

COMMERCIALIZED (IN)JUSTICE

CONSUMER ABUSES IN THE BAIL AND CORRECTIONS INDUSTRY

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EXECUTIVE SUMMARY

This report discusses the growing problem of “commercialized injustice”—consumer abuses perpetuated by companies profiting from the criminal legal system and mass incarceration. Although not always visible to people who do not live in heavily-policed communities or who are protected by other forms of privilege, the scale of private industry’s involvement in the contemporary criminal legal system is staggering. These companies provide a wide range of products and services, and operate in various relationships with the government. Some contract directly with governments (e.g., private probation and prison phone services). Others sell directly to consumers, but under specific authority to administer criminal legal functions (e.g., commercial bail and certain rehabilitation and diversion programs). And others simply profit from the contours of our modern criminal legal system (e.g., pre-arrest diversion programs that contract with private retailers).

The expanding reach of the modern corrections industry represents the intersection of two troubling trends: (1) the outsourcing of the criminal legal system to the private sector, exemplified by the growth of the private prison industry; and (2) the imposition of fines and fees on mostly low-income defendants to fund the criminal legal system. States and local governments are outsourcing various core functions of their criminal legal systems—traditionally public services—to private corporations operating to maximize profit for their owners. At the same time, they have sought to shift the cost of operating the criminal legal system onto those who have contact with the system and their loved ones, particularly through the assessment of fines and fees on those accused of criminal activity. The corrections industry’s growth exacerbates these trends, combining the conflicts of interest endemic in so-called “user-funded” financing structures with the lack of public accountability that advocates have long criticized in the private prison context.

Every industry discussed in this report shares this common feature: each profits from financial extractions from individuals based on their exposure to the criminal legal system. The growth of the corrections industry accelerates the trend whereby the costs of our legal system are imposed on low-income, disadvantaged communities least able to shoulder such burdens, rather than shared as a collective public responsibility. The corrections industry operates for the primary purpose of maximizing profits for its owners—creating strong incentives to achieve *new* forms of monetary extraction in addition to shifting the burden of *existing* costs.

The corrections industry pitches itself to states as way to relieve fiscal pressure (created in part through mass incarceration)—but increases costs for consumers.

Due to the policy decisions that have driven mass incarceration, state and local governments have experienced sharp growth in costs associated with administering the criminal legal system in recent decades. At the same time, many local governments have seen an erosion of state financial support for municipal services and new limitations on their ability to finance their justice systems through taxes. It is in this context that states and local governments have acted so aggressively both to offload core functions of their legal systems to private companies and to find ways outside of tax revenues to pay for the costs of the system.

The private corrections industry has sought to take advantage of these trends. Many of the industries described in this report have adopted a so-called “offender-funded” model, whereby the costs of administering criminal legal functions are shifted from public budgets to individuals who have contact with the legal system. Companies have aggressively marketed their services to states and localities as a way not only to achieve cost savings for existing corrections functions—but also, in many cases, to generate new revenue streams through kickback payments.

These arrangements almost inevitably have the effect of sharply increasing the financial costs that are imposed on economically fragile individuals processed through the criminal justice system. And while state agencies may indeed see budget savings from these arrangements, those “savings” are not achieved via efficiencies in service provision. The cost of those functions has instead simply shifted onto the individuals processed through the legal system and their loved ones. So while the corrections industry commonly represents itself to the public and to agencies as saving money, total costs to communities are likely to be significantly *higher* under commercialization, due to the combination of industry profit-seeking and contractual arrangements that share proceeds between the private company and the state.

Common problems throughout the bail and corrections industry lead to consumer abuses.

The corrections industry provides a wide range of products and services to vulnerable consumers facing impossible choices as a result of their contact with the criminal legal system. But common features across the industry create an operating environment ripe for consumer abuses and financial exploitation—undermining core goals of our criminal legal system.

- The corrections industry operates largely without consumer regulation or government enforcement. The industry is constructed to profit from an acute power imbalance—leveraging the threat of the state’s police powers while creating the terms of their services for consumers and their families. Given such imbalance, strong government regulation and oversight is needed to protect individuals from being taken advantage of. Unfortunately, that need has been ignored, and lax or non-existent regulatory regimes are common throughout the industry.
- Companies take advantage of the threat of criminal consequences and consumers’ lack of knowledge about their rights. People who have contact with the legal system face distinct uncertainty about what laws authorize and restrict these companies; what rights they have as consumers; and what the consequences are for non-payment or if they are otherwise unable to

meet imposed demands. Some companies have used this uncertainty to their advantage when they seek to coerce payment.

- Corporate consolidation and weak competitive pressures have resulted in a handful of large conglomerates wielding market power across sectors. The corrections industry is increasingly characterized by a small number of large corporations contracting with government agencies to provide different types of services, and leveraging power in one market to increase share in another. This creates effective monopolies that contribute to high consumer prices and abusive practices.
- Companies face incentives to make decisions based on what is in their financial interest—which often directly conflicts with public policy goals. The corrections industry operates under perverse incentives to increase the number of consumers, and the revenues that can be extracted from each consumer, through excessive supervision, punishment, or fees. This is especially pernicious when companies exercise decision-making authority affecting the consumers' criminal punishment at the same time as they stand to profit from extensions of such punishment.
- In exchange for exclusive contracts, companies frequently offer kickback payments to cash-strapped corrections agencies. Companies' arrangements with corrections agencies are commonly characterized by two unique features. First, companies compete for contracts by offering to make kickback payments to the corrections agency. These costs are passed directly to people who have contact with the criminal legal system. Second, companies require a promise that the state will limit consumer choices, so that the contracted service is provided by the company on exclusive terms—securing for them what is, in many cases, a literally “captive market.” This system encourages companies to compete on the basis of higher rates charged to consumers, even as the quality of the service is frequently poor.

The commercialized criminal legal system imposes its costs on vulnerable people least able to pay.

The inflated costs resulting from the exploitative practices in the corrections industry are borne by some of the most vulnerable people in our society. The burden of paying these higher costs is concentrated on a much smaller group (those who have contact with the legal system), compared to the broad group of taxpayers who pay for government operations under public financing models. And people in this smaller group are far more likely to be (1) people of color, due to discriminatory policing and sentencing practices, and (2) poor, in part because economically oppressed communities are frequently targeted by law enforcement, as well as the persistent racial wealth gap.

As a result, these financial obligations are more likely to turn into unaffordable debts, on which payment can be demanded under threat of criminal consequences. These excessive costs are imposed not only on those who are arrested or incarcerated, but also their loved ones and communities. Because so many low-income persons struggle to meet the most basic costs of living, the consequence of the exorbitant costs imposed by the corrections industry can be catastrophic, both individually and in the aggregate.

Further, commercialization can increase criminal involvement for individuals. Conflicts of interest can lead to longer supervision periods when, for example, private probation companies profit from increased numbers. And consumers' inability to pay the exorbitant costs can result in criminal sanctions.

Private companies extract wealth from communities at each step of our punishment continuum.

The culmination of these trends is a system where few criminal legal functions have *not*, in some way or in some jurisdiction, been commercialized by private industry. Americans are subjected to costs imposed by private industry from the moment of arrest (and sometimes even before), through the trial and sentencing process, during incarceration, and extending to post-release supervision and reentry programs. Although the services and business models vary, all of these commercial transactions push families deeper into poverty and make it harder for people who have interactions with the criminal justice system to get back on their feet.

- Pre-arrest diversion programs. Over the past several years, companies have emerged to offer people who are suspected by retailers of criminal activity (typically shoplifting) the opportunity to avoid possible referral to law enforcement by paying hefty fees. In reality, people are paying the fee because they are threatened with possible arrest if they do not—despite the fact that many of these cases would not be pursued by law enforcement, either because the amount at issue is minor or there is insufficient evidence to support prosecution.
- Commercial bail. Fees paid by consumers in the \$2 billion commercial bail market are kept by bail bond companies and their corporate partners—even in cases of false arrest, where the charges are dropped or the individual facing charges is determined to be innocent. This industry profits from taking advantage of people at their most vulnerable: when they—or their child or loved one—face a choice between making payment under the offered terms, or staying in jail. As a result of this business model, heavily policed communities find themselves trapped in a cycle of debt and fees related to the cost of commercial bail—often long after the courts have resolved their charges.
- Post-arrest and pre-trial diversion programs. In many jurisdictions, prosecutors have the authority to give people accused of certain criminal violations the option of completing an alternative program of treatment or restitution, in lieu of incarceration. But the recent emphasis on diversion has obscured a troubling new pattern: the outsourcing of pretrial diversion programs to private companies that charge excessive participation fees and operate beyond public scrutiny.
- Electronic monitoring. Increasingly, people who have been arrested or are under other forms of supervision are being required to wear electronic monitoring devices—typically accompanied by onerous fees. Electronic monitoring may be ordered by a court, or imposed as a condition of a private company’s services. Providers frequently charge a one-time installation fee, typically \$50 to \$150; afterwards, defendants must pay for monitoring, typically assessed at a rate of around \$300-\$500 every month.
- Private probation. At least ten states (most in the South) allow counties and municipalities to contract with private companies to administer their probation systems for misdemeanor and lower offenses. Under these arrangements, the government extends exclusive contracts to supervision companies, which are then allowed to enforce probation requirements against probationers. In Georgia alone, probation companies received at least \$40 million in revenue from fees charged to probationers.
- Corrections contracting in telecommunications. The corrections telecommunications industry contracts with prison and jail systems (and immigration detention centers) to provide the exclusive means for prisoners to maintain contact with the outside world. The companies that provide

these phone services charge rates many times higher than the rates outside of correctional facilities. The high cost of calls particularly burdens the families of the incarcerated, creating systematic transfers of wealth from already struggling families and communities to private companies.

- Corrections contracting in financial services. In recent years, facilities have outsourced payment and money transfer systems to private companies that charge prisoners and their loved ones a range of high fees—including for financial services traditionally provided by the correctional facilities at no cost. For example, people newly released from correctional facilities may be given access to their funds only through a prepaid “debit release cards,” rather than as cash. The money on these cards is subject to steep usage and maintenance fees that eat into the balance.
- Other corrections contracting: healthcare and commissary. Prisoners are increasingly being asked to bear costs for healthcare and basic amenities sold through commissaries. The prices charged for these basic necessities are often inflated above retail, exacerbating the financial burden on incarcerated people.
- Reentry, rehabilitation, and treatment programs. The growing community corrections industry offers various “back-end” treatment and reentry programming, including residential halfway houses and work release centers. Over the past decade, the modern private prison industry has moved to take advantage of states’ newfound interest in rehabilitation and alternatives to incarceration by aggressively expanding into providing these services. They have profited from participation fees that sharply limit the availability of these services for economically distressed populations while also creating unaffordable debts for participants.
- Private debt collection. Many states and local governments contract with private debt collection agencies—which are often authorized to charge significant collection costs—to try to collect from those with criminal justice debt. Collection firms are often paid through fees added on top of the original balance, to be paid by the debtor.

Advocates can work to address these abuses by raising awareness, strengthening oversight, enforcing existing laws, and pushing for new reforms. They should work to strengthen public and private accountability for the unfair and unlawful practices that are now widespread in the modern corrections industry—with the goal of ultimately moving toward eliminating exploitative profiteering and other economic injustices from our criminal legal system.