

PYRRHIC DEFEAT THEORY:
THE LUCRATIVE FAILURE OF PRISON
PRIVATIZATION

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Abstract

This paper examines the present criminal justice system in the United States and specifically the privatization of the prison system by using Professor Jeffery Reiman's Pyrrhic Defeat Theory to decipher and dissect the privatization of the prison system. Further, this theory will be used to explain such severe social control measures for not only the purposes of profit maximization on behalf of private corporations building, managing, and writing prison policy, but to concretize the existing racial and class structure in the U.S. Using Pyrrhic defeat theory (success through failure), one could expound the intentions and consequences of American privatization of the prison system. Through examining these policies, a clear pattern emerges. Examination of this pattern demonstrates that the criminal justice system in general—and the process of privatization of prisons in particular—has revolved around a policy of failure for decades. Such failure, although may have been originally unintended, works out to maintain the sociopolitical status quo, ensuring a lasting economic and political structure in the form of prison industrial complex Keynesianism.

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Introduction

The strong inclination by many states and the federal government in privatization of prisons in the United States (U.S.) has persisted for a long time.¹ It has remained a strong movement since the Reagan administration to place the management of prisons and inmates—including services, laundry, communications, food required for inmates—under ownership and management of the private sector.² This is a neoliberal policy that has gone unquestioned and somewhat uncontested by Democratic and Republican politicians alike. It raises the questions of why privatization has been the one relentless alternative and who it really benefits and how. Further, why would many assess privatization of prisons as a positive move in our society or any society for that matter?

Foundations for privatization were set in the political economy and not merely designed by those within the criminal justice system.³ The argument, however, requires an explanation of what it would accomplish to privatize prisons and why the American criminal justice system would pursue and plan to do so.

Pyrrhic defeat theory—winning through losing or success through failure—is a concept developed by Jeffrey Reiman to demystify the maladies or failures of the American criminal justice system. Reiman's objective is to explain the reasons why the American criminal justice system has failed in reducing crime, the disproportionate imprisonment of minorities, and the high rates of incarcerations without serious results.⁴ Reiman argues that all institutions that make up the American criminal justice system—law enforcement, courts, and corrections—are designed to fail; and such failure perpetuates the ex-

¹ Shane Bauer, *The True History of America's Private Prison Industry*, TIME MAGAZINE (Sept. 25, 2018, 3:00 PM), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/>.

² JEFFREY H. REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* (11th ed. 2016).

³ Bauer, *supra* note 1.

⁴ REIMAN & LEIGHTON, *supra* note 2.

tant social stratification in both realms of political power and economic gain and maintains the present class hierarchy.⁵

According to sentencingproject.org, as of 2021, there are more than two million people in the nation's prisons and jails. This has been a 500 percent increase since the 1980s.⁶ This mass incarceration is mostly due to changes in sentencing laws and policies, not changes in crime rates.⁷ This means that the increase in inmate population is not due to increase in crime, rather it is due to change in the politics of the American criminal justice system. This explains the relentless increase in prison population that has resulted in prison overcrowding and financial difficulties for the states to accommodate a rapidly expanding penal system.⁸ This is despite multiple studies demonstrating that large-scale incarceration is not an effective means of achieving public safety, and its consequences.⁹

The destruction of lives and families is not merely limited during incarceration. It is well established that the detrimental effects of incarceration extend into many areas of social life.¹⁰ Incarceration limits future employment prospects and earnings,¹¹ blocks political participation,¹² and can lead to physical and mental health issues for former offenders.¹³ These far-reaching effects have led some to characterize incarceration as a criminal credential or absorbing status that

⁵ *Id.*

⁶ *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf> [hereinafter *Trends in U.S. Corrections*].

⁷ *Id.*

⁸ *Id.*

⁹ Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANN. REV. SOC. 387, 399 (2010).

¹⁰ *Id.*

¹¹ *Id.*

¹² JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 71 (2006).

¹³ Jason Schnittker et al., *Incarceration and the Health of the African American Community*, 8 DU BOIS REV. 133 (2011).

results in continuing disadvantage for former prisoners.¹⁴ As Reiman states: “[w]hen we find patterns, particularly patterns that serve some people’s interests, we are inclined to think of these patterns as intended by those whose interests are served, as somehow brought into being because they serve those interests.”¹⁵

There is no contention here, that the criminal justice system is intentionally designed to fail. It has, however, gradually morphed into lucrative failures. The result has been a criminal justice system which not only fails to deter and decrease crime on the national and state level but serves to perpetuate and keep intact the status quo class structure. The disproportionate arrest, indictment, sentencing, and imprisonment of the poor, Black, and Brown people in America only attests to such failure.¹⁶ On any given day, more than 722,000 people in local jails have not yet been to a trial for sentencing and are in jail because they are too poor to make bail and are being held before trial.¹⁷

I. Reiman's Pyrrhic Defeat Theory

The privatization of prisons, consistent with other fields of criminal justice, is more discernible using Reiman's pyrrhic defeat theory. Pyrrhic victory, as used in the field of political science, denotes a victory where the victor has won at the expense of great loss. It is failure through success. Pyrrhic defeat, however, is success through failure.¹⁸ So, the more the criminal justice system fails to deter and decrease crime and to create safety and security, the more the status quo, in terms of a class structure, remains the same. In addition, such failure

¹⁴ Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 ANNALS AM. ACAD. POL. SOC. SCI. 104 (2007).

¹⁵ REIMAN & LEIGHTON, *supra* note 2, at 14.

¹⁶ *Trends in U.S. Corrections*, *supra* note 6.

¹⁷ Adam Ewing, *In/visibility: Solitary Confinement, Race, and the Politics of Risk Management*, 119 TRANSITION 109 (2016); Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, PRISON POL’Y. INITIATIVE (Mar. 12, 2014), <https://www.prisonpolicy.org/reports/pie.html>.

¹⁸ REIMAN & LEIGHTON, *supra* note 2.

becomes a lucrative investment.

The criminal justice system is a failure, and it is a failure in three institutions: law enforcement, courts, and corrections. First, law enforcement; there is ample data showing law enforcement stopping and arresting minorities, and Black and Brown people. Further, data also shows the use of police brutality, police unethical conduct, police corruption, and more.¹⁹ For the past century, and even longer, no one can argue against the failure of police force in relation to Black and Brown people in America.²⁰ Many are personally familiar with the court system. According to Viano, very few criminal cases go to trial.²¹ About 97% of the criminal cases are resolved by “copping a plea”; that is, they do not get a jury of their peers to decide the case and therefore do not get to exercise their constitutional rights.²² This means that 97% percent of the time, the court system fails.

According to Sourcebook of Criminal Justice Statistics Online, in fiscal year 2010, the prevalent mode of conviction in U.S. District Courts of all crimes was by plea of guilty (96.8% of all cases).²³ The percentage ranges from a relative low of 68.2% for murder cases to a high of 100% for burglary and breaking and entering cases.²⁴ With the exception of sex abuse (87.5%), arson (86.7%), civil rights (83.6%) and murder (68.2%), for all other crimes the rate of convictions by

¹⁹ See THE STANFORD OPEN POLICING PROJECT, <https://openpolicing.stanford.edu/> (last visited Jan. 31, 2021).

²⁰ NAZGOL GHANDNOOSH, THE SENT’G PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 10-2 (2015); MICHAEL D. WHITE & HENRY F. FRADELLA, STOP AND FRISK: THE USE AND ABUSE OF A CONTROVERSIAL POLICING TACTIC 1-16 (2016).

²¹ Emilio C. Viano, *Plea Bargaining in the United States: A Perversion of Justice*, 83 REVUE INTERNATIONALE DE DROIT PÉNAL 109 (2012).

²² U.S. SENT’G COMMISSION, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS table 11 (2010) [hereinafter 2010 SOURCEBOOK]; see *Frontline: The Plea* (PBS television broadcast June 17, 2004) [hereinafter *The Plea*]; *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug.7, 2018), <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/>.

²³ 2010 SOURCEBOOK, *supra* note 22.

²⁴ *Id.*

plea of guilty is well over 90%.²⁵

In a plea bargain, the prosecutor normally offers a reduced prison sentence if the defendant agrees to forego his right to a jury trial and admit guilt in a summary proceeding before a judge.²⁶ According to a U.S. Supreme Court decision in early 1970s, the judge has the right to threaten the defendant with the maximum sentence if he/she chooses to take the case to trial.²⁷

The criminal justice system has been stopping, arresting, indicting, trying, sentencing, and incarcerating Black and Brown people with heavy racism for the past few decades, and especially since the Reagan administration. Black men are six times as likely to be incarcerated as white men; Latinx men are 2.5 times as likely. For Black men in their thirties, about one in every twelve is in prison or jail on any given day.²⁸ Of course, this does not discount the decades before the Civil Rights Movement.²⁹ What is important here is specific policy which ensured a perpetual entanglement of Black and Brown people in the U.S. with the criminal justice system.

Pyrrhic defeat theory explains how the criminal justice system's failures really contribute to a bigger socioeconomic class structure and how lucrative the criminal justice system has truly been to private corporations. A brief look at the socioeconomic class of current inmates in American prisons gives a clearer picture.

²⁵ *Id.*

²⁶ Viano, *supra* note 21.

²⁷ *The Plea*, *supra* note 22; see *Brady v. United States*, 397 U.S. 742, 750 (1970) ("For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction. Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant.").

²⁸ *Trends in U.S. Corrections*, *supra* note 6.

²⁹ Bauer, *supra* note 1.

II. Socioeconomic Classes

According to Brookings Institute in a 2018 report, prisoners fared poorly in the labor market before they were incarcerated.³⁰ The report states that,

[O]f the prisoners we studied, only 49 percent of prime-age men were employed two full calendar years prior to incarceration. Of those who were employed, their median earnings were only \$6,250. Only 13 percent earned more than \$15,000. Indeed, in any given year in the decade prior to their incarceration, only about half of prisoners had any reported earnings.³¹

A look at the existing inmate population in the U.S. who are in one way, or another, entangled with the criminal justice system, demonstrates that a large majority qualifies as poor. Compounding this is the issue of race. The entanglement of the two is by no means a coincidence.

African-American males make up 6.2% of the U.S. population but they make up more than 40% of the U.S. inmate population.³² This is a complete disproportion and it is not a coincidence. How does one make sure that the class structure remains the same? You criminalize the population who challenges it. When a population is criminalized, a vast pervasive social control system is legitimized; that is, keeping Black and Brown people incarcerated and repressed is legitimate. It is legitimate not only in the eyes of the criminal justice system, but this is how a wider culture perceives the issue. It becomes a hegemonic ideology. For the past 40 years, it has been mostly a neoliberal political economy that has pursued the agenda of incarceration of those who

³⁰ Adam Looney, *Up Front: 5 facts about prisoners and work, before and after incarceration*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/blog/up-front/2018/03/14/5-facts-about-prisoners-and-work-before-and-after-incarceration/>.

³¹ *Id.*

³² *13th* (Netflix Documentary Film 2016).

challenge the extant social structure.³³ A bedrock of Ronald Reagan's policies. Since early 1980s neoliberalism has paved the path to relentless privatization.³⁴ Ronald Reagan famously stated, that we used to look at the government as the solution, whereas "[i]n this present crisis, government is not the solution to our problems; government is the problem."³⁵ Neoliberalism is all about privatization and profit making; you can see it in the prison system, you can see it in the education system, you can see it in all kinds of areas and fields of the socio-economic system, and the political system.

III. Funding

There are currently an average of 50,000 SWAT attacks every year in America, which is 130 attacks a day.³⁶ According to the ACLU, 80% of SWAT attacks are to search homes—especially for drugs—and are done disproportionately against communities of color.³⁷ This is completely unnecessary, but it makes sense because the police have been so heavily militarized, and they have to justify the militarization of the police by such attacks. Defunding of the police does not mean that we should get less protection; it means that law enforcement should decrease its budget from militarization to community service; a reduction of paramilitary equipment in our neighborhoods.

According to the Cost of War Project, when the cost of Defense and State Department funds sunk into Operations Enduring Freedom and Resolute Support—in addition to the cost of caring for the conflicts' veterans and the interest on the money borrowed to cover

³³ See Ronald Reagan, 40th President of the United States, Inaugural Address (January 20, 1981).

³⁴ *Id.*

³⁵ *Id.*; MICHAEL REAGAN & JIM DENNEY, *THE NEW REAGAN REVOLUTION: HOW RONALD REAGAN'S PRINCIPLES CAN RESTORE AMERICA'S GREATNESS* (2012).

³⁶ *Cops or Soldiers? America's Police Have Become too militarised*, *ECONOMIST* (Mar. 20, 2014), <https://www.economist.com/united-states/2014/03/20/cops-or-soldiers>.

³⁷ See *War Comes Home*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/reforming-police/war-comes-home> (last visited Jan. 31, 2022).

it all—are added up, it equals over \$2 trillion.³⁸ Up to mid-2021, the U.S. spent close to \$300 million per day on the war in Afghanistan.³⁹ One can only imagine how well that could have been spent on housing, employment, and furthermore, on necessary reforms in the criminal justice system.

Racism is, at its very central core, dehumanizing. A criminal justice system which uses racism as a tool is depriving tens of millions of people of their fundamental human rights. This is not a problem of a few bad apples, it is rather, a systematic effort to endorse and reward such racist behavior. The central philosophy of the U.S. criminal justice system, unfortunately, has been, “increasing punishment will decrease crime.” While this philosophy has been practiced to its crux by the criminal justice system, the same has not been applied to officers, prosecutors, and judges who overtly break the laws; nor panned out to those who practice overt racism during their every-day routines including through police brutality and police fatal shootings.

Conclusion

In the United States, the institutionalization of profiting from the criminal justice system, and more specifically the prison system, has a distinct history. But it is not so much the profit making which makes it so conspicuously irrational, it is rather, the concretization of sociopolitical power. Through the failure of privatization, hence the failure to reduce and deter crime, the entire Black and Brown population is under race and class scrutiny and criminal/legal control. One in three black men, and one in six Latinx men stand the chance of being

³⁸ Meghann Myers, *Afghanistan war cost more than \$2T and 240,000 lives, report finds*, MILITARY TIMES (Apr. 16, 2021), <https://www.militarytimes.com/news/your-military/2021/04/16/afghanistan-war-cost-more-than-2t-and-240000-lives-report-finds/>.

³⁹ Christopher Helman & Hank Tucker, *The War in Afghanistan Cost America \$300 Million Per Day for 20 Years, With Big Bills Yet to Come*, FORBES (Aug. 16, 2021, 3:05 PM), <https://www.forbes.com/sites/hanktucker/2021/08/16/the-war-in-afghanistan-cost-america-300-million-per-day-for-20-years-with-big-bills-yet-to-come/?sh=62d3f5287f8d>.

incarcerated sometime during their lifetime. Under the guise of privatization of prisons, the prison population has seen a 500 percent increase since the 1980s, when Reagan reddeclared a war against drugs. According to the [sentencingproject.org](https://www.sentencingproject.org), “[b]ecause recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high rate or extremely dangerous offenders, are inefficient approach to preventing crime by incapacitation.”⁴⁰

Since the Reagan administration, we have witnessed an unremitting reverse Keynesianism toward the private sector at the cost of ruining millions of lives with no certainty in the future of our youth. The view that by promoting effective demand and supporting private prison profits, and that such senseless policy could help place a floor under the American criminal justice system specifically revolves around a general failure. A failure to bring social protection to deserving neighborhoods, and a failure to deter and decrease crime in cities in America. The more the criminal justice system fails in its fundamental mission, the more the socioeconomic and political structure remains the same and the more it is justified as the sole solution.

⁴⁰ Criminal Justice Facts, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/#:~:text=The%20National%20Research%20Council%20study,to%20preventing%20crime%20by%20incapacitation.%E2%80%9D> (last visited Dec. 1, 2021).