and the Netherlands, prisons are staffed with social workers, mental health professionals, and attorneys.⁴⁰¹ And unlike in the United States, those working in prisons receive extensive training before being placed on a cellblock.⁴⁰² German and Dutch corrections systems also favor rehabilitation over retribution, and they prioritize keeping inmates connected to their families and communities and preparing them to reenter society.⁴⁰³

Some states may be taking preliminary steps to import a new, more “therapeutic” culture into U.S. prisons. In 2013, leaders of the departments of corrections in Colorado, Pennsylvania, and Georgia traveled to Germany and the Netherlands on a “fact-finding trip” sponsored by the Vera Institute of Justice.⁴⁰⁴ According to Kellie Wasko, a former warden and current deputy director of Colorado’s corrections department, Colorado’s department plans to take steps to “begin training corrections staff in client-centered counseling techniques in an effort to bring her staff more in line with European standards.” She further explained, “We can’t replace all of our supervisors with attorneys and social workers, but we can start changing their mentality to show inmates that we’re here to advocate for them.”⁴⁰⁵

While changing the culture of an institution is difficult, it is not impossible. Patricia Caruso explained that, as a warden in Michigan, “I never questioned what our role was in locking people up. For years and years, I never questioned it. . . . I saw that population going up, up, up, up, and it never said anything to me other than that was the way it was, that we couldn’t change that. And now, I know for sure that that’s not true.” Caruso attributed the success of the Michigan Prisoner Reentry Initiative to “a huge culture change,” as prison industry professionals began “to look at our role in this whole continuum of the criminal justice spectrum and figure out that we had a much larger role to play than

401. Subramanian & Shames, *supra* note 127, at 14; *see also* Conway interview, *supra* note 28 (describing the retired Attica Warden’s recent visit to prisons in Finland, Sweden, and Norway, which included Sweden’s Svartsko Prison Camp, where all prison employees were college graduates, and Finland’s Hameenlinnan Vankila Prison, which employed 140 staff members to oversee 160 inmates).

402. Subramanian & Shames, *supra* note 127, at 12.

403. *See id.* at 13 (emphasizing that prisoners in Germany and the Netherlands maintain their right to vote and may be rewarded with “home leave” to visit their families).

404. Christopher Moraff, *Can Europe Offer the U.S. a Model for Prison Reform?*, NEXT CITY (June 19, 2014), <http://nextcity.org/daily/entry/us-prisons-reform-european-prisons-model> [<http://perma.cc/96EN-LQQS>].

405. *Id.*; *see also* Lowry interview, *supra* note 28 (comparing the role of a correctional officer to that of a football coach).

just [keeping the lid on the joint].”⁴⁰⁶ Reforming prisons may require precisely this sort of cultural transformation: a radical expansion of the role, outlook, and self-image of prison industry professionals.

CONCLUSION

Mass incarceration has been one of the most salient policy failures of the past half-century. Current momentum toward decarceration-era goals has created newfound hope that this problem can be addressed. However, the success of contemporary prison reform efforts may hinge on changing both the financial incentives and the cultural outlook of the prison industry. This article uncovers the motivations of prison industry actors and their modes of resistance to reform. In doing so, it is a crucial first step toward shifting the incentives of industry stakeholders and accomplishing the goals of contemporary prison reform.

406. *The Criminal Justice Conversations Podcast with David Onek: Episode #22: Patricia Caruso, Former Director, Michigan Department of Corrections*, LAW.BERKELEY.EDU (Mar. 23, 2011), http://www.law.berkeley.edu/files/CrimJusPod_Episode22_final.pdf [<http://perma.cc/5EHY-PVYL>].