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Fundamental Rights and Private Prisons after Dobbs: Shifting Sands and Opportunities

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INTRODUCTION

The private prison industry has been constructed to extract value from the bodies of incarcerated people and transfer it to the corporations who operate the facilities, their executives, and their shareholders. The War on Drugs, with its express goal of incarcerating people for low-level drug offenses,[1] represented an incredible business opportunity from the point of

* Associate Director, Abolish Private Prisons. J.D., University of Pennsylvania School of Law. This Article would not have been possible without the support of a wide range of people: the panelists who took time to give their insight into prison privatization; the editors of the LSU Law Journal for Social Justice & Policy, who have been helpful, organized, and professional; John Dacey, Executive Director of Abolish Private Prisons, and the Board of Directors have been gracious in giving me space to develop these arguments; and my family whose presence is a constant reminder of why we fight for a more fair and just world.

1. *See* andré douglas pond cummings & Steven A. Ramirez, *The Racist Roots of the War On Drugs & The Myth of Equal Protection for People of Color*, 44 UALR L. REV. 453, 459–60 (2022) ("[T]he [War on Drugs] originated with

view of profit-motivated vendors: engage in long-term contracts with government agencies in a growth market wherein cutting expenses (*i.e.*, staffing, education, and rehabilitative services) increases the size of the market and guarantees future prisoners.

The last forty years have revealed the private prison experiment as the failure it was always destined to be. The United States Department of Justice inspector general reported that private facilities with whom the federal government contracted were more dangerous, had more contraband and worse staffing, and ultimately caused more incident reports and lockdowns, all of which represent a serious infringement on the constitutional rights retained by people sentenced to prison terms.[2] As private prisons have grown to represent a significant share of all facilities (approximately 7% of all prisoners are in private facilities in the United States, but that number varies dramatically among states and the various federal agencies that imprison people as well as year-to-year), academic researchers have turned their incisive attention to the industry.[3] Unsurprisingly, the results reveal problematic outcomes. In Mississippi, for example, prisoners in private facilities spend approximately 90 more days incarcerated than similar prisoners in state-run facilities, largely due to an increased number of disciplinary infractions.[4]

The academic literature has been less robust in identifying potential constitutional remedies to address what has become a systemic problem. This Essay will sketch one such theory: the interplay between substantive due process and equal protection. Most famously in *Plyler v. Doe*, the Supreme Court recognized that while some rights may rise neither to the level of fundamental rights protected solely by substantive due process nor infringe on a protected class under traditional equal protection analysis, the rights nonetheless warrant some form of heightened scrutiny because they implicate important concerns protected by both constitutional

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the intent to criminalize communities of color and marginalize the voting power of political enemies. The WOD is, and always was, meant to be a war on black and brown Americans.").

2. U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS ii (2016).

3. LAURA M. MARUSCHAK & EMILY D. BUEHLER, U.S. DEP'T OF JUST. BUR. OF JUST. STAT., CENSUS OF STATE AND FEDERAL ADULT CORRECTIONAL FACILITIES, 2019 – STATISTICAL TABLES 2 (2021).

4. *See, e.g.*, Anita Mukherjee, *Impacts of Private Prison Contracting on Inmate Time Served and Recidivism*, 13 AM. ECON. J.: ECON. POL'Y. 408, 434 (2021) ("The analysis shows that inmates in private prison serve about 4 to 7 percent larger fractions of their sentences, or 85 to 90 extra days for the average prisoner.").

provisions.[5] This Essay argues that being held in a prison facility operated by a corporation with a vested financial interest contrary to legitimate penological interests is such a case.

This Essay proceeds in three parts. First, it will sketch the history of incarceration paying particular attention to the ways in which private parties have been involved in that system. Some of this history was written about in various United States Supreme Court cases, perhaps most prominently in *Richardson v. McKnight*.[6] *Richardson*'s conclusion that "correctional functions have never been exclusively public" is unassailably true.[7] However, the breadth of control that corporations have over individuals in prison is unprecedented, partly because of the expansion of the carceral state and partly because the key corporations exert influence over the process from the nascent stages of legislation to after a person is released from prison and every step in between.

Second, this Essay discusses *Plyler v. Doe*, the Supreme Court case holding that children of undocumented immigrants had a right to access public education.[8] That case relied on the Equal Protection Clause, but the substance of the analysis includes ideas that fit neatly within the modern understanding of Substantive Due Process.[9] The Court found that access to public education was not a fundamental right, and that undocumented immigrants' children were not a suspect class.[10] Nonetheless, the Court addressed the interplay between those concepts and how they both pointed toward important concerns captured by the Fourteenth Amendment, thereby imposing a more exacting standard of scrutiny than simple rational basis review.[11]

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5. Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

6. Richardson v. McKnight, 521 U.S. 399 (1997).

7. *Id.*

8. *Plyler*, 457 U.S. at 230 ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.").

9. *See infra*, Part II (discussing how *Plyler* may be better read as a Substantive Due Process case).

10. *Plyer*, 457 U.S. at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.' Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.").

11. *Id.* at 224 ("In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.").

Finally, this Essay discusses the effect of *Dobbs v. Jackson Women's Health Organization* on the *Plyler* analysis.[12] The *Dobbs* opinion sent a seismic shock not only through the nation because of its disastrous effects on access to reproductive freedom,[13] but also through the legal community because of its upending of a half-century of precedent.[14] Ultimately, this Essay suggests that even if *Dobbs* has rendered the *Plyler* theory of overlapping classes and rights an artifact of a different judicial era, it opened up new avenues for arguing that the current system of incarceration in private facilities run by corporations for their own profit violates the United States' system of well-ordered liberty.

I. THE CREATION OF MASS INCARCERATION IN THE UNITED STATES

The United States imprisons more people and at a higher rate than any other country in the world.[15] Gathering up-to-date information is a difficult logistical task, largely because "the U.S. doesn't have one 'criminal justice system;' instead, we have thousands of federal, state, local, and tribal systems."[16] Nevertheless, the United States represents a shocking departure from peer countries across the world, holding almost two million people in various detention facilities, including jails and prisons.[17] As the Prison Policy Initiative describes:

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12. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

13. *See, e.g.*, *Human Rights Crisis: Abortion in the United States After Dobbs*, HUMAN RIGHTS WATCH (Apr. 18, 2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs [https://perma.cc/XW2T-TV9D] ("The consequences of the Dobbs decision are wide ranging. Restrictions on access to healthcare places women's lives and health at risk, leading to increased maternal mortality and morbidity, a climate of fear among healthcare providers, and reduced access to all forms of care.").

14. As a naïve look into the *Dobbs* effect, almost 1,000 law review articles accessible on Westlaw have been published since the opinion was leaked on May 2, 2022, that mention "Dobbs." (Search performed on June 14, 2023).

15. HELEN FAIR & ROY WALMSLEY, WORLD PRISON BRIEF, WORLD PRISON POPULATION LIST THIRTEENTH EDITION (2021), https://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_13th_edition.pdf [https://perma.cc/8J38-J9HR] ("There are more than 2 million prisoners in the United States of America… The countries with the highest prison population rate – that is, the number of prisoners per 100,000 of the national population – are the United States (629 per 100,000) followed by Rwanda (580) …").

16. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/2QFE-DZK6].

17. *Id.*

> Not only does the U.S. have the highest incarceration rate in the world; every single U.S. state incarcerates more people per capita than virtually any independent democracy on earth. To be sure, states like New York and Massachusetts appear progressive in their incarceration rates compared to states like Louisiana, but compared to the rest of the world, every U.S. state relies too heavily on prisons and jails to respond to crime."[18]

A. Early Anglo History

Our shared cultural roots and the increasing reliance on "Anglo" history in interpreting the Constitution suggest 19th century England as a starting place in tracing how the United States became the incarceration capital of the world. It is true that imprisonment existed as a form of punishment throughout England before the 1800s; however, its use was not particularly widespread and a large proportion of those imprisoned were debtors.[19] Between 1788 and 1864, the number of people imprisoned in England expanded five-fold[20] as two things happened: (1) what we now call the "criminal justice system" expanded rapidly; and (2) imprisonment became a preferred method of punishment.

Several interrelated factors contributed to the rapid expansion of the imposition of criminal sentences in England around the turn of the 19th century. First, the population of England grew dramatically. After being restrained by Malthusian constraints for centuries, increasing technology allowed the population to approximately triple between 1750 and 1850 – from 5.75 million people to 16.7 million people.[21] Second, there was a

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18. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/6P38-AFLX].

19. J.M. Moore, *Expansion, Crisis, and Transformation: Changing Economies of Punishment in England, 1780–1850*, 46 SOC. JUST (SPECIAL ISSUE: PUNISHMENT AND HIST.) 5, 12–13 (2019).

20. *Id.* at 14–15.

21. Michael Anderson, *The Social Implications of Demographic Change*, *in* THE CAMBRIDGE SOCIAL HISTORY OF BRITAIN, 1750–1950 2 (F. M. L. Thompson ed., Cambridge Univ. Press 1990) ("The specific calculations of Malthus – that is, population would tend to double every twenty-five years while food supplies would lag dramatically – have been widely rejected in the intervening 200 years. However, broadly speaking, social scientists refer to Malthusian constraints as those that hinder population growth, such as wages and food supply."). *See, e.g.*, Rev. R.F. Clarke, *Neo-Malthusianism*, 163 N. AM. REV. 345 (1896) ("The doctrines of Malthus respecting the growth of population, and its relation to the simultaneous increase in the means of subsistence, are now very generally

tremendous demographic shift: "Urbanization proceeded across the period 1600–1800, but accelerated in the first half of the nineteenth century. By 1851 over half the population [of England] lived in settlements of 2,500 or more, peaking at around 80 per cent by the 1890s."[22] And finally, the growth of industry concentrated wealth into capitalists at the expense of laborers.[23]

These changes reveal a society undergoing rapid change, with more people living in closer proximity to each other than ever before. With rising inequality and shifting labor requirements (from agricultural labor to city-based industrial labor),[24] capitalists had both a desire and opportunity to leverage state power in the form of criminal penalty. The desire sprang in part from significant labor protest: the Luddites in the wool industry and Swing Riots throughout England caused "the greatest machine-breaking episode in its history," and in part for satiating the growing need for factory workers.[25]

The expansion of criminal sanctions manifested in several areas. For example, some of the earliest forms of "modern" urban policing appeared in London and quickly spread to other city centers.[26] These police forces acted as "preemptive" forces, using the "character" of suspects as evidence to convict them of crimes, thereby removing them from the free population of the city.[27] Prosecution trade groups also sprang up, which employed private attorneys to "vigorously prosecute[ ] alleged criminals on their members' behalf."[28] Capital owners also worked with the government to transfer public land to private control through enclosure acts and

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discredited. . . . But the difficulties arising from the rapid increase of population have not diminished since the days of Malthus.").

22. Romola J. Davenport, *Urbanization and Mortality in Britain, c. 1800–50*, 73 THE ECON. HIST. REV. 455, 456 (2020) (internal citations omitted).

23. *See, e.g.*, Robert C. Allen, *Class Structure and Inequality During the Industrial Revolution: Lessons from England's Social Tables, 1688-1867*, 72 ECON. HIST. REV. 88 (2018) ("[T]he changes in the size and incomes of the main social groups translated into rising and then falling inequality. In 1688 and 1759, the Gini coefficient was about 0.54. It jumped to 0.6 in 1798 as income was concentrated among the landed classes and the bourgeoisie. Inequality remained at this elevated level in the first half of the nineteenth century and then dropped between 1846 and 1867 when the Gini declined to 0.48.").

24. *Id.*

25. Moore, *supra* note 19, at 16–17.

26. Eleanor Bland, The Identification of Criminal Suspects by Policing Agents in London, 1780-1850 (2018) (Ph. D. dissertation, University of Sheffield) (on file with the Department of History, University of Sheffield).

27. *Id.* at 62–64.

28. *Id.* at 18.

criminalized the use of such land which had previously been open to the public.[29]

The sentences carried out by English courts in this period varied dramatically, and information on punishment for less serious crimes is sparse. However, corporal punishment was widely used, with severity ranging from shaving of heads to time in the stocks and whipping.[30] Additionally, because England was an island nation with extensive colonies during this period, transportation was a common punishment for felonies:

> [A]s well as serving as a substitute for the enforcement of the death penalty, [transportation] was used extensively to punish people who would previously have received a lesser sentence. It is estimated that approximately 30,000 convicts were transported to the American colonies in the eighteenth century. The ending of Atlantic transportation following the American War of Independence generated a crisis for the British penal system. Between the arrival of the first fleet in 1788 and 1815 … the total number of convicts sent to Australia was marginally over 15,000, an annual average of approximately 540 people. However, from 1816 until 1840 this expanded dramatically … on average, over 3,700 convicts arrived in the two penal colonies in Australia each year.[31]

Transportation allowed England to delay the widespread use of prisons longer than its peer countries at the time. However, with the American Revolution ending that location as an option and increasing logistical challenges sending prisoners to Australia, the latter half of the 19th century saw imprisonment become the primary tool of punishment for "serious" crimes in England.[32]

B. Early American History

The history of imprisonment in the United States unsurprisingly shares many roots with England. Initially small populations without urban centers led to a decentralized system of justice and retribution. Much of the low-

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29. *Id.*
30. *Id.* at 6.
31. *Id.* at 11.
32. Although the English system of punishment was not yet as formalized as the modern system of criminal justice, the "serious" offenses are essentially equivalent to what would be considered felonies today. *Id.* at 6.

level crime was handled by the community, including "public penance, the stocks, the pillory, and the scarlet letter. This group of deterrents depended largely, if not exclusively, for its effect on the shame and embarrassment arising from being punished in front of one's friends and neighbors."[33] And like in England, corporal punishment played a large role for more serious crimes (and for those not from the community for whom shaming would have little persuasive power): branding, maiming, gags, and even a chair specifically made for repeatedly dunking people into bodies of water – the ducking stool.[34] However, despite these shared roots, the American system of punishment never reached the heights of cruelty of the English system – perhaps because much of the American population was subjected to harsh persecution before they emigrated.[35]

As populations in the United States grew rapidly with increasing industrialization and urbanization (just as in England), the power of social punishment waned. At the same time, social philosophers were debating new theories of punishment.[36] These ideas included progressive-minded reform ideas, perhaps most embodied by the Quakers who "operated mainly along two related lines of reform – the reduction of the number of capital crimes and the substitution of imprisonment at hard labor for corporal punishment as the most satisfactory penalty to be imposed for the commission of crimes other than capital."[37]

In the second half of the 18th century, reform-minded advocates pushed for changes that led the Walnut Street Jail to adopt many features familiar to modern prisons – separate cells for the most violent offenders and long-term solitary confinement – and spread those concepts throughout Pennsylvania.[38] However, this method of imprisonment failed in part because the Quakers underestimated the negative consequences of

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33. Matthew W. Meskell, Comment, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 STANFORD L. REV. 839, 841–42 (1999).

34. *Id.*

35. *See, e.g.*, Harry Elmer Barnes, *The Historical Origin of the Prison System in America*, 12 J. AMER. INST. OF CRIM. L. & CRIM. 35 (1921) ("The American adaptation of the code of the mother country was never as extreme as the English code.").

36. *See, e.g.*, Robert Alan Cooper, *Jeremy Bentham, Elizabeth Fry, and English Prison Reform*, 42 J. HIST. IDEAS 675 (1981) ("Bentham's pleasure-pain principle and Mrs. Fry's fervent evangelicism brought them both to positions supporting classification of prisoners and productive labor in the prisons, as well as to a shared concern for the maintenance of healthful prison conditions.").

37. *Id.* at 38.

38. *Id.* at 48.

total isolation on the human condition and in part because the Walnut Street Jail was an imperfect application of the Quaker/Reform theory—like many government projects, financial constraints meant that the facility was additionally operating as a jail, and people detained for significantly different offenses were commingling throughout the facility.[39]

Finally, the culmination of the early American penal system was found in the Auburn system.[40] It incorporated several premises of the Pennsylvania system but added in explicit ideas from, among others, Bentham's Panopticon, many of which became mainstays in the American prison system. Prisoners slept in small cells with bars facing a centralized area so that guards could always see inside, but their days were spent largely in communal spaces where they labored together in larger areas.[41]

It is difficult to overstate the importance of the Auburn system of imprisonment, both to the United States and across the English-speaking world. The communal workspaces enabled the facilities not only to save money on what is otherwise an expensive government expenditure, but also in many instances, the prisons were able to generate surpluses by selling goods created by the prisoners.[42] The construction of the facilities allowed guards to have complete physical and psychological control over the imprisoned people. And likewise, it is difficult to overstate the cruelty, both physical and psychological, inherent in the system – with wardens having wide discretion to impose extremely harsh discipline.

C. Post-Civil War Developments

As the Auburn system largely dominated the development of penal systems in the northern states, rich landowners were struggling with the loss of the free labor performed by slaves that propped up their agricultural economy. The Thirteenth Amendment abolished slavery in some forms,[43]

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39. *Id.* at 57.

40. For a more thorough discussion of the Auburn system, see James J. Beha II, Note, *Redemption to Reform: The Intellectual Origins of the Prison Reform Movement*, 63 N.Y.U. ANN. SURV. AM. L. 773, 778-80 (2008).

41. W. David Ball, *Why State Prisons?*, 33 YALE L. & POL'Y REV. 75, 79–81 (2014).

42. Meskell, *supra* note 33, at 857–58 ("Auburn-style prisons produced annual surpluses while the Eastern Penitentiary continually lost money. Legislatures found in the Auburn system a program that was cheap, could protect society, and might help fill their coffers.").

43. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

and former slaveowners searched for loopholes to maintain the *status quo ante* as much as possible – and from this impetus, the concept of convict leasing was born. "Though, to be sure, tried in some northern and western states, and established in some cases prior to the Civil War, the convict lease system came into its own in postbellum southern states."[44] The instantiation of convict leasing varied across the southern states, but they shared the common foundations of criminalizing the life of newly freed Black Americans through laws against "vagrancy," unemployment, and various labor offenses such as breaking an employment contract.[45]

The Reconstruction Era convict leasing system in southern states was widespread and barbaric in a unique way: it replicated slavery across many dimensions. The labor was similar as many leased people were performing agricultural tasks formerly done by slaves. The locations and beneficiaries were similar as plantation owners were lessees of the convicted people. The race dynamics were similar because the plantation owners were white while the laborers were convicted of so-called "Black Codes" because, even if those statutes were not facially targeting black people, the application was certainly racist.

And the conditions were similar. Most people in the United States are aware of the cruel barbarity of chattel slavery throughout the colonies and leading to the Civil War: summary and wanton punishment, whipping, rape, civil death, and psychological degradation characterized the master/slave relationship. Conditions during convict leasing – despite being perhaps less well known – were arguably just as brutal. David Oshinsky's book provocatively titled *Worse Than Slavery* lays out in excruciating detail the harms suffered by those leased to plantation owners during their sentence.[46] The core fact at the bottom of the horrible treatment differentiating convict leasing from slavery is that because slaveowners had a property interest for the entirety of their slaves' lives, they had some incentive to keep that person in at least healthy enough shape to continue working. Lessees in the convict leasing system, however, had no such incentive and were therefore perhaps more likely to impose deleterious working conditions and punishments on those they had leased.

That the essential re-enslavement of Black Americans was accomplished through convict leasing appalled Republican members of Congress who drafted and passed the 13th Amendment. There was some

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44. Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 127 (2001).

45. *Id.* at 126.

46. DAVID M. OSHKINSKY, WORSE THAN SLAVERY (1997).

debate as to whether the Punishment Clause condoned such activity, and a movement emerged to add additional language to a constitutional amendment or pass legislation clarifying the intent of the already passed Thirteenth Amendment. In the end, neither effort could gather enough momentum, and the revisionist Democratic southern interpretation was followed, at least in the south.[47]

Convict leasing as a widespread practice began waning at the beginning of the 20th century, and the last remaining states ended the practice by the mid-1920s. The practice was never seriously challenged in courts; rather the reasons for the demise of convict leasing "seem to center around the displacement of the underlying modes of production and the political agitation of free laborers and excluded businessmen."[48]

D. War on Drugs and Mass Incarceration

The next major development in the American prison system came at the end of the Civil Rights Era.[49] As Black Americans painstakingly gained access to wider participation in the American democratic and market systems, opportunistic and shrewd politicians instituted a "War on Drugs."[50] As part of "an aggressive law enforcement campaign against the use and sale of illegal drugs … [f]rom 1980 to 1997, the rate of incarceration for drug offenses increased nearly tenfold, from 15 per 100,000 adults to 148 per 100,000 adults."[51] This increased incarceration rate was a cynical political operation that targeted Black Americans – a growing bloc who were becoming increasingly solid Democrat voters –

47. For a thorough account of the competing interpretations of the 13th Amendment and how the southern Democrat revisionist account came to dominate, see James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. Rev. 1465 (2019).

48. White, *supra* note 44, at 133.

49. There was a "brief reprieve" from the otherwise relentless assault on Black Americans through the carceral system in the middle of the 20th century. Robert Craig & andré douglas pond cummings, *Abolishing Private Prisons: A Constitutional and Moral Imperative*, 49 U. BALT. L. REV. 261, 300 (2020), *citing* Risa L. Goluboff, *Race, Labor, and the Thirteenth Amendment in the 1940s Department of Justice*, 38 U. TOL. L. REV. 883, 889–93 (2007) (detailing actions to eradicate racist peonage and surety systems and protect black citizens).

50. "Richard Nixon declared 'total war' on drug use, naming it 'public enemy No. 1' in 1971." andré douglas pond cummings, *supra* note 1, at 460.

51. Congressman John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y REV. 377, 379 (2013).

and an estimated "one of every eight black men has been disenfranchised because of a felony conviction."[52]

The time between 1970 and 2015 was marked by an explosive growth not only in the incarcerated population, but also people under some form of contact with the carceral system in the United States. As the Sentencing Project noted:

> The United States criminal justice system is the largest in the world. At yearend 2015, over 6.7 million individuals were under some form of correctional control in the United States, including 2.2 million incarcerated in federal, state, or local prisons and jails. The U.S. is a world leader in its rate of incarceration, dwarfing the rate of nearly every other nation.[53]

The causes and effects of this explosion have been written about extensively. To sum up some of those writings, the causes include: criminalization of drug offenses; sentencing policy reforms that have had the aggregate effect of increasing sentence lengths; the abolition of parole at the federal level and similar reductions and removals of post-incarceration options; much harsher penalties for similar illicit activity visited upon communities of color; and finally, continuing the "system of racial control similar to Jim Crow-era laws that followed the abolition of slavery and Reconstruction."[54]

E. Private Involvement

Private parties have been connected to the punishment apparatus of the state since its inception. In this sense, Justice Breyer's opinion in *Richardson* is correct in pointing out that "[p]rivate individuals operated local jails in the 18th century."[55] Similarly,

> From its very inception in Western society, the prison was used to achieve such private ends as the collection of civil debts, the punishment and secreting away of rivals, and the administration

52. Dan Baum, *Legalize It All*, HARPER'S (Apr. 2016), https://harpers.org/archive/2016/04/legalize-it-all/ [https://perma.cc/FAW9-3P5T].

53. *Report Of The Sentencing Project To The United Nations Special Rapporteur On Contemporary Forms Of Racism, Racial Discrimination, Xenophobia, And Related Intolerance*, THE SENTENCING PROJECT (March 2018), https://www.sentencingproject.org/app/uploads/2022/08/UN-Report-on-Racial-Disparities.pdf [https://perma.cc/4LSM-7R2K].

54. Conyers, *supra* note 51, at 381–83.

55. *Richardson*, 521 U.S. at 406.

> of domestic tyranny. In medieval Europe, this tradition played out perhaps most conspicuously in the punitive use of prisons to maintain order within the essentially private domains of noblemen and clergy. In the early modern era, this dynamic prevailed in the use of prisons to detain upper-class delinquents and the insane.[56]

But these distinctions do not really translate, because the bright line between public and private ends is a relatively recent invention of society. In Medieval Europe, for example, the king as an individual *was* the state whom noblemen served both privately and publicly. Although one can reasonably say that prisons of the time were operated privately, that does not translate to a modern understanding of state functions.

Because this Essay cares most specifically about rights grounded in American tradition,[57] the most relevant history starts in the late 18th century and ends approximately when the Fourteenth Amendment was ratified in 1868. The private jailing from Justice Breyer's *Richardson* opinion was based wholly around the idea of holding someone for the short duration before a punishment could be meted out.[58] Its relevance to the modern activity of private imprisonment for long terms with total control during that time is near zero.

Instead, the most relevant analogs were among the various systems of forced labor. From the Colonial Era through the Civil War, there were approximately six categories of prison labor in use: the public account, the contract, the piece-price, the lease, the state use, and the work and ways system.[59] Of these, the public account, state use, and public works and ways have no connection to private interests; they simply describe ways that states used prisoners to make products or public benefits such as roads.[60] Under the piece-price system, the state was entirely responsible for the prisoners and their labor and simply turned over the output to a private party for a set price.[61]

The two most relevant arrangements were the contract system and the lease system. Under the contract system, a person with capital would essentially construct a factory inside the prison walls. The state would still

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56. White, *supra* note 44, at 123.

57. *See infra*, Part C, discussing *Dobbs* and its reliance on American tradition and history.

58. *See Richardson*, 521 U.S. at 406–07 (discussing the historical practices of private involvement in criminal justice, particularly in England).

59. Henry Theodore Jackson, *Prison Labor*, 18 J. CRIM. L. & CRIMINOLOGY 218, 225 (1927).

60. *Id.* at 225–44.

61. *Id.* at 229.

be responsible for housing, feeding, and disciplining the prisoners while the private party would force them to labor. This system was rife with abuse (as were many prisons of the era), and the private foreperson would sometimes use excessive force to maintain output. However, the state maintained broad authority and control over the prisoners, except for their labor output.[62] The final arrangement is the lease system, and it was the precursor to the Reconstruction Era convict leasing throughout the South, discussed *supra* in Section 3.B. Prior to the passage of the Thirteenth Amendment, it was tried only four times: in Massachusetts in 1798, Kentucky in 1825, Missouri in 1839, and Illinois in 1839.[63] Notably, however, Massachusetts only allowed prisoners to labor for private parties in close proximity to a public facility where the warden could supervise the arrangement.[64]

II. *PLYLER V. DOE*: SUBSTANTIVE EQUAL PROTECTION?

In the words of the district court judge who initially heard the case that would eventually become *Plyler v. Doe*:

> [the case] was a challenge to a Texas statute, first passed in 1975, which withheld from local school districts any state funds for the education of children of undocumented aliens, and which authorized local school districts to deny enrollment to these children. In 1977, the Tyler Independent School District, fearing that Tyler would become a "haven" for undocumented aliens, began denying admission to the children of such aliens unless their parents paid a tuition fee of $1,000 a year for each child. A number of undocumented aliens, who clearly could not afford the tuition fees for their children, promptly filed suit alleging that the Texas statute violated the Equal Protection Clause and was preempted by federal immigration law.[65]

The case obviously implicated important issues: access to education is valuable not only to the children who were being denied access because of their status, but also to society at large; immigration into the United States has been a contentious issue since before the country was founded,

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62. *Id.* at 226–29.

63. *Id.* at 230.

64. E.T. Hiller, *Development of the Systems of Control of Convict Labor in the United States*, 5 J. AM. INST. CRIM. L & CRIMINOLOGY 241, 253–54 (1914).

65. William Wayne Justice, *Putting the Judge Back in Judging*, 63 U. COLO. L. REV. 441, 442 (1992).

although of course the groups who suffer the stigma of being labeled the wrong type of immigrant has shifted over time; and the Fourteenth Amendment was increasingly being used by the federal courts as a tool to protect important civil rights.

For these reasons, it was perhaps no surprise that after the Fifth Circuit affirmed the trial court's decision[66], the Supreme Court granted certiorari to hear the case. The majority decision written by Justice Brenner purported to apply the rational basis standard, although it was a modified version:

> In determining the rationality of §21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in §21.031 can hardly be considered rational unless it furthers some substantial goal of the State.[67]

As was typical for the time (and maybe as remains typical when jurists are attempting to downplay the significance of their decisions), the majority did not explicitly state the bounds of the scrutiny it applied. In the context of Equal Protection, there are typically three tiers: strict scrutiny for classifications based on suspect classes or state action that burden fundamental rights, intermediate scrutiny for quasi-suspect classes (a very limited category, but generally, gender/sex and legitimacy of children), and rational basis for everything else.[68]

The *Plyler* decision was, on its own terms, based on a combination of important factors: the status of the children *and* the right to access public education. "But more is involved in these cases than the abstract question whether §21.031 discriminates against a suspect class, or whether education is a fundamental right."[69] This approach has been widely criticized, from conservative judges and academics alike as "being result-oriented, and because it appear[ed] to be ad hoc and divorced from other related bodies of law created by the Court."[70] At least one academic threw

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66. Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980).

67. Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

68. *See, e.g.*, Dennis J. Hutchinson, *More Substantive Equal Protection? A Note on* Plyler v. Doe, 1982 SUP. CT. REV. 167, 169 (1982) (discussing the various tiers of Equal Protection analysis in the Supreme Court at the time).

69. *Plyler*, 457 U.S. at 223.

70. Maria Pabón López & Diomedes J. Tsitouras, *From the Border to the Schoolhouse Gate: Alternative Arguments for Extending Primary Education to Undocumented Alien Children*, 36 HOFSTRA L. REV. 1243, 1245 (2008) (quoting Justice Berger's dissent along with a law review article that called the decision "messy") (internal citations and quotations omitted).

up his hands, stating that "the narrow scope of the majority opinion and the even more limited concurrences of Justices Blackmun and Powell make detailed doctrinal analysis of the Court's performance somewhat artificial at best."[71]

However, a fair reading of the *Plyler* opinion suggests that in some instances, the Court is willing to "consider both the effects on an individual and the costs to society."[72] A potential challenge to the existence of private prisons arises under this framework. The effect of being in a private prison is that you are significantly worse off compared to a government-run prison. Academics have been researching private prisons for approximately two decades now, and almost universally have found them to be worse than government-run facilities, across a wide range of measures: People in private prisons have less access to rehabilitative and education services, they serve approximately 8% longer sentences than similarly situated people in public facilities, and they are dramatically less safe than equivalent public facilities (which is particularly noteworthy because government-run prisons are very dangerous themselves).[73]

Private prisons put very real costs on society at large. For the local community, private prison companies tout their ability to create jobs – but those jobs are often miserable, with extremely high rates of injury to the worker and low wages, a combination which leads to high turnover and contributes to the safety problems mentioned above. Private prison corporations make large and widespread campaign contributions and lobby for regressive criminal justice policies, both of which have negative externalities absorbed by the rest of the country.[74] The profit motive inherent to the industry widens the opportunity for corruption, leading to scandals, including: the well-known "Cash For Kids" affair, where juvenile court judges received kickbacks for sending children to private

71. Hutchinson, *supra* note 68, at 170.

72. Stuart Biegel, *The Wisdom of Plyler v. Doe*, 17 CHICANO-LATINO L. REV. 46, 56 (1995).

73. *See, e.g.*, Leah Wang and Wendy Sawyer, *New Data: State Prisons Are Increasingly Deadly Places*, PRISON POL'Y INITIATIVE (June 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/ [https://perma.cc/88N6-8WP7] ("The latest data from the Bureau of Justice Statistics on mortality in state and federal prisons is a reminder that prisons are in fact 'death-making institutions.'").

74. Theodoric Meyer, *Who Lobbies for Private Prisons*, POLITICO (June 21, 2019) ("CoreCivic and other private-prison companies maintain a robust presence on K Street, together spending millions of dollars a year on lobbying.").

detention facilities;[75] the insider trading occurrence where a federal court judge's husband bought stock in two private prison companies days before the judge authorized major raids against immigrants;[76] and the instance of a state Commissioner of Department of Corrections receiving more than a million dollars in kickbacks from various private prison companies.[77]

Given these circumstances, a court could reasonably review the existence of private prison statutes or the continued granting of contracts to private prison corporations with the kind of heightened scrutiny applied in *Plyler*. Under such a regime, the court could then look at the evidence that private prisons do not, in fact, save the government any money. And because that is essentially the only identified government interest in most instances, such heightened review would likely conclude that the statutes did not pass constitutional muster.

III. ENTER *DOBBS V. JACKSON WOMEN'S HEALTH*: A NEW PATHWAY?

The *Dobbs* leak and subsequent decision sent shockwaves through the legal community.[78] It upended a half-century of Fourteenth Amendment precedent and signaled that the new Roberts Court would not hesitate before overturning long-standing cases when it suited their conservative agenda. On first look, however, it is not obvious that *Plyler* would be threatened under this new regime; after all, that case was decided under the Equal Protection Clause while *Dobbs* was nominally limited to the Substantive Due Process analysis of *Roe v. Wade*[79] and *Planned Parenthood v. Casey*.[80]

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75. Michael Rubinkam, *Kids-for-Cash Judges Ordered to Pay More Than $200M*, AP NEWS (Aug. 17, 2022), https://apnews.com/article/crime-trending-news-government-and-politics-6f30f575dc739415af1e5b47b1be50f0 [https://perma.cc/Z8YW-HHPE].

76. Samantha Michaels, *A Federal Judge Put Hundreds of Immigrants Behind Bars While Her Husband Invested in Private Prisons*, MOTHER JONES (Aug. 24, 2017), https://www.motherjones.com/crime-justice/2017/08/a-federal-judge-put-hundreds-of-immigrants-behind-bars-while-her-husband-invested-in-private-prisons/ [https://perma.cc/R78Q-5LR2].

77. Albert Samaha, *The Prison Reform Blues*, BUZZFEED (Dec. 5, 2014), https://www.buzzfeed.com/albertsamaha/the-rise-and-fall-of-mississippis-top-prison-reformer [https://perma.cc/2879-BGPR].

78. Of course, the decision also upended the lives of women and families who no longer have access to reproductive care, the doctors and other health professionals who provide that care, and the advocates who spend their lives fighting for the right to reproductive care.

79. Roe v. Wade, 410 U.S. 113 (1973).

80. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

But "[t]he idea that Plyler could be the next landmark decision that is threatened is not purely speculative."[81] At least one Republican Governor, Greg Abbott of Texas, has publicly stated that the Court should overturn *Plyler*, "explaining that he believed the case should be overturned due to increasing costs that undocumented students have supposedly placed on the state of Texas in recent years."[82] And Justice Thomas's concurrence, without explicitly naming *Plyler*, laid out the groundwork for using the *Dobbs* framework for curtailing other rights:

> Second, substantive due process distorts other areas of constitutional law. For example, once this Court identifies a fundamental right for one class of individuals, it invokes the Equal Protection Clause to demand exacting scrutiny of statutes that deny the right to others. Statutory classifications implicating certain nonfundamental rights, meanwhile, receive only cursory review. … Therefore, regardless of the doctrinal context, the Court often demand[s] extra justifications for encroachments on preferred rights while relax[ing] purportedly higher standards of review for less preferred rights. Substantive due process is the core inspiration for many of the Court's constitutionally unmoored policy judgments.[83]

So, if *Dobbs* signals the death knell for the *Plyler*-style analysis, the logical next step is to determine whether there are any potential avenues to challenge the constitutionality of private prisons under a *Dobbs* regime. And of course, this analysis should be taken even if *Plyler* continues to operate, because in that instance, *Dobbs* represents an additional challenge rather than an alternative.

The *Dobbs* majority opinion focuses on two ways a right can be considered fundamental for purposes of Fourteenth Amendment Substantive Due Process protection: the Constitution must make "express reference" to the right or it must be "deeply rooted in our history and tradition" and "essential to our Nation's scheme of ordered liberty."[84] This

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81. Cyrus D. Mehta, Kaitlyn Box & Jessica Paszko, *The Supreme Court After* Dobbs*: Is* Plyler *Next?*, LEXISNEXIS INSIGHTS (Jun. 28, 2022), https://www.lexisnexis.com/community/insights/legal/immigration/b/outsidenews/posts/the-supreme-court-after-dobbs-is-plyler-next [https://perma.cc/X37N-3FE2].

82. Annie Dietz, Plyler v. Doe *in Review: The Insecure Future of the Right to Education for the Undocumented Post*-Dobbs, 111 KY. L. J. ONLINE 1 (Sept. 7, 2022).

83. *Dobbs*, 597 U.S. 335 (Thomas, J., concurring) (internal quotations omitted).

84. *Id.* at 2246 (internal alterations omitted).

Essay will put aside the first prong: although there is a persuasive argument that the current method of transferring someone into a private prison for the express purpose of enriching a private party and not as an actual sentence for punishment of a crime violates the Thirteenth Amendment regardless of the Punishment Clause exception,[85] this work focuses on the historical question.

As ever in constitutional interpretation, the framing of the right at issue is nearly determinative of the outcome: a right framed too broadly can find historical support anywhere while a right framed too narrowly will find no such help. Here, there is at least one plausible way to frame the right that is being infringed when someone is sent to a private prison through an administrative decision of a government corrections agency: the right not to be held in a private prison. The scope of this Essay is not to exhaustively perform the analysis but rather to sketch the outlines of what such an analysis might look like.

We start by accepting the conclusion in *Richardson* that the "realm of correctional functions have never been exclusively public."[86] However, while that framing is appropriate to inform the question of whether private correctional guards should be entitled to qualified immunity, it does not directly address the question of whether there is a historical practice of holding individuals in privately owned, operated, and managed prison facilities. There is a significant difference between the short-term operation of "jails" commonly found in 18th century United States and England municipalities and the long-term dominion offered by private operation of prisons. Jails tend to hold people while they are awaiting trial, which in the modern framework means they preserve some rights denied to those in prisons. Of course, with the crises related to mass incarceration and prison overcrowding, jails do hold people after being convicted, but even then, such arrangements are usually limited to people serving the

85. For a thorough examination of the question of private prisons, the 13th Amendment's history, and how the Punishment Clause was intended to function, see, e.g., Brief for L. Professors & L. Students from Ark. as Amicus Curiae, *Nielsen v. Shinn*, No. CV 20-00182-PHX-DLR(JZB) (D. Ariz. June 24, 2021), ECF No. 69 ("Thomas Jefferson in drafting the language that eventually became the Thirteenth Amendment with its attendant punishment clause, never could have intended for private chattel slavery to extend through the clause, as it eventually was extended through Black Codes, Convict Leasing, and later in the advent of 21st century private, for-profit prisons.").

86. *Richardson*, 521 U.S. at 405.

shortest sentences.[87] That transience is a key nature of jails – they are simply not constructed and operated with the structures in place to hold individuals for long terms safely and with the programs available in some places to encourage successful re-entry.[88]

Until the late 19th century, the prevailing instances of private operation of detention facilities has historically been transient in nature. These included, for example, the English inns that would hold people charged of low-level offenses until their punishment could be carried out, the privately operated ships that would transport people convicted of crimes to their penal colony destinations – usually the American colonies or Australia – and once those ships were no longer seaworthy, they became "hulks" and moored in shallow waters as floating prisons.[89] In fact, until the late 19th century, imprisonment was not generally viewed as a method of punishment for crime, and the great majority of people in "prisons" were debtors being held until their debts were covered. The American history of private detention was likewise limited to discrete amounts of time – perhaps the best-known example is slave jails, where private parties would hold escaped slaves until their owners retook possession, and similar facilities where slaves were held until they were auctioned off. The few instances of privately run prisons were extremely fleeting: for example, San Quentin in California was initially privately operated, but as discussed above in Part B, the arrangement was ripe for abuse and profiteering, and the state forcibly took over the facility after only four years of private operation.

This analysis of the history of punishment suggests that there is no history of long-term operation of private prisons by a party financially invested in the continued imprisonment of those under their care. Taken together with the inherent conflicts between profit and liberty, such an arrangement plausibly violates the Substance Due Process Clause.

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87. *See, e.g.*, Nazish Dholakia, *The Difference between Jail and Prison*, VERA (Feb. 21 2023), https://www.vera.org/news/u-s-jails-and-prisons-explained [https://perma.cc/7YDH-8Q6B].

88. For example, it is a common practice in some jurisdictions for defendants to agree to slightly longer sentences so they can be placed in prisons with drug rehabilitation programs.

89. Anna Lois McKay, *'Allowed to die'? Prison Hulks, Convict Corpses and the Inquiry of 1847*, 18 CULT. & SOC. HIST. 163, 164 (2021) ("Prison hulks were partly dismantled warships used to detain convicted male offenders awaiting transportation. They were commissioned by the British government in 1776 as one way in which to deal with an extraordinary penal housing crisis brought about by the loss of the American colonies as a destination for transported offenders.").

CONCLUSION

The *Dobbs* decision clarified at least one method of interpreting fundamental rights in the United States Constitution. To determine whether such a right is rooted in American tradition and necessary to well-ordered liberty, we must look to the history of that right both in the United States and England. In this instance, we find that although there is some history of private involvement in punishment through American and Anglo history, there are few to no examples of the type of private imprisonment being used today. The combination of outright private control over prisoners with the extremely long sentences of the modern American penal system is unprecedented. The inherent conflicts with liberty such an arrangement manifests potentially rise to the level of a constitutional violation.