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DEMOCRACY AND THE INTERSECTION OF PRISONS, RACISM AND CAPITAL

Review Essay: "Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice. By David Oshinsky.* New York: The Free Press, 1996. Pp. 306. \$25.00.

by David Cohen**

I. INTRODUCTION

As we approach the end of the millennium, this country is facing a crisis of incarceration. With the prison population growing dramatically, 123 new state and federal prisons were scheduled to open in 1996.¹ In 1994 and 1995, the demand for new prison beds averaged about 1400 per week.² At an average cost of \$54,000 per cell,³ the construction costs for this increase are close to \$2.75 billion a year.⁴ Corporate mammoths from many different industries are realizing the potential of prisons and pouring their assets into gaining a share of this rapidly expanding \$31 billion dollar per year industry.⁵ "From architectural firms and construction companies, to drug treatment and food service contractors, to prison industries, to the whole gamut of equipment and hardware suppliers—steel doors, razor wire, communications systems, uniforms,"⁶ everyone from AT&T and MCI⁷ to Westinghouse Electric Corp. and Merrill Lynch & Co.⁸ is getting into the act.

Of course, as the prison industry expands, jobs are created. Prison guard numbers are increasing, and as they become one of the largest and most feared labor unions in the country, they are having a drastic impact on criminal justice policy.⁹ In all, "[m]ore than 523,000 full-time employees

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1. David Lamb, *The Soft Cell: Small Towns Lock Up Construction Dollars; Rural America Has Found the Perfect Way to Escape From the Economic Doldrums—Capture Prison Contracts*, TAMPA TRIBUNE, Oct. 10, 1996, at 8.

2. DARRELL K. GILLIARD & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES, 1995: BUREAU OF JUSTICE STATISTICS BULLETIN 4 (1996).

3. THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 49 (Stephen R. Donziger ed., 1996).

4. This estimate uses an average of 1.5 beds per cell.

5. Sam Vincent Meddis & Deborah Sharp, *Prison Business is a Blockbuster: As Spending Soars, So Do the Profits*, USA TODAY, Dec. 13, 1994, at A10.

6. Phil Smith, *Private Prisons: Profits on Crime*, COVERT ACTION QUARTERLY, Fall 1993.

7. *All Things Considered* (NPR radio broadcast, Aug. 3, 1994).

8. See Paulette Thomas, *Making Crime Pay: Triangle of Interests Creates Infrastructure to Fight Lawlessness*, WALL ST. J., May 12, 1994, at A1.

9. THE REAL WAR ON CRIME, *supra* note 5, at 96-97.

worked in corrections in 1992—more than all the people employed by any Fortune 500 company except General Motors.”¹⁰ The industry as a whole shows no signs of decline: with the passage of the Crime Control Act of 1994, the federal government has committed itself to spend over \$10 billion in the next five years on prison construction alone.¹¹ One study has projected that the overall cost of the Crime Control Act in terms of paying for the “influx of inmates attributable to the provisions” of the bill will be \$351 billion over the next ten years.¹²

The rhetorical driving force behind this increase in incarceration is the “war on crime,” and in this so-called war, the enemy is the faceless, nameless, identity-less African-American¹³ man doing violence to white society. From Willie Horton to the “Central Park Mugger,” we are told again and again that black is the color of crime. Taken at superficial value, statistics bear this out: African Americans account for more than half of this country’s incarcerated population as nearly 7% of the African-American male population is in jail.¹⁴ But, scratching beneath the surface of these numbers shows the true story of criminal justice policies. African Americans account for 13% of monthly drug users but 55% of all drug convictions and 74% of all drug-related prison sentencing.¹⁵ Racist use of prosecutorial discretion and police targeting is the norm.¹⁶ Instead of being erased, crime in this country has been raced, putting a seemingly factual predicate behind modern-day racism. Driving this racialization of crime is not only the state and its oppressive apparatus of police, prosecutors, and courts, but also the interests of capital in increasing profit through the ever-expanding prison-industrial complex.

This “war on crime” is being waged in the name of domestic security and effective democracy. The victims of this war are casually portrayed as innocent families and children losing their security because of random acts of violence carried out by criminals whom the state pampers. Only by making these victims more secure in their daily lives can democracy truly be realized. Crime is certainly a serious problem, especially for inner-city and impoverished neighborhoods. However, the true victim of the war on crime is democracy itself, as the profit-seeking prison-industrial complex force feeds the notion that imprisonment for long periods of time is the only method of dealing with the problem. Democracy is threatened further when the processes by which these enforcers deliver the ultimate sanction in this “war,” incarceration, are hidden from the scrutinizing eye of the

10. *Id.* at 93.

11. 42 U.S.C. § 13708(a)(1) (1996).

12. Ilene M. Shinbein, Note, “*Three-Strikes and You’re Out*”: A Good Political Slogan to Reduce Crime, But a Failure in Its Application, 22 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 175, 199 (1996) (citing a study by the National Council On Crime and Delinquency).

13. In this Essay, I will use the words “African-American” or “African American” in my sections that include original analysis. In the sections of the Essay in which I recapitulate the arguments of Oshinsky’s book, I will use the word “black,” as that is the word he uses.

14. U.S. DEP’T OF JUSTICE, PRESS RELEASE: STATE AND FEDERAL PRISONS REPORT RECORD GROWTH DURING LAST 12 MONTHS 7 (1995).

15. MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 12 (1995).

16. See Keith W. Watters, *Law Without Justice*, *NATIONAL BAR ASSOCIATION MAG.*, Mar./Apr. 1996, at 1 (1996).

public. The profit-driven prison industry is left to direct public policy at will, increasing the number of people from whom it profits without any check by the public.

Important to an accurate and helpful understanding of this current system and its effects on democracy is the backdrop against which these actions take place. Only a historical study of criminal justice and its intersection with capital and racism can shed light on this modern threat to democracy. Rutgers University History Professor David Oshinsky's recent book entitled "*Worse Than Slavery*": *Parchman Farm and the Ordeal of Jim Crow Justice*¹⁷ provides this backdrop.

Oshinsky's book shows us that the intersection of penology, race, and capital insulated from the public eye is a threat to democracy. The problem of this intersection, however, is not merely part of Oshinsky's detailed account of the past; it is happening now and is the quintessential reason for an increased form of democratic oversight of the state's power to incarcerate. Without popular vigilance when it comes to this intersection, the social policy of the country as it relates to imprisonment is left to those with capital to reinforce the racism of the greater society. A monster is created that grows without any true reference to crime or safety. Clearly, in times such as these, we have a great deal to learn from this important book.

In this essay, I review Oshinsky's book as both a backdrop for the current prison-industrial state's unprecedented growth and as a spring board for an analysis of these grave issues facing the nationwide criminal justice and penal system today. In Part II, I recount Oshinsky's depiction of the convict leasing system in the Jim Crow South. I then show that this institution's intersection of race, the criminal justice system, and capital provides insight into the explosion of the modern day prison industry and its effects in furthering racial supremacy. In Part III, I explore Oshinsky's history of Mississippi's handling of prisoners while paying close attention to the processes that brought about the reforms that have occurred. This history provides a jumping-off point for an examination of the current law as it pertains to access to prisons by the public. This necessary right of access is the only guarantor of democratic oversight in this particularly grave time of profit-driven expansion of prisons and the increasing incarceration of African Americans. Ultimately, "*Worse Than Slavery*" points us, in a way that only history can, to the necessity of vigilant democratic oversight of the state and its connection to capital and racism in the modern prison-industrial complex.

II. ONE HUNDRED YEARS LATER AND LITTLE CHANGE: NINETEENTH CENTURY CONVICT LEASING AND TWENTIETH CENTURY PRISONS

The first of two sections of "*Worse Than Slavery*" is entitled "After Slavery, Before Parchman." In this first section, Oshinsky's portrayal of the system of convict leasing exposes the immense dangers to which our criminal justice system is susceptible when the twin powers of capitalism

17. DAVID M. OSHINSKY, "*WORSE THAN SLAVERY*": *PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996). All cites to the book in this Essay will appear in parentheses.

and racism collide and thrive off one another. The history provides a warning about the paths upon which the system is travelling today.

A. *Nineteenth Century Convict Leasing*

Convict leasing is a simple idea. In its original form, it entailed a farm owner receiving convicts from the state to work on his farm. The owner would also receive money from the state for the necessary upkeep of the convicts. Profits derived from the labor of the inmates were kept by the owner as well. (p.35) As it developed, convict leasing took on a new method of operation, one that became a money-maker for the state as well as the owner. Instead of the state paying the owner to take the inmates, the owner would “buy” the inmates from the state in return for their labor. Two of the three parties in this transaction were thus very happy: the state profited from the money it received for the inmates and the owner profited from the labor provided by these inmates. (p.43) Oshinsky traces the development of Mississippi’s convict leasing in detail and then jumps from this treatment to survey convict leasing in other states. The common denominator in each state was racial supremacy.

1. *Mississippi*

Antebellum Mississippi was a lawless state. Before 1835, criminal laws weren’t enforced because they were uniformly too severe. Recognizing the need for some kind of order, the Mississippi legislature adopted a new code of criminal law in 1835. These laws, however, applied only to whites, as blacks, seen only as property, were subject to discipline only by their masters; the state had nothing to do with them. Consequently, Walls, the first state prison in Mississippi, had a completely white population. (pp.5-7) The Civil War changed this focus of the criminal justice system since the whites sought a way to control the newly freed slaves and found the criminal law as the perfect method for that control.

With Emancipation, the freedmen began searching for their new identity. White society, though, barely allowed them to. Whites continued to believe all of the assumptions upon which slavery was built: “In white eyes, the Negro viewed his freedom in typically primitive terms—as a license to roam the countryside in search of pleasure and trouble.” (p.18) Combined with this racial stereotyping by whites was a deep need to replace the labor force that was lost through emancipation. (p.16) This combination produced a post-war Mississippi that, to a black person, seemed little different than the regime of slavery that had just ended.

Not to lose the important source of labor and oppression necessary to the economy, the state reacted to emancipation by passing the Black Codes of 1865. “Their aim was to control the labor supply, to protect the freedman from his own ‘vices,’ and to ensure the superior position of whites in southern life.” (p.20) Particularly harsh penalties were levied for vagrancy, defined as having “no lawful employment.” (p.21) The catch to these crimes was that the penalties were fines, which, of course, the poor freedmen could not pay. Slavery in the remolded name of “convict leasing” thus began:

If the vagrant did not have fifty dollars to pay his fine—a safe bet—he could be hired out to any white man willing to pay it for him. Naturally, a preference would be given to the vagrant's old master, who was allowed "to deduct and retain the amount so paid from the wages of such freedman." (p.21)

A new method of profiting from exploitation and white supremacy was born by utilizing the means of the criminal justice system to perform the same function as slavery.

Convict leasing as a formal enterprise in Mississippi did not begin until a few years after Emancipation. From the increased numbers of people now subject to the criminal law, the prison system, with its physical structures decimated by the Northern troops during the War, was overflowing. In 1868, Edmund Richardson began the era of convict leasing in Mississippi with his contract to take the convicts out of the overcrowded prisons and work convicts on his land in return for a promise to take care of the convicts. Along with the substantial fee the state paid him for the upkeep of the convicts, Richardson was able to keep all the profits he received from the free labor. (p.35) The beginning of formal convict leasing signaled a return to the slavery that the freedmen had known their entire lives; this time, however, white supremacy masqueraded as justice and order.

The institution of convict leasing didn't take root in the state though until after the end of radical Reconstruction. In 1875, Mississippi suffered through a violent upheaval removing blacks who had achieved political office and paving the way for further racial oppression. As the federal troops left the state to its own devices, the departing governor remarked, "Yes, a *revolution* has taken place—by force of arms—and a race are disenfranchised. They are to be returned to a condition of serfdom—an era of second slavery." (p.40) The Mississippi legislature responded by passing "a major crime bill aimed directly at the Negro." (p.40) This bill, known as the Pig Law and applied only to blacks, made the theft of any farm animal or property worth more than ten dollars punishable by up to five years in prison. Complementing the Pig Law was the Leasing Act which allowed for the leasing of the state's convict labor. Blacks were the target of these laws; the few whites who were punished by the criminal laws were kept locked up because they were seen as too dangerous to lease. (p.41)

The white land owners thus had a solution to the dearth of labor created after the Civil War. Convicts were leased to businessmen who would then turn around and sublease the convicts to those who needed the labor. Profits were enormous for everyone involved: the state would profit simply from the prices paid for the convicts by the businessmen, the businessmen would profit by charging more for the sublease than they paid for the lease, and the sublessors would profit from the cheap labor they now had to work jobs that free laborers would never do. (pp.43-44) The loser in this scheme, of course, was the convict. "There was no one to protect him from savage beatings, endless workdays, and murderous neglect." (p.44) In fact, the conditions for these laborers, which Oshinsky describes in frightening detail, resulted in "[n]ot a single leased convict ever liv[ing] long enough to serve a sentence of ten years or more." (p.46)

Convict leasing continued on the books in Mississippi until 1890. Facing pressure from humanitarians disgusted by the conditions under which

the convicts labored and poor whites angry with the easy profits the upper class received from the system,¹⁸ the constitutional convention of 1890 formally ended the practice of convict leasing with a provision stating: "No penitentiary shall ever be leased or hired to any person or corporation . . . after December the thirty-first, 1894." (p.52) However, formal abolition did not completely eliminate the practice entirely as blacks continued to be leased out for their labor until the opening of Parchman Farm in 1904. (pp.52-53)

2. *Other Southern States*

Leasing certainly was not a phenomenon limited only to Mississippi after the Civil War. Leasing also appeared in other Southern states as an easy method of replacing the lost labor of slavery and strengthening the threatened institution of white supremacy.

The abusive system surfaced in slightly different forms in each state.¹⁹ Leasing ranged from the informal, such as in Arkansas where leasing involved little record-keeping and convicts working in various industries, (pp.67-68) to the formal, such as in Georgia where the highly political bidding system enabled state legislator Colonel James Monroe Smith to construct and operate a virtual plantation named Smithonia completely using convicts. (pp.63-67) Racial supremacy played an important role in justifying this brutal practice as whites saw blacks as needing tough punishment through hard labor in order to drive home the consequences of transgressing the boundaries that still existed even with their new found liberty. (pp.82-83) Throughout the states that used convict leasing, "the larger themes of racial caste and cheap, steady labor were everywhere the same." (pp.63)

Most striking within Oshinsky's account of this system is the influence that the rich lessors had on the criminal justice system. As detailed above, the Mississippi legislature enacted its post-Reconstruction Pig Laws with the intent to fill the void in the labor force left after Emancipation. In Georgia, the powerful Colonel Jim Smith would joke with county officials, "You had better send me some more niggers, . . . or I will come down and take the courthouse away from you." (p.67) In Arkansas, the Governor acknowledged that "the local courts had become a conveyor belt for labor-starved employers throughout the state." (p.69) Florida employers "worked hand-in-glove with local officials to keep their camps well stocked with able-bodied blacks," even going so far as to draw up a list of specific "negroes known . . . as good husky fellows, capable of a fair day's work" for the sheriff to round up. (p.71) Local Tallahassee officials, reacting to the abolition of convict leasing on the state level in 1919, operated in such close connection to the turpentine industry that when the industry lost its contract to lease state prisoners, the county experienced a not-so-coincidental "crime wave" that conveniently filled the vacancies the industry needed. (pp.73-74) Finally, in Alabama:

18. See *infra* pp. Part III.A.1.

19. Oshinsky describes the leasing systems of eight different states: Alabama (pp. 76-81); Arkansas (67-70); Florida (70-76); Georgia (pp. 63-67); North Carolina (p. 58); South Carolina (60, 63); Tennessee (pp. 81-82); and Texas (pp. 60-62).

Their numbers ebbed and flowed according to the labor needs of the coal companies and the revenue needs of the counties and the state. When times were tight, local police would sweep the streets for vagrants, drunks, and thieves. Hundreds of blacks would be arrested, put on trial, found guilty, sentenced to sixty or ninety days plus court costs, and then delivered to a "hard labor agent," who leased them to the mines. (p.77)

As Oshinsky shows, it is easy and correct to point to the search for labor and the racial oppression of the times as an explanation for the practice of convict leasing. It is not so easy to explain away today's prison explosion, an explosion that has definite parallels to the developments that Oshinsky describes.

B. *Twentieth Century Prison Industry*

The facts surrounding the current expansion in prisons and prison populations are astounding. Many of the numbers detailing this expansion are presented in the introduction to this essay; here, a more in-depth argument based on these numbers and Oshinsky's history will be made. To start with, the prison construction industry has grown in phenomenal leaps recently as, in 1996 alone, 123 state and federal prisons are scheduled to open their doors.²⁰ Prospects for prison construction are so good that a generic construction trade magazine hailed a promising outlook for the prison construction business, especially after the passage of the Crime Control Act of 1994 which earmarked over \$10 billion for prison construction between 1996 and 2000.²¹ As a result, profits are soaring for the businesses involved: Wackenhut and Corrections Corporation of America, the two largest prison construction industries in the country, are reporting tremendous gains.²² Also, private prison operators are profiting from the business boom as the country experiments with privately-run prisons.²³

The prison industry does not consist of construction alone. Health care and food service are rapidly-growing sectors of this huge industry.²⁴ Corporate mammoths such as AT&T and MCI have entered the arena to get a part of the lucrative phone contracts that the prisons need.²⁵ Fire services, consulting, advertising, and employee training are also among the many businesses profiting from the increase in prisons.²⁶ Total yearly estimates for the entire industry are in the \$31 billion dollar range.²⁷

The reason for this skyrocketing prison industry seems simple enough: the huge increase in the number of people incarcerated. Nearly 1.6 million

20. Lamb, *The Soft Cell*, *supra* note 3.

21. Michael A. O'Brien & Thomas R. Loy, *On the Upswing*, *DOORS & HARDWARE*, Mar. 1, 1995, at 52. The magazine states the crime bill calls for \$7.9 billion in construction for prisons, but that number is actually over \$10 billion. 42 U.S.C. § 13708(a)(1) (1996).

22. Bloomberg Business News, *Wackenhut Plans to Turn More Prisons Into Profit*, *SUN-SENTINEL*, Mar. 18, 1996, at A15.

23. Right now, just 2.5 percent of the country's prison population resides in privately run prisons, but as the idea catches on, which it seems it is doing, that number will increase. Elizabeth Payne, *Prisons for Profit: Canadians Should Hesitate to Follow U.S. Lead*, *MONT. GAZETTE*, July 22, 1996, at B3.

24. J. Robert Lilly & Richard A. Ball, *Selling Justice: Will Electronic Monitoring Last?*, 20 N. KY. L. REV. 505, 509 (1993).

25. *All Things Considered*, *supra* note 9.

26. Meddis & Sharp, *Prison Business is a Blockbuster*, *supra* note 7.

27. *Id.*

people in this country are incarcerated, triple the population that was incarcerated in 1980.²⁸ Of course, this is all excellent news for the prison industry as the increase in prisoners in 1995 alone created a demand for 1224 additional beds per week; in 1994, the demand was for over 1625 additional beds per week.²⁹ These numbers speak only partly to the huge increase in the criminal justice system as a whole; the total number of people under the supervision of the criminal justice system (including parole, probation, and other forms of supervision) is now over 5 million.³⁰

Stiffer criminal laws resulting from anti-crime hysteria provide the easy explanation for the increased number of people under the control of the criminal justice system. "Three strikes" laws, requiring life imprisonment for a third-time offender, have been enacted in several states³¹ and at the federal level as well.³² Mandatory minimum sentences, as provided for by many states³³ and in the Federal Sentencing Guidelines,³⁴ are also part of the reason for the increase because judges no longer have the discretion they traditionally had to impose lesser sentences. Furthermore, some jurisdictions have abolished parole for certain offenses,³⁵ thus keeping prisoners in jail longer for crimes for which they previously would have been released earlier. Finally, federal *habeas corpus* reform³⁶ will certainly limit the number of successful prisoner appeals of their state sentences. All of these changes that have occurred in the past 10 years have helped fuel the increase in the number of people incarcerated in this country. In fact, the National Council of Crime and Delinquency has projected that the prison population could rise to 7.5 million with the implementation of these new "tough on crime" measures.³⁷

Hardest hit by these anti-crime measures have been African Americans. In 1994, the number of African-American inmates surpassed the number of whites in state or federal prisons and local jails for the first time. Nearly seven percent of all African-American male adults nationwide were

28. GILLIARD & BECK, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES, 1995, *supra* note 4, at 2.

29. *Id.* at 4.

30. Justice Department figures show the exact number to be more than 5.3 million for 1995, or 2.8 percent of the adult population. U.S. DEP'T OF JUSTICE, PRESS RELEASE: PROBATION AND PAROLE POPULATION REACHES ALMOST 3.8 MILLION (1996).

31. Worst among these is the California three-strikes law which doesn't even require the third offense to be a violent offense. CAL. PENAL CODE § 667 (West 1988 & Supp. 1995); *see also* ALA. CODE § 13A-5-9 (1995); ARIZ. REV. STAT. ANN. § 13-604(A)-(C) (1995); COLO. REV. STAT. § 16-13-101 (West 1990); ILL. ANN. STAT. ch. 730, ¶ 5/5-5-3 (Smith-Hurd 1992 & Supp. 1995); IOWA CODE ANN. § 902.8 (West 1994); N.Y. PENAL LAW §§ 70.04-10 (McKinney 1987 & Supp. 1995); OHIO REV. CODE ANN. § 2929.11(B) (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 51 (West 1983 & Supp. 1995); WYO. STAT. § 6-10-201 (1995).

32. 18 U.S.C. 3559(c) (1994).

33. *See* Karen Tutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 389 (1996).

34. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES (1995); *see* Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Value, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851 (1995).

35. *See generally* Robert P. Crouch, Jr., *Uncertain Guideposts on the Road to Criminal Justice Reform: Parole Abolition and Truth-in-Sentencing*, 2 VA. J. SOC. POL'Y & L. 419 (1995).

36. Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. 104-132, § 106(b), 110 Stat. 1214, 1220-21 (1996) (modifying 28 U.S.C. § 2244(b)).

37. REAL WAR ON CRIME, *supra* note 5, at 36.

in jail in 1994 as opposed to less than one percent of white male adults.³⁸ An October 1995 study by the Sentencing Project found that one in three African-American men in their twenties is under the supervision of the criminal justice system on any given day—in prison, on probation, or on parole. The same figure was one in four only five years ago.³⁹ Keith Waters, the President of the National Bar Association, states that “African American communities have been ‘red-lined’ for mass arrest and incarceration while white communities have been largely ignored. . . . Simply stated, African Americans are targeted, selectively prosecuted, and imprisoned in a vastly disproportionate ratio to whites.”⁴⁰

What explains this dramatic increase in the prison population accompanied by the disproportionate representation of African Americans in the system? The easy answer given by politicians is that the increase in crime has caused the correlative increase in prisons and prisoners. This answer is patently false. As criminologist Nils Christie has explained, crime rates have actually gone down in the same time period in which the number of prisons and prisoners have gone up.⁴¹ There is now an unlimited supply of crime because legislatures, acting within a culture marked by racism and class divisions, are criminalizing acts previously not seen as punishable by the law and catching more and more of the disempowered in their criminal web.⁴²

To answer what is driving this increased criminalization, we must look at the connection Oshinsky provides in “*Worse Than Slavery*.” As detailed above, Oshinsky’s description of the convict leasing system in the post-Civil War South showed a labor economy that used its vast influence to alter the criminal justice system in a way that turned prisoners into profit. The resulting system reproduced the conditions and oppression of slavery by using the freed blacks to fill the missing labor after Emancipation. The current situation sketched above finds an obvious, although not completely identical, parallel here. The burgeoning prison industry is the new profit maker for industries searching for recession-proof profits in an uncertain economy. Huge prison industries are now the ones that exert pressure on the criminal justice system to supply them with a steady flow of prisoners to fill their beds. Within this racist society, the prison industry incarcerates

38. U.S. DEP’T OF JUSTICE, PRESS RELEASE, *supra* note 32, at 4, 7; *Nearly 7% of Adult Black Men Were Inmates in ‘94*, N.Y. TIMES, Dec. 4, 1995, at A15.

39. MAUER & HULING, *supra* note 17, at 4 (1995); accord Fox Butterfield, *Study Examines Race and Justice in California*, N.Y. TIMES, Feb. 13, 1996, at A12 (discussing a new study showing the corresponding California figure to be 40%). The statistics point to the fact that this difference is not because African Americans commit more crime. A graph in the report shows that African Americans make up 12% of the general population, 13% of the monthly drug users, 35% of the drug arrests, 55% of the drug convictions, and 74% of the drug related prison sentences. MAUER & HULING, *supra* note 17, at 12.

40. Waters, *Law Without Justice*, *supra* note 18, at 23. Statistics show the following: (ii) 52% of crack users are white. (iii) 75% of cocaine powder users are white. (iv) Powder cocaine related convictions in 1993 were comprised of 32% white, 27% black, 39.3% Hispanic. (v) The average sentence for drug offenders is 6.5 years as compared to 5 years for racketeering and extortion convictions. (vi) Whites are more likely to be placed on probation than African Americans. (vii) Since 1988, the U.S. Attorney General has approved death penalty prosecutions against 12 whites, 7 Hispanics, 2 Asians, and 40 African Americans. *Id.* at 23.

41. NILS CHRISTIE, CRIME CONTROL AS INDUSTRY 92-94 (2d ed. 1994).

42. *Id.* at 23-24.

more and more African Americans, reproducing centuries old forms of racial supremacy and oppression. Thus, in the late 1800s, imprisoned blacks were the source of profitable labor for large land owners; now, in the late 1900s, imprisoned African Americans are the commodity necessary for the profits of the large prison industry.⁴³

This explanation answers the questions left by Christie's analysis of the crime situation: more people are in jail because the prison industry needs them in jail to make a profit. Simple contractual relations provide industry with its desired commodity. For instance, Florida has contracted with a prison management company that it will guarantee that the prison run by that company will never be at less than ninety percent capacity.⁴⁴ Lobbying provides the obvious other alternative here. The National Law Journal reports that legislators' tough on crime attitudes are augmented by "lobbyists now representing companies with fat prison contracts."⁴⁵ Exemplifying this point, a prison industry representative at an industry convention told a reporter that "if you come up with [a tough on crime] policy, well naturally, it's going to translate into more sales."⁴⁶ Not only does the industry lobby for tougher criminal laws, but the employees of the industry do as well. In California, the correctional officers union spent "lavishly" lobbying on behalf of the "three-strikes" law.⁴⁷

In Illinois, . . . the union of prison guards pushed through legislation to ban the privatization of prisons and to stiffen sanctions against inmates found carrying weapons. The Michigan Corrections Organization has opposed proposals to lower the rate of incarceration by making prisoners eligible for boot camps. "*It's becoming a dollar-driven corrections policy in the state,*" says Mel Grieshaber, the legislative coordinator for the union.⁴⁸

While lobbying efforts at the turn of this century are not as invidious as the blatant cooperation between business and the criminal justice system "*Worse Than Slavery*" portrayed at the turn of the eighteenth century, Oshinsky's history gives us reason to fear that this trend is once again taking place in this country.

One missing connection between Oshinsky's past and the modern system is the change that produced this explosion in incarceration. In Oshinsky's account of convict leasing, the end of slavery brought about by the Civil War was the change that produced the dearth of labor for the land owners. Thus, convict leasing filled the void. Now, the parallel is less obvious and the answer is not definite, but Oshinsky's book points us in a plau-

43. The difference is that in the late 1800s, the land owners were actively pursuing racist policies. Now, the prison industries care only about the bottom line, a bottom line that looks equally strong regardless of the color of the skin of the people imprisoned. However, this difference is one of intent, not of effect. The imprisonment of large numbers of African Americans because of racism exogenous to the prison-industrial complex creates the same effect of enshrining racial supremacy as did the racist labor exploitation of the late 1800s. There is, without a doubt, racism within the confines of the prison-industrial complex as well; however, identifying the racist actors without a Texaco-style revelation is nearly impossible. Yet, I would argue, finding this intent is irrelevant when, as stated above, the effect is the same.

44. Thomas, *Making Crime Pay*, *supra* note 10.

45. Marcia Chambers, *Sua Sponte*, NAT. L.J., Oct. 25, 1993, at 17.

46. *All Things Considered*, *supra* note 9.

47. THE REAL WAR ON CRIME, *supra* note 5, at 97.

48. *Id.* at 96 (internal citations omitted) (emphasis added).

sible direction. Some of the companies that currently need their prison beds filled and their prison technology consumed in order to justify their industry are part of the same network of capital that benefitted from the Cold War military build-up. Now that the Cold War is over, these industries need to convert to a different form of revenue and a different invisible enemy to make their profit.⁴⁹ The Cold War military-industrial complex has now become the post-Cold War prison-industrial complex.⁵⁰ This time, however, it is the African-American criminal that is industry's coveted commodity.

Of course, the final element of this system is racism and racial supremacy. Racism continues to plague this country, and it is racism as an institution and its connection to capital and profits that ultimately explains this placing of the burden of the prison industry on African Americans. The victims of this system are many. The actual communities of those suffering at the hands of the criminal justice system are greatly affected.⁵¹ Less specific though is the entire African-American community in this country that has had to endure the racism that accompanies this criminalization of its youth. Furthermore, the entire democratic process is compromised as state resources are committed to punishing and incarcerating its citizens at the request of the collective corporate will. The effect of this twentieth century prison explosion is thus the same as the effect Oshinsky described regarding convict leasing at the turn of the nineteenth century: law and capital combining to entrench racial stereotypes and white supremacy.

III. PAY NO ATTENTION TO THE PRISON BEHIND THE FACADE: PRISON REFORM AND PUBLIC ACCESS TO PRISONS

"*Worse Than Slavery*" is not solely about the evils that the prison system levied against blacks in the Jim Crow South. Oshinsky's account of the criminal justice system includes ample insight into the processes of reform that brought about positive changes in systems of imprisonment. This pattern that emerges highlights the importance of public knowledge about the conditions that convicts face.

A. *Historical Patterns of Prison Reform*

1. *Convict Leasing*

Convict leasing in both Mississippi and the rest of the South did not last forever. In Mississippi, the brutality of the system slowly became apparent to the citizens of the state. Oshinsky attests that the turning point in Mississippi was the Vicksburg Incident:

49. Thomas, *Making Crime Pay*, *supra* note 10 ("Though it is produced by some of the same companies that built up the military arsenal 30 years ago, this high-tech weaponry is designed to combat crime in the U.S.").

50. *Id.*

51. MAUER & HULING, *supra* note 17, at 17. Identifiable negative effects include the loss of male role-models, the reduction of marriage partners, the deepening of poverty, and the martyring of criminals. *Id.* Another obvious and direct effect on democracy is that the communities lose a large part of their electoral power with so many convicted felons not being able to vote.

In the winter of 1884, a squad of battered convicts arrived in Vicksburg by steamer from a nearby Delta farm. The men were chained together, frostbitten, and barely alive. Their filthy, half-naked bodies were covered with blisters and scars. "They presented such a shocking spectacle," wrote one official, "that the city authorities of Vicksburg refused to permit them to march through the streets, and had them conveyed in covered wagons to the railway stop." Their final destination was the prison hospital in Jackson, forty miles to the east, where worn-out convicts were routinely sent to die. (p.48)

Thus began the battle against convict leasing in Mississippi as the public got its first visual taste of the realities of the system.

Opposition to the practice of convict leasing began on humanitarian grounds. The press became involved in the public outrage that ensued. Editors of major newspapers even went so far as dueling an important businessman whose honor had been threatened by reports they had published about brutality under his convict leasing regime. (pp.49-50) Courts also "took a peek of their own. What they found, in the words of one observer, was a system of 'fiendish cruelty,' which 'could only [flourish] in an ex-slave state where ex-slaves made up the majority of convicts.'" (p.49) The public's outrage reached a peak in 1887 when reports were released that "15 percent of Mississippi's convicts had died [that year] (as opposed to less than 1 percent in states like Ohio and Illinois, which kept their prisoners in penitentiaries, under careful state control)." (p.50)

Of course, humanitarian outrage about the system was not the only reason that Mississippi moved away from convict leasing. Two other factors played a major role as well. First, amid reports of high escape rates of leased convicts, whites in Mississippi feared the roaming black criminal, an icon of post-Emancipation white racism. (pp.50-51) But even this fear focused people's attention to humanitarian concerns as "the publicity surrounding these escapes served to focus attention on the system's brutality in an unintended way. Time and again, these fugitives were described in newspaper reports as emaciated, frostbitten, and badly scarred by the lash." (p.51) Second, poor whites and small farmers in the state began to feel class-based anger as they were "squeezed and cheated" by a system that allowed the rich landowners to profit easily without having to employ white labor. (p.52) Ultimately, "[t]his combination of class anger and moral outrage carried the day," and the Mississippi constitutional convention of 1890 formally ended the practice of convict leasing. (p.52)

Reform in other states followed this same general pattern. In Arkansas, for example, it took the Governor publicizing the abuses of the convict leasing system there for people to become outraged enough to abolish the system. "[F]ollowing months of protest by reformers, church groups, newspapers, and 'hundreds' of letter-writing folk[.]" the state legislature abolished convict leasing in 1913. (p.69) Florida took the same route, although through a slower process. The state legislature had outlawed leasing of state convicts in 1919, but the practice continued to thrive through the leasing out of county convicts. (pp.73-74) This practice continued until a white convict named Martin Tabert, who had been sentenced to 90 days of labor for vagrancy, died from being "overworked, underfed, beaten senseless, and left to die. Before long, Tabert's killing became front-page news across

the country. His story riveted national attention upon a system that had been slaughtering Southern blacks for decades with scandalous ease.” (pp.74-75) Responding to the humanitarian concerns of the newly-informed public, the state legislature voted to abolish the practice of leasing country prisoners in 1923. (p.75)⁵²

2. *Parchman Farm*

After discussing the history of convict leasing and the reform movements that ended it, Oshinsky turns to the history of Parchman Farm. The evolutionary process was a slow one, but as with the reform that brought about the end of convict leasing, Parchman’s change from a farm with slaves to a modern penal institution occurred only after the public became informed of its conditions and demanded change.

Parchman Farm opened in 1904 as a state penal institution in the Delta part of Mississippi, a part of the state thriving from cotton farming. (p.109) The Delta was a violent area of the state, where the cheapness of human life was often recalled by those who damned the rivers, drained the swamplands, and chopped down the trees. If a worker happened to stumble and fall into a pit along the levees, an old-timer remembered, “why, they just dump the next dirt on him and leave him there—cover him up and forget him—I’ve seen that happen.” (p.113)

Racism was also a part of the Delta lifestyle as the thriving cotton economy required huge numbers of slaves before the Civil War and oppressed black laborers after emancipation. (pp.111-14) This combination of racism and violence carried itself over to the administration of justice for criminals at Parchman Farm.

Parchman Farm was structured to derive the maximum labor output from its inmates with as little concern for their well-being, beyond keeping them working, as possible; thus, abusive treatment was the norm. Inmates were called gunmen because they worked in the field all day long (“We worked from before you could see until you couldn’t see,” said one inmate (p.143)) under the supervision of the gun-toting inmate-guards, called “trusties.” (p.140) Drivers rode mules around the fields enforcing the work quotas for the gunmen. (p.144) The most brutal part of the farm was the trusty system. “Comprising about 20 percent of the [inmate] population, the trusty-shooters lived apart from the gunmen, wore vertical stripes instead of horizontal ones, and carried .30-.30 Winchesters on the job.” (p.140) Allowing convicted criminals to carry guns while imprisoned resulted in immense brutality and countless slaughter of gunmen. (pp.141,148) There was even an incentive system set up that pardoned trusties for shooting an escaping prisoner. (pp.193-96) All-in-all, one penologist wrote, the penitentiary succeeded in “reducing the men to a condition of abject slavery.” (p.147)

Throughout the history of Parchman, Oshinsky points out that the punishment of black Mississippians was its main concern. Punishment in

52. As in Mississippi, economic concerns were a factor as well. The state’s spoiled image soured the tourist industry that it relied upon, and Northern boycotts put further pressure on the state. However, it was humanitarian opposition to the brutality the laborers experienced that spurred the boycotts. (p.75)

Mississippi criminal law remained mostly for blacks as “[w]hites did not usually send fellow whites to prison without a good reason, and when they did, it was not for very long.” (p.159) Whites who did go to Parchman had to perform the same work as the black prisoners, although in segregated fields. The Depression brought about an increase in the number of imprisoned whites, but Parchman remained a predominantly black prison. (p.164)

Punishment within the institution of Parchman was also meted out on a racist basis. “The true symbol of authority and discipline at Parchman was a leather strap, three feet long and six inches wide, known as ‘Black Annie,’ which hung from the driver’s belt.” (p.149) Whipping as a primary form of punishment brought back the tradition of slave oppression still deeply rooted in the culture. (p.149) The most severe punishment issued by the state legislature went beyond Parchman—capital punishment.

As expected, the process was deeply rooted in race. According to a comprehensive report of legal executions in Mississippi, blacks accounted for 87 percent of the 443 people put to death there since the Civil War, a figure slightly above the Southern average of 80 percent. The report listed the crimes for which blacks had been executed (331 males and 4 females for murder, 33 males for rape, 8 males for armed robbery), as well as the race of their victims (41 percent of the murders, 85 percent of the rapes, and all of the armed robberies were committed against whites). Not surprisingly, black-on-white crime—a marginal phenomenon in comparison to black-on-black crime—accounted for more than half of the legal executions in Mississippi. (p.208)

Thus, the system of brutality toward blacks that was so much a part of the tradition of Mississippi slavery and convict leasing continued even with the emergence of the state penitentiary.

Conditions for prisoners did not improve until the 1970s. Major reform, as during the end of the leasing system, did not occur until the public became mobilized to do something about the conditions from learning about them in detail. Until the 1960s, there was no such concerted effort by the public to focus attention on the treatment of prisoners at Parchman. This all changed, however, with three highly publicized events.

As with most of the country’s changes during that era, the civil rights movement provided the spark that brought Parchman’s harsh conditions into question. The first major blow to Parchman’s old regime was the imprisonment of Clyde Kennard, a young NAACP member who sought admission to Mississippi State College. For his attempt at admission, he was framed and arrested for stealing chicken feed. His stay at Parchman was brutal, and he did not get the medical attention he needed for his developing colon cancer. Kennard died, “a victim of Mississippi justice,” a few months after his release in 1963. (pp.231-33) This was the first incident that focused national attention on Parchman Farm. While Kennard was in prison, the Freedom Riders passed through Mississippi and were taken to Parchman Farm after being arrested for “breach of the peace.” Although the state governor told the prison official to keep the Freedom Riders safe, they still were treated poorly (although not as poorly as other prisoners). After their release, “[t]hey became national heroes, bold survivors of the toughest prison in America’s most repressive state.” (p.236) People were finally beginning to discover what Parchman was really all about.

The final straw signalling an end to Parchman's regime occurred soon after the Freedom Riders incident. In Natchez, a court order had been issued prohibiting any marching to protest segregation. Hundreds of civil rights activists demonstrated against this court order and were arrested. They were sent to Parchman Farm. (p.237)

This time, the treatment was rough. These prisoners were local people, with no friends in Washington or the national press. Lacking both the moral fervor and celebrity status of the Freedom Riders, they faced a far more dangerous fate. When their buses arrived at Parchman, the demonstrators were stripped naked, beaten, marched to the maximum security unit, and packed eight to a cell. "The first night we were quiet as lambs," said one, "but after we were made to feel freezing we shouted that we wanted our clothes. . . . My jaw was so cold I couldn't eat hard food." (p.237)

Even though they weren't national figures when they went into Parchman, the protestors emerged focusing more national attention on the institution. This time, though, the attention was so strong and outraged that lawyers became involved for the first time.

In the late 60s, the seeds were sown for an all out constitutional challenge to the conditions at Parchman. With the nation's focus now on the prison, a lawyer from the local chapter of the Lawyers' Committee for Civil Rights Under the Law brought a federal suit after collecting the stories of hundreds of inmates suffering at Parchman. (pp.241-45) The case, *Gates v. Collier*,⁵³ was decided in 1972 in favor of the prisoners, and the judge issued an order for the prison to meet constitutional standards of prison operation. (pp.246-48) Compliance with the order has taken a long time, but Oshinsky claims that Parchman has become a less violent place and is now integrated as a result of the order. (pp.249-50)

3. *Today's Mississippi Jail Hangings*

Parchman and the Mississippi jail system still have their problems. The one major shortcoming of "*Worse Than Slavery*" is that it doesn't follow up on the major problems existing within Parchman today. In the six years between 1987 and 1993, at least 49 inmates in the Mississippi prison and jail system died as a result of hangings; the official reason listed for each was suicide.⁵⁴ Of these 49 inmates, 26 were African-American.⁵⁵ Among the more notable incidents were: David Scott Campbell, found hanging in his jail cell hours after being arrested while on a date with a white woman who was related to the local sheriff;⁵⁶ Andre Jones, the son of the local NAACP president, reportedly found hanging from his shoelaces

53. 349 F. Supp. 881 (D. Miss. 1972).

54. Eric Harrison, *Jail Cell Hangings Revive Old Ghosts in Mississippi Civil Rights: Unanswered Questions in 48 Deaths Since 1987 Rekindle Charges of Racism and Police Misconduct*, L.A. TIMES, May 30, 1993, at A1. The number is now at least 49 with the July 17, 1993 suicide of Cedric Walker. *U.S. Presses Probe in Jail Hanging*, NEW ORLEANS TIMES-PICAYUNE, July 24, 1993, at B4 [hereinafter *U.S. Presses Probe*].

55. Harrison, *supra* note 53. Adding Cedric Walker to the 25 stated in the article accounts for the 26. This number is particularly shocking because "in the national jail population, blacks account for only 16% of suicides while making up 41% of inmates, according to a 1988 study by the National Center on Institutions and Alternatives." *Id.*

56. Elijah Gosier, *Something Sinister in Suicide Numbers*, ST. PETERSBURG TIMES, March 20, 1993, at B1.

which somehow left no marks on his neck;⁵⁷ and Cedric Walker, a young man who was two-months away from parole at which time he was looking forward to marrying his girlfriend.⁵⁸ Each of these incidents was investigated by the local authorities; each was determined to be a suicide. Yet, most people do not agree.

Local civil rights leaders in Mississippi see the prison "suicides" as a modern-day version of the lynching prevalent in Mississippi's history.⁵⁹ The United States Justice Department was even called in to investigate the suspicious jail hangings.⁶⁰ Four of the local jails involved were ordered to rebuild as a result of the investigation, and fourteen were found to have "unconstitutional violations";⁶¹ however, nothing was found that lead to any conclusions of malicious action on the part of the prison officials.⁶² Nonetheless, these findings did not quell the fears of the African-American communities nor thwart the attempts by the families of the inmates to seek redress from the courts.⁶³

These prison hangings present shocking questions about the modern system of criminal justice and prison life for African Americans in Mississippi. Were it not for the reporting of a small Mississippi African-American newspaper named the *Jackson Advocate*, the little that has been done about the hangings may never have happened.⁶⁴ Still, public scrutiny has yet to focus its full weight on this situation, a situation that is as much a part of the Jim Crow administration of justice that Oshinsky portrays in his book as is the brutality of the past.

B. *Public Access to Prisons*

In August of 1996, I had the privilege of travelling through the South with a group of civil rights lawyers and activists. Part of our trip was a tour of Parchman Farm. After our tour guide took us through the reception

57. *Id.*; Christina Cheakalos, *Around the South One Death that Started an Uproar: Blacks Claim Cover-Up in Mississippi*, ATLANTA J. & CONST., Feb. 7, 1993, at A3.

58. *U.S. Presses Probe*, *supra* note 56; *Lost in Mississippi* (Fieldhand Productions 1996) (a documentary detailing the conditions surrounding Cedric Walker's death). I also know some of the information about the details of Cedric Walker's death from working on his family's lawsuit against the prison guards. See *Legal Updates: Police Brutality and Prisoner's Rights*, CCR's Development Update (Center for Constitutional Rights, New York, N.Y.), Fall 1996, at 4 [hereinafter CCR Update].

59. Ben Chaney, brother of one of the three civil rights workers murdered in Philadelphia, Mississippi in 1964, said, "Mississippi is still Mississippi." Gosier, *supra* note 55. Others called the suicides disguised lynchings in a "state where the terror of Jim Crow and the civil rights eras lives on in new forms." Peter Applebome, *Many Fear Jailhouse "Suicides" are Mask for Mississippi Lynchings*, PORTLAND OREGONIAN, Feb. 21, 1993, at C5.

60. *How Could That Many People Die? Justice Department Begins a Welcome Inquiry into Mississippi Jail Deaths*, DES MOINES REGISTER, Apr. 19, 1993, at 12.

61. Jim Yardley, *After Mississippi Hangings, Feds Order Jails to Shape Up*, ATLANTA CONST., Dec. 31, 1993, at A1.

62. The FBI concluded the investigation two years after the Department of Justice commenced it. FBI Director Louis Freeh announced there was "no evidence of wrongdoing." Jim Yardley, *Around the South: Mississippi Jail Deaths Probe Ends; FBI Finds No Evidence Civil Rights Violated*, ATLANTA CONST., Jan. 26, 1995, at A3.

63. *Parents of Hanged Miss. Inmate File Lawsuit*, NEW ORLEANS TIMES-PICAYUNE, Aug. 26, 1993, at B4 (Andre Jones' family filing suit); CCR Update, *supra* note 60 (Cedric Walker's family filing suit).

64. Cheakalos, *supra* note 59.

area, the prison church, the prison firehouse, the prison band's rehearsal area, and the visitors' dining hall, we were left with a sense that, having seen only the "nice" parts of the prison, we had missed a major part of the institution: inmates and the conditions in which they live. We asked to see some of the inmate units, but the tour guide told us prison tours did not visit these locations for the safety of the tour members.⁶⁵ The inmates we were able to see (those with the highest clearance levels) told us another story: we were not allowed to visit the cell units because the prison officials did not want outsiders to see the horrendous conditions there. Just like in *The Wizard of Oz* when Dorothy is told by the Wizard to "pay no attention to the man behind the screen," we were being told to pay no attention to the prison behind the facade.

Oshinsky's *Worse Than Slavery* points us to the question of what kind of reform could possibly come about at Parchman if no one is allowed to see the conditions in which inmates live. Generally, with the growing modern prison-industrial state driven by the twin powers of racism and capitalism, can the public, especially those communities decimated by the prison explosion, adequately check this increase in the instances of complete deprivation of liberty? True democratic oversight of this growing prison-industrial complex necessitates a public right of access to prisons. Without this right and the information that flows from it, as Oshinsky shows us, meaningful reform of prison conditions and a way for the public to stop this explosion in the criminal commodification of African Americans are very unlikely.

The most promising source of any such right is the United States Constitution. No clause of the constitution expressly delineates any public right to access to information, but commentators have discussed the "right to know" as a right arising from the First Amendment generally and the fifth amendment specifically for criminal trials. Part of this "right to know" comes from what Justice Brennan refers to as the "structural" theory of the First Amendment: "The Amendment . . . forbids the government from interfering with the communicative processes through which we citizens exercise and prepare to exercise our rights of self-government."⁶⁶ The communicative process Justice Brennan is referring to is the "press" role in providing and circulating the information necessary for informed public discussion."⁶⁷ Thus, in the interest of democratic self-government, the First Amendment guarantees the public's right to know what the government is doing.

The Supreme Court has had three occasions to apply this right to know to access to prisons, and in all three cases, the press was denied the expansive right of access to the prison that it sought. The first two cases dealing with this issue were the companion cases of *Pell v. Procunier*⁶⁸ and

65. In response to an inquiry I made after the tour, the prison Superintendent wrote: "Due to liabilities we face each day certain areas are restricted to tours . . ." Letter from James V. Anderson, Superintendent, Parchman Penitentiary, to David S. Cohen (Aug. 26, 1996).

66. William J. Brennan, Jr., *Address*, 32 RUTGERS L. REV. 173, 176 (1979). The other model of the first amendment identified by Brennan is the "speech" model which absolutely prohibits "any interference with freedom of expression." *Id.*

67. *Id.* at 177.

68. 417 U.S. 817 (1974).

*Saxbe v. Washington Post Co.*⁶⁹ In both cases, journalists⁷⁰ challenged a prison regulation prohibiting members of the press from interviewing "specific individual inmates."⁷¹ Their challenge rested on their claim that the restriction amounted to an "unconstitutional state interference with a free press."⁷² Relying heavily on the facts that alternative means of communicating with the outside world were available to the inmates and that the press already had some access to inmates and the prison, the Court held that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."⁷³

Four Justices dissented vigorously in these two cases. Justice Powell, with Justices Marshall and Brennan joining, stressed that a face-to-face interview provides valuable information that other forms of communication cannot capture.⁷⁴ Drawing on the political science works of Zechariah Chafee and Alexander Meiklejohn, Powell then commented on the structural theory of the First Amendment: "No individual can obtain for himself the information needed for the intelligent discharge of political responsibilities. . . . By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment."⁷⁵ Justice Douglas' dissent, also joined by Justices Marshall and Brennan, stressed the application of this structural principle to the context of prisons: "Prisons, like all other institutions, are ultimately the responsibility of the populace. . . . [P]eople have the right and the necessity to know not only of the incidence of crime but of the effectiveness of the system designed to control it."⁷⁶

In 1978, the Court was called upon to re-examine the doctrine flowing from *Pell* and *Saxbe*. In *Houchins v. KQED, Inc.*,⁷⁷ a television and radio broadcasting station challenged the denial of permission to inspect a California jail which was the site of an inmate's suicide.⁷⁸ The trial court had granted an injunction requiring the "reporters be given access to [the jail] 'at reasonable times and hours,' and that they be allowed to use photographic and sound equipment and to interview inmates."⁷⁹ In reversing this injunction, the Court was split in a rare three-one-three vote.⁸⁰ Chief Justice Burger's plurality opinion explicitly rejected the application of the structural theory in the context of the plaintiffs' request: "The public importance of conditions in penal facilities and the media's role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and

69. 417 U.S. 843 (1974).

70. In *Pell*, along with the three journalist plaintiffs, four prisoners challenged the regulation as well. *Pell*, 417 U.S. at 819.

71. *Id.* (challenging a California Department of Corrections regulation); *Saxbe*, 417 U.S. at 844 (challenging a policy statement of the Federal Bureau of Prisons).

72. *Pell*, 417 at 833.

73. *Id.* at 834.

74. *Saxbe*, 417 U.S. at 854 (Powell, J., dissenting).

75. *Id.* at 863.

76. *Pell*, 417 U.S. at 840 (Douglas, J., dissenting).

77. 438 U.S. 1 (1978).

78. *Id.* at 3.

79. *KQED, Inc. v. Houchins*, 546 F.2d 284, 285 (9th Cir. 1976).

80. Justices Marshall and Blackmun took no part in the consideration of the case.

take moving and still pictures of inmates for broadcast purposes.”⁸¹ He then concluded that the media was given a special right of access in this injunction, and that is not required by the Constitution.⁸²

However, Justice Stewart’s opinion, the controlling one, did not go that far. Stewart wrote that in certain circumstances, the media can have a right of access *in form* above and beyond the right of the public when reasonable public restrictions “impede effective reporting without sufficient justification.”⁸³ In this particular case, though, Stewart felt that the injunction granted by the trial court was too broad and went beyond this special *form* of access and created a special type of access.⁸⁴ Dissenting, Justice Stevens agreed with the principle that Stewart announced, but he found that in this case, the restriction was unreasonable.⁸⁵ Once again relying on the structural theory of the First Amendment, the dissent wrote that “prison officials have an interest in the time and manner of public acquisition of information about the institutions they administer, [but] there is no legitimate penological justification for concealing from citizens the conditions in which their fellow citizens are being confined.”⁸⁶

Thus, the resulting general doctrine from these three cases is that the press has a right of access to prisons that is only as extensive as the access the prison gives the general public, but the officials must pay special attention to the particular needs of the press in granting this access.⁸⁷ What good does this doctrine do in the modern prison-industrial state in which we now live? Not much, but there is some helpful language in the cases that might point to a right of access to prisons with a bit more bite than the proposition stated above.

First, the Court has indicated that it might, in certain situations, look to the reasons for any restriction on the public or the press. This indication came in *Pell* when the majority specifically mentioned that the intent behind the enactment of the regulation is relevant. Discussing the regulation, the majority wrote that it “is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press’ investigation and reporting of those conditions.”⁸⁸ Thus, the Court hinted that it would entertain a claim of a right to access when the regulation was enacted to conceal prison conditions from the public. Applying this to a specific regulation would be difficult because finding the intent of the drafters of a regulation is difficult, but extreme cases that limit access for this illegitimate purpose could be challenged, albeit this is unlikely. For instance, if the Parchman Superintendent were to have specifically stated that the policy was not to allow people to visit the prison because he didn’t want anyone to see the

81. *Houchins*, 438 U.S. at 9 (Burger, C.J., plurality opinion).

82. *Id.* at 15-16.

83. *Id.* at 17 (Stewart, J., concurring in judgment).

84. *Id.* at 18-19.

85. *Id.* at 30 (Stevens, J., dissenting).

86. *Id.* at 36.

87. The Supreme Court’s subsequent landmark decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (granting a right of access to the press for criminal proceedings), has not been extended beyond the courthouse and thus does not alter the Court’s holdings in the three prison access cases. See Eugene Cerruti, “*Dancing in the Courthouse*”: *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 266-69 (1995).

88. *Pell*, 417 U.S. at 830.

conditions in which the hanged inmates had lived, the First Amendment's right of access would presumably strike down such a restriction.

The second expansion of the simple proposition that the right of access to prisons for the press and the public must be the same can be found by looking at the specific holding of all three of these cases. In *Pell*, the Court laid particular emphasis on the various alternative methods of visitation of the prison granted to both the press and the public:

The Department of Corrections regularly conducts public tours through the prisons for the benefit of interested citizens. In addition, newsmen are permitted to visit both the maximum security and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institutions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on the group meetings and to interview the inmate participants.⁸⁹

The federal regulation challenged in *Saxbe* was similar to the California regulation in *Pell*.⁹⁰ And, in *Houchins*, the jail's regulation allowed public visitors in most parts of the facility and required the sheriff to give the press "effective access" to these areas.⁹¹

The holdings in these cases are thus necessarily limited to requests by the press that it be given more access when it already has considerable access to the prisons and the prisoners. Commentators have noted that if the prison regulations were completely to close off access to prisons, the opinions here would not apply to the situation.⁹² However, I would read this limitation on the holding more broadly, including regulations that provide only minimal access to prisons in the category of regulations to which *Pell*, *Saxbe*, and *Houchins* would not apply. This reading is justified because the Court's opinions all dealt with regulations providing substantial access to prisons. Thus, any prison that tried to completely or close-to-completely prohibit access to prisons and prisoners would run up against a First Amendment problem. A close case would be presented if a prison were to allow access to only a few "presentable" parts of the prison, as in the situation with which our tour group was faced. Thus, it is possible that the Constitution provides a limited right of access to prisons for the public and the press.

Alternatively, statutory authority does exist that could help to give some access to prison information. Freedom of information acts have been enacted by all fifty states⁹³ and the federal government.⁹⁴ Under these stat-

89. *Id.* at 830-31.

90. *Saxbe*, 417 U.S. at 846-48 (permitting the press to "tour the prisons and photograph any prison facilities," "conduct brief interviews with any inmates [encountered on the tour]," and receive and send uncensored and unlimited correspondence from and to inmates).

91. *Houchins*, 438 U.S. at 17.

92. Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 942 (1992); Neil E. Nussbaum, "Film at Eleven . . ."—*Does the Press Have the Right to Attend and Videotape Executions?*, 20 N.C. CENT. L.J. 121, 126-27 (1992).

93. See A JAILHOUSE LAWYER'S MANUAL 124-26 (Stephanie I.R. Fidler ed., 4th ed. 1996) [hereinafter JLM] (listing the freedom of information acts for all fifty states).

94. 5 U.S.C. § 552 (1988).

utes, the public is entitled to obtain the records of government agencies that are not exempt.⁹⁵ Prison records, excepting those that are specified in the statute, are thus open for the public and the press to retrieve and scrutinize. Such scrutiny can provide a meaningful method for the public to ferret out information about the contracts that go into prison construction and the companies who benefit. This information is essential to understanding the link between the prisons, racism, and capital described above in Part II. But, while this access to files and records is an essential part of an open government, for the purposes of keeping prison conditions in check for the increasing number of people who occupy them, mere access to files is not enough as in-person observation, as opposed to mere passive analysis of records, is essential to truly understanding what goes on in a prison. As Chief Justice Burger observed, "A visit to most prisons will make you a zealot for prison reform."⁹⁶

If Chief Justice Burger is right, and I think he is, the law must do everything it can to protect the right of the public and the press to have full access to prisons. As the colloquialism goes, knowledge is power, and a populace armed with the knowledge of what is going on within its own prisons has the power to change those prisons and the policies that are filling them. Anything less than a constitutional right of full access to prisons would thus amount to law's sanctioning of inhumane prison conditions within the unchecked prison-industrial state. Oshinsky describes the important transformation that can occur when citizens are fully informed about convicts' conditions, and the modern situation involving the prison hangings in Mississippi provides a current example of this basis for reform; it is important for law to absorb this message and provide accordingly—especially in a time when the prison population is expanding quickly with African Americans targeted for this growth.

IV. CONCLUSION

"*Worse than Slavery*" is a work of history, not law. Nonetheless, the book's relevance to law cannot be denied. Parallels with history are important ways for us to learn about the present, and the parallel that I have drawn here between Oshinsky's description of the convict leasing system in the late nineteenth century South and the profit-driven modern day criminal justice system has striking importance for any comprehensive understanding of how the criminal law is continuing to oppress those convicted of crimes, in particular, African Americans. With the understanding that the prison-industrial complex is being driven by profit and racism, people can better analyze and attack the draconian criminal justice policies that legislatures are trying to spoonfeed the public everyday in this country. Complete knowledge is one of the pre-conditions for true democracy rather than the anti-democratic system in effect right now.

Complementing this need for an understanding of the nature of prisons and racism is the need for knowledge about the conditions within the prisons themselves. Oshinsky shows that democratic reform is possible

95. JLM, *supra* note 95, at 123.

96. Pell v. Procunier, 417 U.S. 817, 830 n.7 (1974) (quoting Warren Burger, *For Whom the Bell Tolls*, reprinted in 25 Record of N.Y.C.B.A. (Supp.) 14, 20-21 (1970)).

when people are aware of what is going on behind bars. That the public can have no complete constitutional right or effective statutory guarantee of access to observe prison conditions, however, further demonstrates the anti-democratic nature of the prison industry.

The lesson the law can draw from "*Worse than Slavery*" is a frightening but eerily familiar one: criminal law, corrupted by private interest in profit and left unchecked from public scrutiny, oppresses those it can. As Oshinsky's history, the prison suicides in Mississippi, and an analysis of the current prison industry show, this oppression often amounts to legally sanctioned and institutionalized racial oppression at the expense of knowledge and democracy.