

# Privatized Justice: Ankle Monitors Are the New Private Prison

Rebekah M. Cochran

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## I. INTRODUCTION

The United States has the largest imprisoned population in the world, despite having less than 5% of the world's population.<sup>1</sup> COVID-19 has forced this issue to the forefront, as incarcerated facilities easily became a hotbed of viral transmission.<sup>2</sup> But despite the significant increase in prisoner releases since 2020, incarceration rates in the United States are staggering—one out of every five prisoners in the world is incarcerated in the United

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1. Peter Wagner & Wanda Bertram, *What percent of the U.S. is incarcerated? (And other ways to measure mass incarceration)*, PRISON POL'Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/> [<https://perma.cc/FFJ3-TA9P>] (showing that as of August 2021, of the 11 million people incarcerated worldwide, approximately 2.3 million are in U.S. prisons and jails).

2. See *infra* note 22 for multiple resources describing releases at the federal and state level as the result of COVID-19.

States.<sup>3</sup> Moreover, the U.S. Department of Justice (DOJ) estimates that 6,344,000 people were supervised by the U.S. adult correctional system at the end of 2019.<sup>4</sup> The COVID-19 pandemic has presented the United States with a limited case study in mass release and crime rates.<sup>5</sup> Critics of decarceration often raise concerns about the danger that incarcerated individuals pose to society if and when released.<sup>6</sup> Although more study is necessary, there are early indications that alarmists were just that—unduly concerned.<sup>7</sup>

This Note will argue that the real cause for concern is the prevalence of for-profit corporate actors in the criminal justice system. Part II traces the historical roots of prison privatization up to the current major market players and discusses the increasing diversification and resilience these corporations have demonstrated in response to changing public attitudes surrounding criminal justice. Part III explores the issue of government contracting with for-profit corporations, focusing on new opportunities for exploitation in the business of Electronic Monitoring (EM).<sup>8</sup>

If efforts to address mass incarceration continue,<sup>9</sup> legislators should act proactively, anticipating the next steps of private corporations. This Note argues that corporations wishing to stay in the for-profit prison game will increasingly push EM services. Despite claims that EM offers a safe alternative to incarceration, there is already significant data

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3. Wagner & Bertram, *supra* note 1.

4. TODD D. MINTON ET AL., U.S. DEP'T JUST. BUREAU JUST. STATS., NCJ 300655, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2019—STATISTICAL TABLES (July 2021).

5. See *Decarceration and Crime During COVID-19*, ACLU (July 27, 2020), <https://www.aclu.org/news/smart-justice/decarceration-and-crime-during-covid-19/> [<https://perma.cc/U9ZK-4GCF>] (citing a 29-city study showing decreased crime rates in most cities from March to May 2020 than for the same months in 2019, regardless of jail population size); see also TODD D. MINTON ET AL., U.S. DEP'T JUST. BUREAU JUST. STATS., SPECIAL REP., NCJ 255888, IMPACT OF COVID-19 ON THE LOCAL JAIL POPULATION, JANUARY–JUNE 2020 (Mar. 2021) (discussing the effects of COVID-19 and related early releases on the local jail populations).

6. See Rafael A. Mangual, *Issues 2020: Mass Decarceration Will Increase Violent Crime*, MANHATTAN INST. (Sept. 18, 2019), <https://www.manhattan-institute.org/issues2020-mass-decarceration-will-increase-violent-crime> [<https://perma.cc/HPL7-KUA4>] (focusing on published recidivism studies, but aptly noting that the United States would need to release 75% of its prisoners to align the U.S. prison incarceration rate with the U.K., France, Germany, or Canada).

7. *Decarceration and Crime During COVID-19*, *supra* note 5; see also SAFETY AND JUST. CHALLENGE & THE JFA INST., THE IMPACT OF COVID-19 ON CRIME, ARRESTS, AND JAIL POPULATIONS: AN EXPANSION ON THE PRELIMINARY ASSESSMENT (June 22, 2021), <https://safetyandjusticechallenge.org/resources/the-impact-of-covid-19-on-crime-arrests-and-jail-populations/> [<https://perma.cc/Y9AL-V7AL>] (studying the effects of COVID-19 on arrests in eleven jurisdictions across the United States from January 2019 to December 2020).

8. Electronic monitoring encompasses a wide arrange of technologies that are used as forms of digital incarceration. Most often, EM devices take the form of an ankle monitor and are often worn by those on pretrial release or supervised release after serving a term of imprisonment. See *Street-Level Surveillance: Electronic Monitoring*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/PAGES/ELECTRONIC-MONITORING> [<https://perma.cc/H9M8-H5V7>] (“Monitors are commonly used as a condition of pretrial release, or post-conviction supervision, like probation or parole.”).

9. See, e.g., Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (reducing the sentencing disparity between crack and powder cocaine); First Step Act, Pub. L. No. 115-391, 122 Stat. 657, 677 (2018) (shortening mandatory minimums for nonviolent drug offenses and extending compassionate release for terminally ill inmates). Compare *A Growing National Consensus for Criminal Justice Reform*, SENTENCING PROJECT 1 (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/10/2015-TSP-Fall-Newsletter.pdf> [<https://perma.cc/Q6W6-7QMW>], with Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262 (2018) (suggesting consensus is a myth because of larger misconceptions surrounding the “ill-defined” terms “overcriminalization” and “mass incarceration”).

showing how corporations exploit both governments and individuals when marketing these devices.<sup>10</sup> Part IV proposes a solution to the growing push for EM in the event of mass decarceration: an incentive-based model that aligns corporate and public interests.

## II. BACKGROUND

### A. Privatizing Imprisonment<sup>11</sup>

To understand the current criminal justice system and the for-profit corporations which play a central role, it is necessary to understand how and why incarceration became profitable. In the years following the American Civil War, the issue of slavery proved to have been as much a battle for morality and humanity as a battle for cheap labor and profit.<sup>12</sup> The Reconstruction-era South was faced with a pressing economic problem of how to maintain profits in the absence of an uncompensated workforce.

One of the early examples of a state's response to the labor shortage of the late 1800s is the Mississippi "Pig Law" of 1876.<sup>13</sup> This infamous law made the theft of a farm animal or any property (valued at or above ten dollars) grand larceny, punishable by five years in prison.<sup>14</sup> This law, like many at the time, increased the number of incarcerated individuals and created an opportunity for states to lease prison labor out to private businesses.<sup>15</sup> By the 1930s, unions and prison activists had pushed federal legislation that prohibited the exploitation of prison labor,<sup>16</sup> but the damage was already done. The legislation and policing strategies that effectuated the increased prison population were entrenched.

10. See discussion *infra* Part III.B; see also KATE WEISBURD, ELECTRONIC PRISONS: THE OPERATION OF ANKLE MONITORING IN THE CRIMINAL LEGAL SYSTEM 21 (GEO. WASH. UNIV. L. SCH., 2021), <https://issuu.com/gwlawpubs/docs/electronic-prisons-report?fr=sOGI5NDcxODg3> [https://perma.cc/8ZL4-X3XA] (examining the power of private industry and finding "[v]endors wield significant power over monitoring operations.").

11. Throughout this Note, any reference to "private" refers simply to businesses in the private sector and is unrelated to corporate structure or shareholder interests. Likewise, the use of "private prison" should be assumed to refer to private players in the prison-industry, unless specifically referring to a corporation's ownership or management of a prison.

12. See Marcos Gonzalez, *Information Asymmetry in Private Prison Management: Monitoring and Oversight as the Basis for Private Prison Legitimacy*, 47 PUB. CONT. L.J. 377, 379 (2018) (explaining that "after the abolition of slavery and the end of the Civil War, inmates became an inexpensive labor source during Reconstruction in southern states"). See also LAUREN-BROOKE EISEN, *INSIDE PRIVATE PRISONS: AN AMERICAN DILEMMA IN THE AGE OF MASS INCARCERATION* 48–49 (2018) (describing the fee payments negotiated by states in the convict lease system).

13. *January, 1876: Mississippi Legislature Passes "Pig Law"*, MISS. DEP'T ARCHIVES & HIST., HIST. TIMELINE, <https://www.mdah.ms.gov/timeline/events/mississippi-legislature-passes-%E2%80%98pig-law%E2%80%99/> [https://perma.cc/52PP-4PFR].

14. *Id.*

15. See Gonzalez, *supra* note 12, at 381 ("The convict lease system was the product of budget shortfalls in southern states and the availability of cheap, exploitable labor."); see also Charity Ryerson, *Private Companies Producing with US Prison Labor in 2020: Prison Labor in the US, Part II*, CORP. ACCOUNTABILITY LAB (Aug. 5, 2020), <https://corpaccountabilitylab.org/calblog/2020/8/5/private-companies-producing-with-us-prison-labor-in-2020-prison-labor-in-the-us-part-ii> [https://perma.cc/XUV4-B53U] (discussing the private companies benefitting from the types of prison labor available).

16. See Gonzalez, *supra* note 12, at 380 (discussing Ashurst-Sumners Act and the Fair Labor Standards Act—the result of pushback from "organized labor and business associations unable to compete with companies who purchased cheap prison labor").

Prisons continued to be filled and by the 1970s, “prison overcrowding emerged as the new rationale for contracting with private companies.”<sup>17</sup>

The exploding prison population was undeniable—the DOJ reported 240,000 state and federal prisoners nationwide in 1975.<sup>18</sup> In 2008, the U.S. prison and jail population peaked at 2.3 million.<sup>19</sup> The upward trend has slowed, with just over 2 million at the end of 2019,<sup>20</sup> but a March 2020 report estimates 2.3 million people are incarcerated across the United States.<sup>21</sup> Unfortunately, even the releases triggered by COVID-19 are already proving to be short-lived—state prison and jail populations are “ticking back up” to pre-pandemic levels.<sup>22</sup>

### B. Private Prisons

Problems of prison overcrowding were widely known in the 1980s, with two-thirds of states under court order to improve conditions that violated the Constitution.<sup>23</sup> But as the prison population grew,<sup>24</sup> states struggled to balance the need for more facilities and the political pressure to be “tough on crime.”<sup>25</sup> Needing a solution to housing the growing

17. *Id.*

18. *Id.* See also U.S. DEP’T OF JUST., BUREAU OF JUST. STATS., BULL. NO. 102494, STATE AND FEDERAL PRISONERS, 1925–85 2 (1986), <https://bjs.ojp.gov/library/publications/state-and-federal-prisoners-1925-85> [<https://perma.cc/4FMB-PWZ2>].

19. John Gramlich, *America’s Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/#:~:text=The%20nation’s%20incarceration%20rate%20peaked,810%20inmates%20per%20100%2C000%20adults> [<https://perma.cc/F27R-BZFZ>].

20. *Id.*

21. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/V8X2-TZKP>] (finding that of the 2.3 million people confined, 1.29 million are in state prisons, 631,000 in local jails, 226,000 in federal prisons and jails, and 42,000 are in immigration detention).

22. See generally Wendy Sawyer, *New Data: The Changes in Prisons, Jails, Probation, and Parole in the First Year of the Pandemic*, PRISON POL’Y INITIATIVE (Jan. 11, 2022), [https://www.prisonpolicy.org/blog/2022/01/11/bjs\\_update/](https://www.prisonpolicy.org/blog/2022/01/11/bjs_update/) [<https://perma.cc/MHD6-YQMW>] (reporting on the latest Bureau of Justice Statistics data of national and state correctional populations through the end of 2020); *Reducing Jail and Prison Populations During the Covid-19 Pandemic*, BRENNAN CTR. FOR JUST. (Jan. 7, 2022), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> [<https://perma.cc/6AQ6-3VPH>] (providing a resource for jail and prison-related news, Spring 2020 to Winter 2021); see also *The Most Significant Criminal Justice Policy Changes From the COVID-19 Pandemic*, PRISON POL’Y INITIATIVE (Feb. 8, 2022), <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/3EFL-6MJD>] (tracking pandemic-related policy changes in everything from court orders to medical co-pays for incarcerated persons); Emily Widra, *Data Update: As the Delta Variant Ravages the Country, Correctional Systems are Dropping the Ball (Again)*, PRISON POL’Y INITIATIVE (Oct. 21, 2021), [https://www.prisonpolicy.org/blog/2021/10/21/october-2021\\_population/](https://www.prisonpolicy.org/blog/2021/10/21/october-2021_population/) [<https://perma.cc/NF9A-GJVC>] (finding the historically low state prison population is largely attributable to reduced admissions, not increased releases).

23. See EISEN, *supra* note 12, at 52–53.

24. Dan Carmichael, *U.S. Prison Population Exploded in 1980s*, UNITED PRESS INT’L (May 16, 1991), <https://www.upi.com/Archives/1991/05/16/US-prison-population-exploded-in-1980s/4744674366400/#:~:text=But%20during%20the%201980s%2C%20the,at%20the%20end%20of%201990> [<https://perma.cc/QXU3-RS V9>] (“At the end of 1980, there were almost 330,000 convicts in America’s state and federal prisons. That number exploded to 771,000 at the end of 1990.”).

25. See EISEN, *supra* note 12, at 54 (“Taxpayers invested in an expansion of metal and bars resulting in an

inmate population—while still facing the politically unpopular issue of funding incarceration—the war on drugs of the 1980s and 1990s created a perfect storm for corporate actors to enter the marketplace.<sup>26</sup> Private corporations offered a solution to governments overwhelmed by the number of inmates, and privatized incarceration was touted as a logical extension of the free market. There was a belief that corporations—unhindered by government bureaucracy—could offer the same *if not better* public services and at a reduced price.<sup>27</sup>

### 1. The Corporate Duopoly

Filling that need in the market, CoreCivic<sup>28</sup> and GEO Group<sup>29</sup> became the two largest players in the private prison industry. Since its founding in 1983, CoreCivic has become “the nation’s largest owner of partnership correctional, detention, and residential reentry facilities and one of the largest private prison operators in the United States.”<sup>30</sup> CoreCivic reported an annual revenue of \$1.9 billion in 2020 and \$1.86 billion in 2021,<sup>31</sup> operating 113 facilities across 22 states.<sup>32</sup> The corporation is also a major contractor in the temporary detention facility business (specifically immigration detention) and holds the longest-running federal contract in the industry.<sup>33</sup> In 2016, CoreCivic was awarded a \$1 billion no-

unparalleled investment in corrections, from slightly under \$7 billion in 1980 to \$40 billion in 1995. . . . Any discussion of alternatives to incarceration was the [political] kiss of death.”)

26. See generally MICHELLE ALEXANDER, *The Lockdown, in* THE NEW JIM CROW 75–120 (2020) (describing the systemic impact of the War on Drugs on continued mass incarceration).

27. See EISEN, *supra* note 12, at 55 (“The privatization trend emerged as three realities coalesced: (1) the rising belief in the potential of the free market, (2) the skyrocketing number of prisoners, and (3) the price tag of mass incarceration. . . . this trend stemmed from the growing costs of imprisonment and a desire to reduce the size and scope of the government.”).

28. Formerly known as Corrections Corporation of America (CCA). See *Corrections Corporation of America Rebrands as CoreCivic*, CORECIVIC (Oct. 28, 2016, 12:53 PM), <https://www.corecivic.com/news/corrections-corporation-of-america-rebrands-as-corecivic> [<https://perma.cc/VB37-N4U4>] (“Rebranding as CoreCivic is the culmination of a multi-year strategy to transform our business from largely corrections and detention services to a wider range of government solutions . . .”).

29. Formerly known as Wackenhut Corrections Corporation (WCC), the corporate name was officially changed to The GEO Group, Inc. in 2003. *GEO Group History Timeline*, GEO GROUP, [https://www.geogroup.com/history\\_timeline](https://www.geogroup.com/history_timeline) [<https://perma.cc/UYH6-6Z6M>].

30. CoreCivic, Inc., Annual Report (Form 10-K) 7 (Feb. 18, 2022) [hereinafter CoreCivic 2021 Annual Report]; see *id.* at 28 (listing the “notable accomplishments” by which CoreCivic “pioneered modern-day private prisons”).

31. *CoreCivic Financial Statements 2009-2022*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/CXW/corecivic/financial-statements> [<https://perma.cc/BB9Y-UK3K>].

32. See *Find A Facility*, CORECIVIC, <https://www.corecivic.com/facilities> [<https://perma.cc/PM3J-NDP9>] (displaying a map of locations); *Compare* CoreCivic 2021 Annual Report, *supra* note 30, at 20 (At 2021 year-end, CoreCivic operated “46 correctional and detention facilities, 41 of which [it] owned and managed . . .” and “26 residential reentry centers.”), with CoreCivic, Inc., Annual Report (Form 10-K) 27 (Feb. 20, 2020) [hereinafter CoreCivic 2019 Annual Report] (documenting a decrease from 50 facilities (43 owned) and 29 reentry centers reported at 2019 year-end).

33. *CoreCivic Enters Into New Management Contract with the State of Idaho: Renews Two Federal Contracts in Texas*, CORECIVIC (Aug. 27, 2020, 8:00 ET), <http://ir.corecivic.com/news-releases/news-release-details/corecivic-enters-new-management-contract-state-idaho> [<https://perma.cc/9NZ2-VLKC>] (touting its Houston, Texas facility as “the longest continuing contract in the industry, and [] one of the first contracts awarded to the Company extending back to 1983 with the predecessor agency to ICE.”); see also UNIV. OF TEX. AT AUSTIN

contest bill by the U.S. Administration to build and operate a detention facility for immigrants from Central America.<sup>34</sup> In 2019, it was awarded a five-year contract worth \$2.1 billion to provide guard services at a private San Diego immigrant detention center.<sup>35</sup>

GEO Group, considered the second-largest private prison corporation in the United States, was given the first federal government contract for a privately operated prison in 1997.<sup>36</sup> Although traditionally showing a smaller profit margin than CoreCivic,<sup>37</sup> GEO Group had an annual revenue of \$2.35 billion for 2020 and \$2.25 billion for 2021—an over \$1 billion revenue increase since 2010.<sup>38</sup> Worldwide, GEO operates and/or manages “approximately 86,000 beds at 106 secure and community-based facilities . . . and electronic monitoring and supervision services for more than 250,000 individuals.”<sup>39</sup> Like CoreCivic, Geo Group recently signed large government contracts for immigration detention facilities with U.S. Immigration and Customs Enforcement (ICE) in California—the two 15-year contracts, awarded in 2019, are worth \$3.7 million combined.<sup>40</sup>

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SCH. OF L. IMMIGR. CLINIC & GRASSROOTS LEADERSHIP, CRUELTY AND CORRUPTION: CONTRACTING TO LOCK UP HUTO DETENTION CENTER 3 (2021), [https://grassrootsleadership.org/sites/default/files/reports/utlaw\\_hutto\\_rpt\\_2.pdf](https://grassrootsleadership.org/sites/default/files/reports/utlaw_hutto_rpt_2.pdf) [<https://perma.cc/G55S-2B4Z>] (reporting on the troubling history and oversight of the Hutto Immigration Detention Center, managed and owned by CoreCivic).

34. See Chico Harlan, *Inside the Administration's \$1 Billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), [https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2\\_story.html](https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html) [<https://perma.cc/7VFV-DFFF>] (noting that because this is a no-contest bill, this contract skipped the usual public bidding process, and was considered “a boon for CCA” because “in an unusual arrangement, [CCA] gets the money regardless of how many people are detained at the facility”).

35. Rebecca Plevin, *ICE Signs Long-Term Contracts Worth Billions for Private Detention Centers, Dodging New State Law*, PALM SPRINGS DESERT SUN (Dec. 22, 2019), <https://www.desertsun.com/story/news/2019/12/20/ice-signs-long-term-contracts-private-detention-centers-two-weeks-ahead-state-law/2713910001/> [<https://perma.cc/48JD-ZTQJ>].

36. Gonzalez, *supra* note 12, at 382 (noting the first federal contract was for housing inmates at the Taft Correctional Institution in California for ten years).

37. *Compare CoreCivic Gross Profit 2006–2021*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/CXW/corecivic/gross-profit> [<https://perma.cc/6EPZ-JDJM>] (narrowed to just 2020), *with Geo Group Inc. Gross Profit 2006–2021*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/GEO/geo-group-inc/gross-profit> [<https://perma.cc/FW39-MYCB>] (with date range set to 2010–2019).

38. *Geo Group Inc. Financial Statements 2009–2022*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/GEO/geo-group-inc/financial-statements> [<https://perma.cc/F3ZN-59JL>].

39. The GEO Group, Inc., Annual Report (Form 10-K) 3 (Feb. 28, 2022) [hereinafter GEO Group 2021 Annual Report]. See *GEO U.S. Secure Services*, GEO GROUP, [https://www.geogroup.com/GEO\\_Secure\\_Services](https://www.geogroup.com/GEO_Secure_Services) [<https://perma.cc/67B3-2X4F>] (GEO operates facilities for three federal clients—BOP, USMS, and ICE—and has “7 state correctional clients” in addition to various local clients.); see also *GEO International*, GEO GROUP, <https://www.geogroup.com/Locations#international-services> [<https://perma.cc/P6HX-MB9T>]. Internationally, GEO operates four facilities across Australia and South Africa. *Id.*

40. Plevin, *supra* note 35.

### C. Diversifying Interests

#### 1. The Prison Industrial Complex<sup>41</sup>

For all the public outrage over private prisons, it is important to remember that privately owned and/or managed prisons account for only 8% of facilities nationwide.<sup>42</sup> Private corporations, however, are involved at almost every level of the criminal justice system. A 2017 study by the Prison Policy Initiative followed the money of mass incarceration—a \$182 billion industry.<sup>43</sup> While private prisons account for \$3.9 billion of that industry, that does not even touch on the number of for-profit interests involved in everything from bail fees to commissary, telephone calls, and video visitation.<sup>44</sup> A 2020 report lists over 4,100 corporations that profit from mass incarceration in the United States.<sup>45</sup> Central to the success of the private prison industry has been its ability to offer diverse product offerings while maintaining ongoing profit margins.

CoreCivic and GEO Group have expanded their portfolios to include for-profit privatized correctional services, such as ankle monitoring, transportation, and residential re-entry centers (half-way houses).<sup>46</sup> Since 2005, GEO Group and CoreCivic have spent \$2.2 billion acquiring smaller companies.<sup>47</sup> CoreCivic seems to have solidified its interest in residential reentry centers,<sup>48</sup> and GEO Group now has a strong foothold in the EM arena. It acquired BI, Inc.—the nation’s largest manufacturer of EM devices—for \$415 million in 2011.<sup>49</sup>

#### 2. Electronic Monitoring Technology

EM is widely used in the private prison industry. A 2016 PEW report found that its

41. See EISEN, *supra* note 12, at 70 (noting that Eric Schlosser coined the term in 1998 as “a set of bureaucratic, political, and economic interests that encourage spending on imprisonment, regardless of actual need”).

42. John F. Pfaff, *The Incentives of Private Prisons*, 52 ARIZ. ST. L.J. 991, 995 (2021); see also Peter Wagner, *Are Private Prisons Driving Mass Incarceration?*, PRISON POL’Y INITIATIVE (Oct. 7, 2015), [https://www.prisonpolicy.org/blog/2015/10/07/private\\_prisons\\_parasite/](https://www.prisonpolicy.org/blog/2015/10/07/private_prisons_parasite/) [<https://perma.cc/4NE4-D3J3>] (noting that “[p]rivate prisons are more like a parasite on the publicly-owned prison system, not the root cause of mass incarceration”).

43. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/47FV-PMJU>].

44. *Id.* For example, the study found \$1.4 billion in fees paid to bail bondsmen, \$1.6 billion in commissary goods purchased by prisoners and/or their families, and \$1.3 billion in telephone calls.

45. WORTH RISES, *THE PRISON INDUSTRY: MAPPING PRIVATE SECTOR PLAYERS I* (2020), <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/5eb26cb17cc82c67c6254da6/1588751538880/The+Prison+Industry++2020.pdf> [<https://perma.cc/47RZ-RSAJ>].

46. Donald Cohen, *The Private Prison Industry Has a Backup Plan*, IN THE PUB. INT. (ITPI) (Sept. 8, 2016), <https://www.inthepublicinterest.org/the-private-prison-industry-has-a-backup-plan/> [<https://perma.cc/XT7J-QMHE>].

47. IN THE PUB. INT., *GEO GROUP AND CORRECTIONS CORPORATION OF AMERICA SPEND BILLIONS OF TAXPAYER DOLLARS PURCHASING SMALLER COMPANIES 1–2* (2016), [https://www.inthepublicinterest.org/wp-content/uploads/ITPI\\_PrivatePrisonsMnA\\_FactSheet\\_Sept2016.pdf](https://www.inthepublicinterest.org/wp-content/uploads/ITPI_PrivatePrisonsMnA_FactSheet_Sept2016.pdf) [<https://perma.cc/4NEU-4WW6>]. (reporting GEO Group spent \$2 billion to acquire nine companies between 2005 and 2015 and CoreCivic (formerly CCA) spent \$229 million to acquire three companies in the same time period).

48. *Id.* at 2.

49. *Id.*

use had more than doubled in ten years.<sup>50</sup> This expansive growth, since first being patented in 1983,<sup>51</sup> can be largely credited to technological improvements in GPS. In the most recent comprehensive study, active GPS and radio frequency device manufacturers reported a nearly 140% increase in the use of monitoring technology—from 53,000 in 2005 to over 125,000 in 2015.<sup>52</sup> While the exact number is unknown, EM is a lucrative business. At any time, there are almost 4.5 million Americans paroled or on probation.<sup>53</sup> That number has only increased with COVID-19 as many have been released to home confinement with EM devices.<sup>54</sup>

The expanded use of EM is a logical extension of improved technologies and is often seen as a cost-effective alternative to physical imprisonment. Advocates of EM tout how it offers individuals an opportunity to reintegrate themselves into society while also giving government officials a kind of public safety insurance policy. But while being monitored may be better than being fully incapacitated (behind bars), the true impact of EM is easily overlooked. The actual cost of EM monitors is passed on to the individuals themselves, particularly at the state and local levels.<sup>55</sup> Too often, the reality is that “[e]lectronic surveillance is not an alternative to incarceration, it’s an alternative *form* of incarceration.”<sup>56</sup>

### III. ANALYSIS

With renewed public support for decarceration and waves of prisoner releases during the COVID-19 pandemic, governments are again in crisis while for-profit corporations offer purported solutions. This Note argues that the traditional public-private contracts that

50. PEW CHARITABLE TRUSTS, USE OF ELECTRONIC OFFENDER-TRACKING DEVICES EXPANDS SHARPLY 1 (2016) [hereinafter TRACKING DEVICES].

51. See generally William D. Burrell & Robert S. Gable, *From B.F. Skinner to Spiderman to Martha Stewart: The Past, Present and Future of Electronic Monitoring of Offenders*, 46 J. OFFENDER REHAB. 101, 101–18 (2008) (describing the progression of EM technology, with Robert and Kirk Gable’s two-way radio device in the 1960s, to Arizona District Court Judge Jack Love’s inspiration by *Spiderman* in 1983).

52. TRACKING DEVICES, *supra* note 50, at 1 (“The count does not include information from manufacturers that went out of business or were acquired by other companies between 2005 and 2015, so the actual numbers for each year may be higher than reported.”). This number also does not include immigration detainees.

53. See Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants Into Debt*, PROPUBLICA (July 3, 2019, 5:00 AM), [https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt#:~:text=New%20York%20Times\)-Digital%20Jail%3A%20How%20Electronic%20Monitoring%20Drives%20Defendants%20Into%20Debt,may%20end%20up%20behind%20bars](https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt#:~:text=New%20York%20Times)-Digital%20Jail%3A%20How%20Electronic%20Monitoring%20Drives%20Defendants%20Into%20Debt,may%20end%20up%20behind%20bars) [<https://perma.cc/2MQ4-EQFY>] (detailing the use and market related to electronic monitoring devices).

54. April Glaser, *Incarcerated at Home: The Rise of Ankle Monitors and House Arrest During the Pandemic*, NBC NEWS (July 5, 2021, 10:30 AM), <https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008> [<https://perma.cc/BT8S-S82L>]; see also *Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency*, 45 O.L.C. 1, at 9–10 (Dec. 21, 2021), <https://www.justice.gov/olc/file/1457926/download> [<https://perma.cc/42VP-FVGG>] (reinterpreting CARES Act § 12003(b)(2), “the expiration of the [COVID-19] emergency period affects only BOP’s authority to lengthen terms of home confinement, not its authority to continue placements already made”). The likely result of this DOJ Memorandum will be the continued monitoring of thousands of individuals who have been released during the COVID-19 pandemic; monitoring which may last years.

55. WEISBURD, *supra* note 10, at 15–17.

56. *Id.* at 2 (emphasis in original).



“solved” the problem of exploding incarceration rates in the 1980s and 1990s<sup>57</sup> will bring the same unintended consequences if pursued blindly. Just as mass incarceration begot private prisons and the increased role of for-profit corporations in building and operating detention facilities, this Note predicts EM will become a “service” that governments find themselves reliant upon to maintain the status quo.

Private contractors, in most cases, have no incentive to support decarceration efforts. Most private contracts involve a bed per diem and stipulated payments regardless of actual capacity.<sup>58</sup> This runs counter to any goal of reducing incarceration. Governments are disincentivized from enacting legislation because they are already contractually obligated to pay corporations for prison space.<sup>59</sup> Moreover, even when faced with prison closures and progressive legislation, the largest corporate players have diversified their service offerings.<sup>60</sup> They have suggested EM as a companion solution to decarceration, increasingly transferred prisoners to maximize capacity,<sup>61</sup> and transformed former facilities into immigration detention centers. Involved in the prison industrial complex at every turn, the reach of private corporate interests (and CoreCivic and GEO Group, in particular) is far greater than suggested by statistics focused solely on the detention facilities they own and operate.<sup>62</sup>

### A. Consequences of Market-Driven Criminal Justice

#### 1. Unclear Benefits

After nearly three decades of experience with private prison corporations, the purported benefits of privatizing incarceration have not come to fruition. There is no definitive evidence suggesting corporate involvement leads to lower costs, equal or greater safety, or reduced recidivism.

First, there is little evidence that private corporations have met their claims of equal or greater operations at reduced cost. A study by the Center for Naval Analyses (CNA), a non-profit research institute which analyzes policy issues for government entities, including the DOJ, found “no significant difference in the cost of public and private sector operations at the facilities reviewed . . . .”<sup>63</sup> Despite multiple attempts to answer this

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57. See generally Gonzalez, *supra* note 12 (positing a “new rationale” for the problem of an exploding prison population).

58. See EISEN, *supra* note 12, at 186 (discussing the perverse incentives created by guaranteed occupancy contracts); see also ITPI, CRIMINAL: HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS FOR PRIVATE PRISON CORPORATIONS 2, (2013), <http://www.njcn.org/uploads/digital-library/Criminal-Lockup-Quota,-In-the-Public-Interest,-9.13.pdf> [<https://perma.cc/KNK6-M7DT>] [hereinafter LOCKUP QUOTAS] (finding occupancy guarantee clauses for private prisons were most frequently for a 90% quota; three prisons in Arizona have a 100% quota).

59. See LOCKUP QUOTAS, *supra* note 58, at 2.

60. See *supra* Part II.C.1.

61. See EISEN, *supra* note 12, at 178 (indicating that private prisons often contract for profitable outcomes, such as negotiating away from high-security or elderly inmates who require more supervision and present health care costs).

62. *Id.* (Private prisons and jails are said to account for only eight percent of such facilities in the United States.).

63. JULIANNE NELSON, THE CNA CORP., COMPETITION IN CORRECTIONS: COMPARING PUBLIC AND

question of whether for-profit corporations can offer a public service more efficiently and effectively than the government, there is no clear evidence that private prisons are cheaper to operate.<sup>64</sup> The evidence is simply inconclusive. The few studies that *have* found cost savings were funded by the private prison industry.<sup>65</sup> There is “no evidence that the private prison industry has innovated beyond what government prisons provide.”<sup>66</sup>

Second, private prisons are repeatedly found to be more dangerous prisons.<sup>67</sup> This is believed to be due, in large part, to understaffing.<sup>68</sup> Because prisons have a set overhead, labor is the only variable cost. Fewer staff predictably leads to greater violence. A 2016 study of Federal Bureau of Prisons (BOP) contracts found “contract prisons incurred more safety and security incidents per capita than comparable BOP institutions.”<sup>69</sup> The main goal of private prison corporations is arguably not to operate a quality prison but to make a profit. Unlike government-run facilities, in 2015 alone CoreCivic made a profit of \$3,356 per prisoner, and GEO Group made \$2,135 per prisoner.<sup>70</sup>

Third, there is no clear evidence suggesting private prisons reduce recidivism rates when compared to public facilities. In fact, studies suggest that there are higher rates of repeat offenders in private prisons.<sup>71</sup> One of the more glaring indications of this is corporate cherry-picking of offenders.<sup>72</sup> Elderly offenders, in particular, are often passed up by private corporations both because they are less likely to re-offend and more likely to require ongoing, costly medical care.<sup>73</sup> In the same vein, private prisons also routinely

PRIVATE SECTOR OPERATIONS 22–23 (2005) (studying Taft Correctional Facility, the Bureau of Prisons’ first contract with a private operator (GEO Group)).

64. EISEN, *supra* note 12, at 176.

65. *Id.* at 176–77 (describing multiple studies, including a 2007 Vanderbilt University study that found “states could save up to \$15 million yearly . . . if they used privately managed prisons” and a 2014 Temple University study which has been largely discredited but which CoreCivic continues to cite as evidence that private partnerships “can cut costs by government from 12 to 58 percent”).

66. *Id.* at 200.

67. See OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS ii (2016), <https://oig.justice.gov/reports/2016/e1606.pdf#page=2> [<https://perma.cc/2CT6-2Y5G>] (discussing the safety incidents at private prisons).

68. See Timothy Williams, *Inside a Private Prison: Blood, Suicide, and Poorly Paid Guards*, N.Y. TIMES (Apr. 3, 2018), <https://www.nytimes.com/2018/04/03/us/mississippi-private-prison-abuse.html> [<https://perma.cc/Y79N-MCP4>] (describing the staffing issues at East Mississippi Correctional Facility, once run by GEO Group and now arguably no better under contract with its competitor, Management & Training Corporation).

69. OFF. OF THE INSPECTOR GEN., *supra* note 67, <https://oig.justice.gov/reports/2016/e1606.pdf#page=2> [<https://perma.cc/2CT6-2Y5G>] (finding contract prisons confiscated eight times as much contraband and had higher assault rates than BOP-run institutions).

70. *How Private Prisons Take Tax Dollars Away from Fixing Our Criminal Justice System*, ITPI (Feb. 26, 2016), <https://www.inthepublicinterest.org/how-private-prisons-take-tax-dollars-away-from-fixing-our-criminal-justice-system/> [<https://perma.cc/S4F2-W4ZW>]. See also Cohen, *supra* note 46 (estimating the profits generated per prisoner from their federal government contract “customers” (BOP, ICE, or USMS)). In 2015, CoreCivic gained a profit of \$112.8 million and GEO Group registered a \$62.6 million profit (51% and 46%, respectively, of total corporate revenue). *Id.*

71. See generally ITPI, SEE HOW PRIVATE PRISON COMPANIES INCREASE RECIDIVISM (2016), <https://www.inthepublicinterest.org/wp-content/uploads/ITPI-Recidivism-ResearchBrief-June2016.pdf> [<https://perma.cc/NJ7S-KJP2>].

72. Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 610 (2018).

73. Julie Bowling, *Are Private Prisons Good Investments for States?*, BRENNAN CTR. FOR JUST. (Apr. 15,

shuffle and consolidate prisoners out-of-state away from their families. An entire industry has developed around bed-brokering and the business of connecting buyers (like local jail administrators, the USMS, or ICE) with correction facilities ready to “sell” their empty beds.<sup>74</sup> Already “fac[ing] a number of obstacles to successful reintegration, including unemployment, debt, homelessness, substance abuse, and family conflict, housing [inmates] in far-away prisons makes the transition [when released] all the more difficult and risky.”<sup>75</sup>

## 2. Disinterested Partners

CoreCivic and GEO Group promote themselves as partners with government bodies in the interest of rehabilitating incarcerated individuals, but their focus has long been increasing profits by cutting operating costs, expanding real estate holdings, and limiting corporate tax rates.<sup>76</sup> To this end, CoreCivic and GEO Group have come up with increasingly creative ways to secure prison contracts with federal and state partners. Whether through public-private partnership contracts<sup>77</sup> or managed-only contracts,<sup>78</sup> the building and leasing of a prison facility seem like a win-win to state and local governments overburdened by deteriorating facilities and overcapacity. CoreCivic and GEO Group offer a seemingly perfect solution to the present problem, but what appears to be less evident to governments is the long-term commitment they are making to the corporations and continued mass incarceration. It may be politically preferable, in the short term,<sup>79</sup> to lease the building and its maintenance from a private corporation, but the financial and social costs are crushing.

Take, for example, the Lease-Purchase (or Build-Lease-Transfer) model contract awarded to CoreCivic in November 2017 by the Kansas Department of Corrections (KDOC).<sup>80</sup> KDOC contracted with CoreCivic to design, finance, build, and maintain a new facility to replace its old prison in Lansing, Kansas. It signed a 20-year contract term under which, upon completed construction, the government would pay \$14.9 million for the first

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2014), <https://www.brennancenter.org/our-work/analysis-opinion/are-private-prisons-good-investments-states> [<https://perma.cc/9SH6-UAPU>].

74. See EISEN, *supra* note 12, at 71 (finding “[s]ome facilities were even encouraged to send inmates out of town . . . to free space so they could rent their own beds at a higher rate than what they paid to house their inmates elsewhere”).

75. Appleman, *supra* note 72, at 610 (internal citations omitted).

76. ITPI, AN EXAMINATION OF PRIVATE FINANCING FOR CORRECTIONAL AND IMMIGRATION DETENTION FACILITIES 5 (2018), [https://www.inthepublicinterest.org/wp-content/uploads/ITPI\\_PrivatePrisonP3s\\_June2018\\_FINAL.pdf](https://www.inthepublicinterest.org/wp-content/uploads/ITPI_PrivatePrisonP3s_June2018_FINAL.pdf) [<https://perma.cc/5MGJ-AMNZ>] (discussing the structure of contracts and services offered by CoreCivic and GEO Group, and how they profited as licensed Real Estate Investment Trusts (REITs), a designation that allowed them to escape certain taxes). REIT status is beyond the scope of this Note, but interestingly both CoreCivic and GEO Group have restructured as taxable C-corporations (effective Jan. 1, 2021 and Jan. 1, 2022, respectively).

77. *Id.* at 2. In a public-private contract, the corporation is responsible for the design, finance, and maintenance of the facility, but parties negotiate responsibility for the actual operation of the facility. *Id.*

78. *Id.* at 8. Managed-only contracts offer lower profit margins to corporations and do not satisfy the real-estate requirements of REIT. As the name suggests, in managed-only contracts corporations agree to manage and operate the facility but are not involved with the actual physical buildings. *Id.*

79. See *supra* Part II.B (describing the politically unpopular issue of funding incarceration).

80. ITPI, *supra* note 76, at 15–16.

year and an annual payment thereafter pegged to a nearly 2% increase.<sup>81</sup>

Considering the upfront savings (CoreCivic secured private financing of \$159.5 million to build the building), a \$14.9 million initial investment is an easier number to swallow when needing to convince taxpayers to fund a new prison. Unfortunately, the expected cost savings were short-lived. The project was presented as a state-of-the-art facility with a unique, square housing-pod design which would require fewer guards. Once under construction, those plans proved infeasible. The project's overall estimated savings over twenty years plummeted from \$23 million to what is now expected to be only \$1.3 million.<sup>82</sup> With CoreCivic paying all upfront costs and maintaining the facility for the duration of the contract, this type of arrangement looks beneficial to both parties, but the tradeoff of private contracting has long-term consequences that are all too clear. The inevitable reality of Kansas' deal for a new prison in Lansing is the continued pressure of filling a prison to capacity to justify the high lease payments, as well as the expectation that in 20 years the facility will enter public ownership in a still-viable condition.<sup>83</sup>

### 3. Lobbying Efforts

Perhaps most shocking is the fact that the two largest private prison contractors both purport to stay out of any political discussions involving sentencing or detainment—anything that would result in increased incarceration.<sup>84</sup> But in 2018 alone, GEO spent \$3.33 million on corporate and GEO PACS, as well as \$4.3 million on expenditures to “consultant government relations professions” in direct lobbying.<sup>85</sup> From local county elections to major senate seats, the two largest private prison corporations offer political donations in nearly every state.

In federal elections every four years between 2006 and 2014, CoreCivic and GEO

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81. *Id.* at 16.

82. See Madison Pauly, “Hoodwinked”: Kansas’ Low-Staff, Long-Term Prison Deal Hints at a Booming Future for Private Corrections, MOTHER JONES (Mar. 21, 2019), <https://www.motherjones.com/crime-justice/2019/03/kansas-corecivic-lansing-correctional-contract-brownback/> (describing the implications of Kansas’ “first-of-its-kind deal to outsource the rebuilding of a massive state prison”).

83. See ITPI, *supra* note 76, at 18 (highlighting that long-term contracts work against efforts to reduce prison populations because “[t]he governmental entity may feel pressure to keep beds filled to justify high-cost lease payments”); *Id.* at 21 (describing how an expectation of viability can be illusory, particularly when governments contract for managed-only facilities). At the CoreCivic-managed Hernando County jail, north of Tampa, Florida, “the company neglected routine building maintenance . . . even though maintaining the facility was a requirement in its agreement with the county.” *Id.* A county-commissioned report found \$1 million worth of damage, and subsequently the county withheld its final payment to the company of \$1.86 million. *Id.* CoreCivic promptly sued, with the case settling for \$100,000 in 2012, but “the county taxpayers” ended up footing the maintenance bill. *Id.*

84. See, e.g., Sunny Kim, *Private Prison Firm Quietly Ramps Up GOP Lobbying Efforts as Trump Expands Immigrant Detention Centers*, CNBC (Oct. 4, 2019, 4:45 PM), <https://www.cnbc.com/2019/10/04/private-prison-firm-ramps-up-lobbying-amid-trump-immigration-crackdown.html> [<https://perma.cc/39KM-ND6Q>] (quoting GEO Group spokesperson claiming that the company “has never advocated for or against, nor have we ever played a role in setting criminal justice or immigration enforcement policies.”).

85. GEO GRP., INC., POLITICAL ACTIVITY AND LOBBYING REPORT 4 (2018), [https://www.geogroup.com/Portals/0/SR/Political%20Engagement/Political\\_Activity\\_and\\_Lobbying\\_Report\\_2018.pdf](https://www.geogroup.com/Portals/0/SR/Political%20Engagement/Political_Activity_and_Lobbying_Report_2018.pdf) [<https://perma.cc/W37G-BV4P>].

Group have contributed at least \$500,000.<sup>86</sup> They also wield significant influence over members of Congress who are not up for reelection. In 2015, CoreCivic and GEO Group spent \$1.6 million to hire 20 lobbyists, many of whom are “revolving-door lobbyists” who previously worked on capitol hill as chiefs of staff or communications directors.<sup>87</sup> The lobbying efforts have paid off. For example, the Justice is Not for Sale Act and Private Prison Information Act are just two bills that have not received a single vote in committee.<sup>88</sup> These bills would have banned private prisons at every level and disallowed an exemption for private prison companies in reporting statistics.<sup>89</sup> Currently, private prison companies are not required to disclose violence, demographics, or budget statistics about their facilities.<sup>90</sup>

### B. Expansion of Electronic Monitoring

While some see private prison corporations as simply a parasite on an already massive public system,<sup>91</sup> the infestation, so to speak, should not be taken lightly. Having supplanted their foothold in the prison industry since the mid-1980s, CoreCivic and GEO Group have established themselves as big political players dedicated to diversifying their portfolio of government services. This is particularly true in the arena of EM.<sup>92</sup> From 2010 to 2019, BI Inc. (owned by GEO Group) had contracts totaling \$670 million with ICE for GPS monitoring of immigrants.<sup>93</sup> For its part, CoreCivic is the parent company of Residential Monitoring Services and offers administrators a full range of non-residential services, including EM. CoreCivic advertises that “[p]roviding these non-residential services is a natural complement to our broad network of residential reentry centers and can help keep individuals from going back to prison or being incarcerated in the first place.”<sup>94</sup>

#### 1. Lessons from Bail Legislation and COVID-19

Unfortunately, EM is more of a black box of corporate profit than a progressive

86. ITPI, BUYING INFLUENCE: HOW PRIVATE PRISON COMPANIES EXPAND THEIR CONTROL OF AMERICA’S CRIMINAL JUSTICE SYSTEM 6 (Oct. 12, 2016), <https://www.inthepublicinterest.org/buying-influence-how-private-prison-companies-expand-their-control-of-americas-criminal-justice-system/> [https://perma.cc/3HQ5-HPX9].

87. *Id.* at 3.

88. *Id.* at 9.

89. H.R. 994, 117th Cong. (2021).

90. See Libbi L. Vihler, Note, *Private Prisons and the Need for Greater Transparency: Private Prison Information Act*, 12 BROOK. J. CORP. FIN & COM. L. 213 (2017) for a discussion of the lax disclosure regime applicable to private prisons.

91. See Sawyer & Wagner, *supra* note 19.

92. See ITPI, *supra* note 47 (discussing GEO Group’s 2011 acquisition of BI, Inc. for \$415 million); CoreCivic 2019 Annual Report, *supra* note 32, at F-24 (reporting CoreCivic’s January 2018 acquisition of Rocky Mountain Offender Management Systems—an EM service operating in seven states—for \$7 million and its December 2018 acquisition of Recovery Monitoring Solutions Corporation—an EM and case management “non-residential correctional alternative” operating in four states—for \$15.9 million).

93. *Electronic Monitoring Hotspot: Colorado*, MEDIAJUSTICE, <https://mediajustice.org/electronic-monitoring-hotspots/colorado/> [https://perma.cc/ZUB9-SATA] (highlighting statistics about BI, Inc., which is headquartered in Boulder, Colorado).

94. *Non-Residential Services*, CORECIVIC, <https://www.corecivic.com/community/non-residential-services> [https://perma.cc/ML76-J2WL].

solution and alternative to incarceration. In 2015, less than 2% of the total number of incarcerated, probationed, and paroled individuals were being monitored by EM devices.<sup>95</sup> But today, governments are rapidly expanding their use of EM. As the chief executive of The Bail Project<sup>96</sup> has remarked, “[y]ou would be hard-pressed to find bail-reform legislation in any state that does not include the possibility of electronic monitoring.”<sup>97</sup> The result of bail reform is largely unsurprising: for-profit corporations are filling a need in the market.<sup>98</sup> Some corporations have even capitalized on the process of determining whether an EM device should be assigned in the first place—themselves marketing the risk assessment tools courts use.<sup>99</sup>

The EM market is booming and has only increased during the COVID-19 pandemic. As Robert Murnock of GEO Group’s BI, Inc. remarked in July 2020, “demand has spiked everywhere.”<sup>100</sup> At the time, Murnock estimated BI had 1,300 U.S. accounts and said, “we’re getting calls from different jurisdictions and other countries we’ve never worked with.”<sup>101</sup> There is every reason to expect that a continued push for no-cash bail and decarceration will lead to more EM.<sup>102</sup>

## 2. The New Debtor’s Prison

While this might not appear to be a big problem—being out of custody is certainly better than being behind bars—the consequences of EM devices are well-known. Private corporations—including the recently acquired subsidiaries of CoreCivic and GEO Group—are repeatedly seen profiting off the unregulated EM market at the expense of the poorest in society. In all states except Hawaii and the District of Columbia, defendants and

95. TRACKING DEVICES, *supra* note 50.

96. The bail project is a non-profit with the goal to end cash bail and “combat[] mass incarceration by disrupting the money bail system—one person at a time.” THE BAIL PROJECT, <https://bailproject.org/> [<https://perma.cc/AL8U-LULY>].

97. *Defendants Driven into Debt by Fees for Ankle Monitors from Private Companies*, EQUAL JUST. INITIATIVE (July 23, 2019), <https://eji.org/news/defendants-driven-into-debt-by-fees-for-ankle-monitors/> [<https://perma.cc/2N96-NYLM>] [hereinafter *Defendants Driven into Debt*]; see also U.S. COMM’N C.R., THE CIVIL RIGHTS IMPLICATIONS OF CASH BAIL 108 (2022) (finding “[s]ince 2012, every state legislature has addressed some aspect of pretrial policy, resulting in nearly 700 new enactments by 2018. In 2017 alone, state lawmakers in 46 states and the District of Columbia enacted 182 new pretrial laws . . .”); Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. (forthcoming 2022) (citing recent bail reforms in St. Louis, San Francisco, New York, New Jersey, and Ohio).

98. See U.S. COMM’N C.R., *supra* note 97, at 77 (finding an “increasingly utilized, alternative to pretrial detention is requiring defendants to wear electronic monitoring bracelets”).

99. See *Where Are Risk Assessments Being Used?*, MAPPING PRETRIAL INJUSTICE, <https://pretrialrisk.com/national-landscape/where-are-prai-being-used/> [<https://perma.cc/4H4Z-BCLG>] (surveying the use of risk assessment tools across the U.S. and finding “most states use at least one pretrial RAT”); see also Bryce Covert, *A Bail Reform Tool Intended to Curb Mass Incarceration Has Only Replicated Biases in the Criminal Justice System*, THE INTERCEPT (July 12, 2020, 7:00 AM), <https://theintercept.com/2020/07/12/risk-assessment-tools-bail-reform/> [<https://perma.cc/RDL2-7TA2>] (discussing how risk assessment tools utilized by courts reinforce systemic inequities).

100. Cara Tabachnik, *Covid-19 Created a Bigger Market for Electronic Ankle Monitors*, BLOOMBERG LAW (July 14, 2020, 5:00 PM), <https://news.bloomberglaw.com/white-collar-and-criminal-law/covid-19-created-a-bigger-market-for-electronic-ankle-monitors> [<https://perma.cc/89WM-SXKJ>].

101. *Id.*

102. *Defendants Driven into Debt*, *supra* note 97.

offenders are required to pay a fee for the EM devices they must wear.<sup>103</sup> Depending upon the state, fees can range anywhere from \$1.50 daily to a \$2,275 one-time fee.<sup>104</sup> Extrapolated over the course of a year, an individual on supervised release could pay anywhere from \$25 to \$8,606, with the average being \$3,283.08.<sup>105</sup> Too often, the same indigent offender who could not secure bond for release is now expected to make EM payments or suffer the consequences of having a warrant issued and returning to jail.<sup>106</sup> Even when there is a fee-waiver process, it is often unclear how offenders opt into such programs.<sup>107</sup>

### 3. Lagging Legislation

Perhaps most disturbing, despite being used in courts since 1983,<sup>108</sup> EM remains largely unregulated. It was not until 2015 that the U.S. Supreme Court weighed in on the issue in the case *Grady v. North Carolina*.<sup>109</sup> The Court held that sentencing recidivist sex offenders to satellite-based monitoring constituted a search for purposes of the Fourth Amendment.<sup>110</sup> Refusing to decide in the first instance whether the use of such monitoring constituted a reasonable search, the Court remanded.<sup>111</sup> Thus, left to their own devices regarding whether EM is a reasonable means to serve a state interest, it is unsurprising that states have rapidly expanded the use of EM.

Since 2005, 46 states have passed legislation mandating lifetime EM for adults convicted of certain sexually based offenses.<sup>112</sup> And as corporations have essentially free reign to fill the growing need for EM services, fee payments continue to be a problem. The state of Arizona is just one example.<sup>113</sup> In Arizona, Robert Hiskett was ordered as a condition of pre-trial release to wear an ankle monitor and was charged \$400 per month by

103. See Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor> [<https://perma.cc/NNP3-CJCM>] (conducting a year-long state-by-state survey on criminal justice costs); see also WEISBURD, *supra* note 10, at 15 (confirming in a 2021 study of 101 government agencies across 44 states and the District of Columbia, that individuals are typically expected to pay for their own EM).

104. WEISBURD, *supra* note 10, at 15.

105. *Id.*

106. *Id.* at 17; see also *Defendants Driven into Debt*, *supra* note 97 (finding “[i]f defendants don’t pay, private companies can initiate criminal-court proceedings . . .”).

107. See WEISBURD, *supra* note 10, at 17.

108. See Burrell & Gable, *supra* note 51 and accompanying text.

109. *Grady v. North Carolina*, 575 U.S. 306 (2015).

110. *Id.* at 310.

111. *Id.* at 310–11.

112. See *Jessica’s Law*, STOP CHILD PREDATORS, <https://www.stopchildpredators.org/policy-priorities-jessicas-law> [<https://perma.cc/V9SR-8JKY>] (describing the legislation passed in Florida in 2005, which has since become a model for other states); see also *Electronic Monitoring Hotspot Map*, MEDIAJUSTICE, <https://mediajustice.org/electronic-monitoring-hotspots/florida/> [<https://perma.cc/FGL8-RXMP>] (describing the strict electronic monitoring laws for sex-offenders in Florida).

113. See Lauren Castle, *Criminal Suspects Can’t be Forced to Pay for Their own GPS Monitoring*, *Court Rules*, ARIZ. REPUBLIC (Oct. 1, 2019, 12:14 PM), <https://www.azcentral.com/story/news/local/arizona/2019/10/01/arizona-suspects-cant-forced-pay-gps-monitoring-appeals-court-rules/2034335001/> [<https://perma.cc/55VC-2H85>] (“A state law allowing the electronic monitoring of people accused of sex offenses does not give counties the authority to force defendants to pay for their own monitoring before they are convicted of any crime . . .”).

the EM corporation.<sup>114</sup> When unable to pay, the judge sent Hiskett to jail on a \$100,000 bond.<sup>115</sup> This ultimately resulted in a 2019 case before the Arizona Supreme Court, but with a limited ruling: a defendant cannot be forced to pay for their own monitoring *before* being convicted of a crime.<sup>116</sup> Even when a case reaches the highest state court, protections for indigent offenders in both pretrial and post-conviction are uncertain.

### C. The Unintended Consequences of Mass Decarceration

While it is undoubtedly an admirable goal, decarceration at any level will have ripple effects. We have already seen an increased use of ankle monitoring with pre-trial bail reform and home-confinement releases during the COVID-19 pandemic. In the event of decriminalization legislation or the next form of compassionate release,<sup>117</sup> there is every reason to anticipate that private prison contractors will fight to maintain their government contracts. Faced with a public that is generally wary of former criminals, the use of ankle monitoring or perhaps new implanted drug-testing devices<sup>118</sup> may appeal to governments eager to guarantee public safety and garner popular support.

Without legislative guidance, the consequences of decarceration are devastatingly predictable. GEO Group (with its arsenal of EM-related subsidiaries) and CoreCivic (with its residential reentry centers) can wage war against true decarceration by brokering beds or enforcing occupancy clauses in contracts that guarantee payment regardless of beds filled or needed. They can promote the use of EM devices as a social safety measure, all while pushing the cost of the device and monitoring upon either the formerly incarcerated or taxpayers. It is unclear whether the government has considered this response and is willing to stand up to the political pressure to monitor recently released individuals. To curb the expanding rush to electronic ankle monitoring, government officials must definitively address the market reaction that is likely to follow any major change in criminal sentencing through legislation.

## IV. RECOMMENDATION

Private prisons are a small part of the prison industrial complex's larger issue—privatization. CoreCivic and GEO Group have proved to be committed to diversifying their interests and moving away from their real estate-centered models. If legislators are reading the tea leaves, they must get ahead of the situation and anticipate the next move of the two

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114. Lauren Castle, *Some Arizona Defendants are Being Charged Hundreds a Month for Their own GPS Monitoring*, ARIZ. REPUBLIC (Aug. 23, 2019, 6:15 AM) <https://www.azcentral.com/story/news/local/arizona/2019/08/21/arizona-defendants-paying-gps-monitoring-jail-time-aclu-unconstitutional/2034460001/> [<https://perma.cc/L7TY-BBA8>].

115. *Id.*

116. Castle, *supra* note 113.

117. See ITPI, *supra* note 86, at 7–10 (analyzing the spending trends of GEO Group and CoreCivic (CCA) on national, state, and local government lobbying).

118. See Marie McCullough, *FDA Urged to Investigate Use of Unapproved Anti-opioid Implant on Prisoners and the Homeless*, PHILA. INQUIRER (Nov. 20, 2019), <https://www.inquirer.com/health/biocorrx-opioid-implant-louisiana-prisoners-naltrexone-homeless-20191120.html> [<https://perma.cc/WC4K-4X7W>] (discussing the case of a prisoner who received an unapproved naltrexone implant while in the custody of the Louisiana Department of Corrections; BioCorRx had planned to test the implant on Louisiana prison inmates and homeless Philadelphians struggling with addiction).



biggest players in the for-profit prison industry. It is not only possible but probable that in the event of mass decarceration, CoreCivic and GEO Group will survive the aftermath. Government officials must reorient their conceptualization of public-private contracting in the criminal justice system if they wish to have any chance of true oversight. The “rub” lies in incentivizing the objectives one wants to achieve.

Commentators have discussed various contractual options regarding private prison contracts, but little discussion centers on the “service” industry into which private corporations have already expanded. By realizing the interconnected problem of EM and private actors, legislators can anticipate possible inroads by which corporations will try to profit from decarceration measures (at the expense of the public welfare). The problem is already visible: in response to no cash-bail initiatives, courts have increasingly ordered indigent offenders to wear EM as a condition of release. Private corporations supplying the EM devices charge the offender a deposit and daily fee to use the technology—the government saves, and the public is safe. But the savings and safety are illusory at best and devastating to indigent offenders at worst.

#### A. *Recognize Mutual Interests*

Any solution to the problem of balancing private and public interests in the event of mass decarceration should take account of both public safety concerns and the private industry structure already in place. As explored in Part II, for-profit corporations in the prison industry have repeatedly proved themselves to be disinterested partners. The lobbying efforts of CoreCivic and Geo Group betray their true motives, and there is no evidence to suggest that private prisons operate at a lower cost, more safely, or reduce recidivism. In fact, the opposite is true.

If governments wish to correct mass incarceration—rather than simply transfer the inmate population to ankle monitors—they must recognize the for-profit interests at play and contract to that end. Quite simply, EM offers an unprecedented opportunity for corporations to exert complete control over their government partners. No one has an exact number of how many people are monitored on EM across the United States.<sup>119</sup> The government does not own the means of producing EM devices and is therefore completely dependent upon private companies to use the technology.<sup>120</sup>

#### B. *Incentivize Positive Outcomes*

I propose governments contract with this background understanding in mind. Corporations will be paid—regardless of whether the government or individual holds the bill. But if the most recent studies are correct, any amount over \$3,248.08<sup>121</sup> (the annual price individuals are charged for EM) would be a profit to EM corporations, and any amount paid by the government in incentives—below \$33,274<sup>122</sup> (the average cost of incarcerating a state prisoner)—would be a savings to the government. This is an oversimplification, as the release of one prisoner does not automatically reduce the cost of

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119. See WEISBURD, *supra* note 10, at 3 (giving an overview of electronic monitoring in the United States).

120. *Id.*

121. WEISBURD, *supra* note 10, at 15; see generally Part III.B.2 (discussing the cost of EM).

122. CHRIS MAI & RAM SUBRAMANIAN, VERA INSTITUTE OF JUSTICE, THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015 8 (2017).

staffing, maintenance, and other fixed costs by \$33,274. But the principle remains. Whether looking at average or marginal cost—*any* amount less than what the government would have paid is a savings.<sup>123</sup>

Rather than require indigent individuals to pay for their EM devices, the government should contract with private industry to provide the devices at no cost. If individuals appear in court or do not recidivate, the corporation can receive a bonus payment equal to or above what the company would have collected from the offender in deposits and fees. If the individual does not appear or reoffends, only the private company would be at a loss. This type of contract creates incentives for corporations to support offenders and assist in their rehabilitation.

Private corporations are already familiar with these types of contracts. Three private prisons—two in Australia and one in New Zealand—have contracts with incentive provisions designed to target high recidivism rates and racial imbalances.<sup>124</sup> Although it is too soon to tell how all three facilities will do,<sup>125</sup> the mere fact that such an incentivized contract exists should be encouraging. When the Australian division of GEO Group was asked about its 25-year contract for Ravenhall, it remarked, “[w]e welcome the Victorian government’s unique scheme to encourage rehabilitation and reduce recidivism and look forward to partnering successfully with them.”<sup>126</sup> A similar proposition should be brought to CoreCivic and GEO Group in the United States. By structuring contracts not on occupancy percentage,<sup>127</sup> but on successful reintegration into society, government officials will incentivize corporations to continue pursuing diversified services they are already investing in—such as halfway houses, rehabilitation centers, and parole monitoring. And by anticipating that facilities will be increasingly unoccupied if common crimes (such as low-level drug offenses) are decriminalized, government officials will get ahead of rogue, opportunistic private actors and instead contract for the ultimate outcomes they desire—reduced recidivism.

Professor John F. Pfaff at Fordham University School of Law has done an excellent job analyzing the incentive structure as it may apply to private prison corporations in the United States.<sup>128</sup> Significantly, he notes that measuring “recidivism” in our system is not about “reoffending” but about contact with the criminal justice system.<sup>129</sup> The reported recidivism rates can be easily skewed based on the patrol level in a given area (e.g., the

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123. *Id.* at 15 (describing how states estimate potential savings and the fact that marginal cost is “generally found to be less than half the value of [] average cost”).

124. Pfaff, *supra* note 42, at 1002–04.

125. *See id.* at 1002–03 (noting Ravenhall Correctional Centre in Victoria was opened in 2017, the incentive provisions took effect in 2019 at Parklea Correctional Complex in New South Wales, and Auckland South (Wiri) Corrections Facility opened in 2015).

126. *Id.*

127. *See* EISEN, *supra* note 12, at 180. A study of 63 private state and local prison contracts found 41 contracts containing occupancy clauses requiring 80–100% occupancy. *Id.* at 207. The financial repercussions of decarceration are clear in the case of CoreCivic’s contract with the New Mexico Correctional Center in Grants, New Mexico: the occupancy clause incentivizes officials to operate at a minimum of 586 female inmates. *Id.* If housing only 300 inmates, the state Department of Corrections pays CoreCivic \$68.20/inmate/day; at 323–585 inmates, the state pays \$59.27/inmate; when at least 586 individuals are housed, the state pays only \$15.99 per inmate/per day. *Id.*

128. *See generally* Pfaff, *supra* note 42.

129. Pfaff, *supra* note 42, at 1006.

likelihood of arrest is correlated with the likelihood of recidivism). Private corporations should be incentivized to lower recidivism, but this means also recognizing “intermediate successes that we know often lead to (unobserved, and mostly unobservable) desistance.”<sup>130</sup> Governments should simultaneously remove the financial burden of EM from individuals (or governments) while also contracting with EM corporations to incentivize successful reintegration. They could do as the Australian government did at Ravenhall: GEO Group Australia is promised an annual bonus of \$2 million if the released inmates re-offend at a 12 percent lower rate than surrounding prisons.<sup>131</sup> Governments should make a similar flat-rate bonus incentive and make targeted efforts at increasing private prison programming in general. This could be done by tying the success of EM with factors that are proven to lead to reduced crime—such as stable housing, community support, and regular employment.<sup>132</sup>

### C. *Contract in Anticipation of Future Market Growth*

Government officials should anticipate the market opportunities available and the perverse incentives which have already been created by privatizing incarceration. If they do not, governments will continue to be pressured into contracts that appear to be a “deal” for the government but have devastating latent costs. In the EM industry, these costs are already clear. The 2021 report referenced in Part II extensively investigated the full impact of EM.<sup>133</sup> Imprisoned at home, with numerous and vague rules, and monitoring fees ranging from \$2,800 to \$5,000 annually, individuals ordered to wear EM are cast into a system that facilitates reincarceration.<sup>134</sup> Not only are a small group of private companies profiting millions off the use of EM technology, but private vendors hold significant power over the entire monitoring process. They provide the equipment, monitor violation alerts, and in many cases communicate directly with individuals, bypassing the government entirely.<sup>135</sup> Governments must fully comprehend the extent of this industry’s grasp and how “because private companies are not governed by public record laws, it is virtually impossible to determine how these companies function.”<sup>136</sup>

## V. CONCLUSION

Legislators today are faced with an unprecedented scale of prisoners, corporate actors, and technological advances. But this also presents a unique opportunity for legislators. An opportunity to pull back the curtain on decades of mass incarceration and use market regulation to course-correct for the future. For-profit prison contractors, while unincentivized, will act only in their own interest. They will do as expected—seek profit. This takes an obvious form when considering EM. More EM devices equal more profit, and “[t]he more people remain on monitors for longer, the higher the profit.”<sup>137</sup> Only in

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130. *Id.* at 1007.

131. EISEN, *supra* note 12, at 224.

132. Pfaff, *supra* note 42, at 1006.

133. *See generally* WEISBURD, *supra* note 10.

134. *Id.* at 2–3.

135. *Id.* at 20.

136. *Id.* at 22.

137. *Id.*

anticipating the push towards greater use of EM equipment can government officials counteract for-profit motives in the public interest. Some will continue to claim, like the CEO of CoreCivic,<sup>138</sup> that “the government needs us,” but so too does the corporation need its customer—the government and its prisoners. State and federal governments are in a position to demand for-profit prison corporations to better serve the public’s needs or expect non-renewal of contract. The government is not responsible for or accountable to the business interests of for-profit corporations—but the government *is* responsible for the health and wellbeing of its citizenry, including those in custody.

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138. CoreCivic’s CEO Damon Hininger indicated that ending the federal government’s use of private prisons is not “very realistic” as “[t]hey have no alternative. They either rely on us, the private sector, or cities and counties for space . . . .” Matt Blois, *CoreCivic Execs: Biden Administration Will Still Need Private Prisons*, NASHVILLE POST (Nov. 9, 2020), [https://www.nashvillepost.com/business/area\\_stocks/corecivic-execs-biden-administration-will-still-need-private-prisons/article\\_38c5bcf1-61dc-5536-a200-1de46dbbe344.html](https://www.nashvillepost.com/business/area_stocks/corecivic-execs-biden-administration-will-still-need-private-prisons/article_38c5bcf1-61dc-5536-a200-1de46dbbe344.html) [https://perma.cc/PQY4-W7RZ].