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# The Business of Punishing: Impediments to Accountability in the Private Corrections Industry

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THE BUSINESS OF PUNISHING: IMPEDIMENTS TO  
ACCOUNTABILITY IN THE PRIVATE CORRECTIONS  
INDUSTRY

*Stephen Raher*<sup>\*</sup>

I. INTRODUCTION

*Sixty citizens have been thrown into prison and the business of punishing them is to begin to-morrow. This province sets a fine example to the others, teaching them above all things to respect their governors and gouvernantes, and not to throw any more stones into their garden.*<sup>1</sup>

When Alexis de Tocqueville wrote his observations of nineteenth century American society, he repeatedly focused on the ways in which social equality shaped governance and civic institutions in the erstwhile British colonies. Tocqueville—himself no stranger to contemporary penology<sup>2</sup>—opined that “[i]n no country is criminal justice administered with more mildness than in the United States.”<sup>3</sup> In contrast, European justice is described as heavily influenced by the feudal system of the Middle Ages, where the ruling classes “cannot... thoroughly understand what others feel” due to the hierarchical social structure of the time.<sup>4</sup> To illustrate his point, Tocqueville quoted Madame de Sévigné’s dispassionate

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1. Marie de Rabutin-Chantal, Madame de Sévigné (1675), *quoted in* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 201 (Henry Reeve, trans., 1862).

2. *See* G. DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (Fancis Liber, trans. & ed., 1833).

3. TOCQUEVILLE, *supra* note 1, at 203.

4. *Id.* at 199.

descriptions of “the business of punishing,”<sup>5</sup> the scattering of severed limbs about the city, and the regular use of capital punishment “just to keep up appearances.”<sup>6</sup>

Tocqueville was writing at the same time that American prisons were enjoying their first period of popular support.<sup>7</sup> Cognizant of the apathy with which European aristocracy oversaw brutal systems of capital punishment, democratic reformers of the Jacksonian Era championed penitentiaries as an enlightened alternative.<sup>8</sup> Instead of responding to crime by inflicting physical injury, the penitentiary would “rehabilitate” errants and return them to productive roles in society.<sup>9</sup> Throughout American history, the ideal of prisons as rehabilitative institutions has waxed and waned, counterbalanced by periods in which public policy has focused on punishment and retribution as the ultimate goal of incarceration.<sup>10</sup>

Today, the dispassionate lack of empathy that Tocqueville used to define European sensibilities has resurfaced in a new trend in American corrections: the use of for-profit, contractor-operated prisons. While retaining nominal public oversight of correctional facilities, prison privatization effectively shrouds prison operations in a veil of secrecy.<sup>11</sup> Prisons, whether publicly or privately operated, have a long history of hiding operational shortcomings by invoking the mantle of facility security concerns.<sup>12</sup> Private prisons, however, have proven quite adept at using an additional layer of corporate security protections (e.g., trade secret law) to prevent public oversight of contract facilities.<sup>13</sup>

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5. *Id.* at 201. Henry Reeve, who translated *Democracy in America* into English for the 1862 edition, translated Sévigné’s phrase as “the business of punishing.” *Id.* Modern translators have typically used the more direct phrase “the business of hanging,” which is more historically precise (since Sévigné was certainly referring to capital punishment) and may be linguistically accurate as well. See 3 ALEXIS DE TOCQUEVILLE, *DE LA DÉMOCRATIE EN AMÉRIQUE* 277 (Calmann Lévy ed., 1888) (using original French “et on commence demain à pendre”).

6. TOCQUEVILLE, *supra* note 1.

7. David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 100, 100 (Norval Morris & David J. Rothman eds., 1998) [hereinafter *Perfecting the Prison*].

8. *Id.* at 105.

9. *Id.* at 106.

10. See, e.g., REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941*, at 3–4 (2008).

11. Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 140 (2001).

12. See *infra* Part IV.B.

13. See *infra* Part IV.B.

Although prisoners theoretically enjoy enhanced legal protections established after decades of civil rights litigation,<sup>14</sup> enforcing those rights against secretive and largely unaccountable contractors is exceedingly difficult. The use of contractual relationships to shield correctional shortcomings from public view echoes the lack of inter-caste empathy that preoccupied Tocqueville. Although American public opinion about prisoners fluctuates (generally changing in proportion to public fear of crime), the opaque operations of private prisons prevent citizens and even policy-makers from having to confront many injustices that occur within prison walls.<sup>15</sup> Prisoners housed in private facilities frequently broadcast their grievances to the outside world, but most inmates suffer from a lack of credibility, particularly when speaking about conditions of confinement.<sup>16</sup> Attorneys, prisoner advocates, and policy experts who wish to compile an evidence-based picture of private prison operations are typically left with little useful information.<sup>17</sup> Instead, oversight is left to the contracting government agency—an inadequate solution since agencies, which depend on privately-owned capacity to ensure adequate space of an entire prison system, will rarely risk disrupting a relationship with a critical vendor.<sup>18</sup>

To understand the contemporary use of contractor-operated prisons, one must appreciate the political and economic developments which allowed privatization to enter the corrections industry. Accordingly, this article starts with a brief history of privatized corrections in the United States. The following section explores how the modern marketplace for private prisons has been shaped by two prominent dynamics—the emergence of a national market for prison beds and the massive expansion of the nation’s immigrant detention system. The paper then considers the general implications of non-governmental prison operation, with a focus on how contractors have exploited their private status to the detriment of inmates, taxpayers, and contracting agencies.

Over the past two decades, researchers, correctional professionals, and policy-makers have devoted substantial time to debating the efficacy of prison privatization—both in terms of operational success and cost savings.<sup>19</sup> Such debates usually presuppose that the participants’ arguments

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14. *But see infra* notes 66–68 and accompanying text (discussing the erosion of prisoner civil rights law in the 1980s and 1990s).

15. White, *supra* note 11, at 139.

16. Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 *GEO. J. ON POVERTY L. & POL’Y* 249, 269 (2004).

17. *See id.* at 272–74.

18. CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* 194 (1990).

19. *See* White, *supra* note 11, at 135.

are based on reliable data concerning private prisons' record.<sup>20</sup> As discussed in this article, private prison operators have prevented the adequate dissemination of information to support their claims of success; however, because of the general public lack of interest in the details of prison operations, such information asymmetry has generally gone unnoticed.<sup>21</sup>

## II. HISTORICAL EVOLUTION OF PRIVATIZED PRISONS IN THE UNITED STATES

The birth of the American prison system is a notorious paradox. In the words of historian David Rothman, “[i]n the 1820s and 1830s, when democratic principles were receiving their most enthusiastic endorsement, when the ‘common people’ were participating fully in politics and electing Andrew Jackson their president, incarceration became the central feature of criminal justice.”<sup>22</sup> Prisons were part of a uniquely American rejection of British social control mechanisms.<sup>23</sup> As a general matter, British and early colonial responses to dependent and deviant populations (i.e., the poor, the criminal, the insane, and the orphaned) were disorganized, harsh, and heavily influenced by religious doctrines.<sup>24</sup> Prisons were one component of a broad-based reform movement that originated in the late eighteenth century and flourished in the early to middle nineteenth century.<sup>25</sup> Governments assumed responsibility for the operation of various charitable institutions designed to cure deviant behavior—institutions such as asylums, reformatories, penitentiaries, and orphanages.<sup>26</sup>

The initial use of incarceration in America was a novel alternative to British criminal sentencing schemes, which relied heavily on corporal and capital punishment.<sup>27</sup> But Americans quickly became dissatisfied with prisons, seeing them as breeding grounds for criminal behavior.<sup>28</sup> The Jacksonian Era rebirth of the penitentiary (and the concomitant renaissance of other charitable institutions such as the asylum) sought to reclaim prisons as rehabilitative institutions.<sup>29</sup> In what was gradually becoming a familiar

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20. See *infra* note 202 and accompanying text.

21. See *infra* Part II.B.

22. *Perfecting the Prison*, *supra* note 7.

23. *Id.* at 102–04.

24. DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 1–14* (1971) [hereinafter *THE DISCOVERY OF THE ASYLUM*].

25. *Perfecting the Prison*, *supra* note 7, at 102–04.

26. See *THE DISCOVERY OF THE ASYLUM*, *supra* note 24, at 30–154.

27. *Id.* at 59; *Perfecting the Prison*, *supra* note 7, at 102–03.

28. *Perfecting the Prison*, *supra* note 7, at 103–04.

29. *Id.* at 106 (“[T]he reformers hoped that the solutions that they devised to prison design problems

cycle, the Jacksonian reform movement also ended in broad disillusion as prisons once again became warehouses of cruelty and inefficiency.<sup>30</sup> This time, however, the reformers had laid the foundation for a major systemic change through the penitentiary's enhanced emphasis on convict labor.<sup>31</sup> Pioneered by penal reformers in New York, some American prisons in the mid-nineteenth century began providing inmate labor, for a fee, to private business firms.<sup>32</sup> Early contract labor arrangements typically entailed multiple private firms contracting for prison labor, with inmates working in prison workshops manufacturing goods which were then sold by the contracting firms.<sup>33</sup>

After the Civil War, the system of convict labor took a decided turn in favor of increased private control of prisoners, particularly under the "convict leasing" system employed in southern states. Many southern states restricted or even abolished contract prison labor during Reconstruction, but the economic depression of the 1870s resulted in states looking to cut prison costs and businesses looking for cheap labor.<sup>34</sup> When "redeemer" Democratic governors began ending Reconstruction in the southern states, many prisons began leasing large numbers of inmates to private industries.<sup>35</sup> This iteration of inmate labor differed from earlier models in two notable regards. First, the scale was much larger—in some states, two or three companies would effectively lease all available prison labor.<sup>36</sup> Second, companies typically assumed de facto custody of leased convicts.<sup>37</sup> Although some politicians and social reformers were disturbed by the extremely harsh conditions that inmates endured under convict leasing arrangements, the ultimate demise of the system was due to economic concerns.<sup>38</sup> As organized labor became more powerful, unions set their sights on abolishing private firms' use of convict labor, citing the inequity of making free-world laborers compete with the low-cost and easily exploited pool of inmate workers.<sup>39</sup> The battle was long and

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would be relevant to the wider society. With no ironies intended, they talked about the penitentiary as serving as a model for the family and the school. The prison was nothing less than 'a grand theatre for the trial of all new plans in hygiene and education.'").

30. *Id.* at 107–14.

31. *See id.* at 105.

32. *See* MCLENNAN, *supra* note 10, at 53.

33. *Id.* at 53–86.

34. *Id.* at 101.

35. *Id.* at 101–02.

36. *Id.* at 102.

37. White, *supra* note 11, at 127.

38. *See id.* at 133.

39. *Cf. id.* at 133.

complicated, but ultimately, the convict leasing system was abolished during the 1880s and 1890s, with the last vestiges disappearing in the early twentieth century.<sup>40</sup>

The role of private contractors in the corrections system did not completely disappear after the end of the convict lease system. Most notably, private (often not-for-profit) entities have long been used to operate juvenile facilities and community-based corrections programs, such as halfway houses.<sup>41</sup> But generally, the use of prisoners as commodities in profit-making industries disappeared in twentieth century American corrections—until the 1980s.<sup>42</sup> The modern advent of privately operated adult secure facilities came in 1979 when the Immigration and Naturalization Service (“INS”) “began contracting with private firms to detain illegal immigrants pending hearings or deportation...”<sup>43</sup> In the 1980s, the INS issued a contract to Wackenhut, an international security firm, for the operation of an immigrant detention facility near Denver, Colorado.<sup>44</sup> The Corrections Corporation of America (“CCA”) incorporated in 1983 and began operations under its first contract the next year in Houston, Texas.<sup>45</sup> From its inception, the private prison market has always been thin, with two dominant firms—CCA and Wackenhut Corrections Corporation.<sup>46</sup> Wackenhut started as a subsidiary of the Wackenhut Corporation and is now an independent entity, recently renamed “The GEO Group.”<sup>47</sup> Over the years, many smaller firms have been acquired by CCA and Wackenhut.<sup>48</sup> In 1998 (after much consolidation had already occurred), there were twelve private prison companies operating in the United States, with CCA and Wackenhut controlling a combined seventy-six percent of the total domestic private bed capacity.<sup>49</sup> Of the twelve companies listed in the 1998 census of private facilities, at least three have subsequently been acquired by larger firms.<sup>50</sup>

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40. MCLENNAN, *supra* note 10, at 137–92.

41. DOUGLAS McDONALD ET AL., ABT ASSOCS. INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 4–5 (1998).

42. White, *supra* note 11, at 134.

43. McDONALD ET AL., *supra* note 41, at 5.

44. *Id.*

45. *Id.*

46. White, *supra* note 11, at 134.

47. See The Geo Group, Inc., Historic Milestones, <http://www.geogroupinc.com/history.asp> (last visited Jan. 15, 2010).

48. McDONALD ET AL., *supra* note 41, at 19.

49. JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 4 tbl.3 (2001) (showing that CCA and Wackenhut controlled 51.4% and 25.1% of the market, respectively).

50. CiviGenics, Inc. was acquired by Community Education Centers in 2007. *Community Education Centers Acquires CiviGenics Creating the Nation’s Largest Provider of Offender Reentry Services*,

The growth of the industry during the 1980s and early 1990s can best be described as a perfect storm, involving three interrelated policy dynamics.<sup>51</sup> First, changes in sentencing policy ensured an unrelenting increase in prison populations, necessitating new facility construction.<sup>52</sup> Second, unconstitutional conditions within state prison systems led to judicial mandates to alleviate overcrowding—a challenge most states responded to by building more prisons.<sup>53</sup> Third, the increasing political clout of the fiscal conservatism movement made paying for prison expansion more difficult.<sup>54</sup>

Late twentieth century sentencing changes (the first factor of the perfect storm) prioritized incarceration as the preferred response to crime. Fueled by misinformation and sensational media portrayals of crime, voters in the 1980s became fixated on lengthy prison sentences for convicted offenders, providing vote-seeking legislators an incentive to advocate for longer sentences.<sup>55</sup> Culminating in Lee Atwater's fear-based Willie Horton campaign during the 1988 presidential election, public opinion increasingly reflected insecurity about personal safety and a belief that imprisonment was the most effective solution.<sup>56</sup> In addition to public anxiety about crime in general, drug policy increasingly occupied center stage in criminal justice policy debates, with federal and state lawmakers in a seeming competition to craft the harshest drug sentencing regime.<sup>57</sup> By 2003, drug offenders constituted twenty percent of state prisoners and fifty-five percent of the

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INSIDE CEC (Cmty. Educ. Ctrs., West Caldwell, N.J.), Spring 2007, at 1, *available at* [http://www.cecintl.com/UploadedFiles/86997\\_CECnwltr.pdf](http://www.cecintl.com/UploadedFiles/86997_CECnwltr.pdf). Correctional Services Corporation was acquired by GEO/Wackenhut in 2005. GEO Group, Inc., Annual Report (Form 10-K), at 1 (Mar. 17, 2006). Correctional Systems, Inc. was acquired by Cornell Companies in 2005. Cornell Companies, Annual Report (Form 10-K), at 33 (Mar. 16, 2006).

51. Cf. JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 98 (2d ed. 1995) (“Crises, disasters, symbols, and other focusing events only rarely carry a subject to policy agenda prominence by themselves. They need to be accompanied by something else . . . [Or, quoting a case-study interview subject,] ‘A fortuitous catalyst [is often] thrown into an existing environment.’”). Although no author has concatenated detailed state-level case studies of this policy process in the context of prison privatization, some isolated discussions do exist. See generally C. Elaine Cummins, *Private Prisons in Texas, 1987-2000: The Legal, Economic, and Political Influences on Policy Implementation* (Oct. 25, 2000) (unpublished Ph.D. dissertation, American University) (on file with American University Library); Stephen Rahe, *Walls of Stone, Bars of Gold: A Politico-Economic History of Colorado's Prisons* (Nov. 2002) (unpublished paper, University of Colorado Graduate School of Public Affairs) (on file with author).

52. MCDONALD ET AL., *supra* note 41, at 8.

53. *Id.*

54. *Id.*

55. *Id.*

56. See generally DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* (1995).

57. See EVA BERTRAM ET AL., *DRUG WAR POLITICS: THE PRICE OF DENIAL* 134–50 (1996).



federal prison population, representing a twelve- and seventeen-fold increase, respectively, since 1980.<sup>58</sup> All told, this period of tough-on-crime politics saw the nation's total prison population increase from 319,598 in 1980 to 1.4 million in mid-2003—an increase of 334 percent.<sup>59</sup>

The second contributing factor to the rise of the modern private prison industry is a direct result of the first. More stringent sentencing policy predictably led to a higher prison population; however, this population increase was not accompanied by adequate expansion of the nation's carceral infrastructure.<sup>60</sup> Not surprisingly, this resulted in overcrowding and substandard prison conditions.<sup>61</sup> While deplorable prison conditions had been tolerated throughout the nation's history, states could not ignore such problems in the 1980s and 1990s, due to the birth of prisoners' rights litigation in the 1960s and 1970s.<sup>62</sup> Due to a more robust judicial approach to vindicating prisoners' constitutional rights, more prison systems found themselves under court supervision.<sup>63</sup> So pronounced was the overcrowding and resultant litigation that by mid-1988, the corrections systems of thirty-nine states, the District of Columbia, and two territories were operating under court orders to remedy unconstitutional conditions.<sup>64</sup> These judicial pressures made lawmakers much more susceptible to private-sector promises of quick and cheap prison construction and operation.<sup>65</sup>

Ironically, after the private sector reaped the benefit of the states' need to rapidly expand their carceral capacity, private operators received a windfall from the Supreme Court and Congress. First, after judicially crafted remedies created the need for a massive prison-building campaign, the United States Supreme Court substantially curtailed the ability of judges to impose reforms on correctional systems, adopting a substantially deferential constitutional standard in *Turner v. Safley*.<sup>66</sup> Eight years after *Turner*,

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58. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, THE 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 9–10 (2007), available at [http://www.sentencingproject.org/doc/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/doc/publications/dp_25yearquagmire.pdf).

59. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 2003, at 478 tbl.6.1 (Ann L. Pastore & Kathleen Maguire eds., 2005).

60. MCDONALD ET AL., *supra* note 41, at 8.

61. *Id.*

62. See, e.g., 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1:4 (3d ed. 2002) (describing the demise of the constitutional common-law “hands-off doctrine” during the 1960s and 1970s, culminating in the United States Supreme Court cases *Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Procunier v. Martinez*, 416 U.S. 396 (1974), overruled by *Thornburgh v. Abbott*, 490 U.S. 401 (1989)).

63. *Id.*

64. MCDONALD ET AL., *supra* note 41, at 8.

65. *Id.*

66. 482 U.S. 78, 89 (1987), superseded by statute, Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

Congress went several steps further and enacted the Prison Litigation Reform Act (“PLRA”), placing numerous procedural restraints on prisoner lawsuits.<sup>67</sup> The ultimate result of *Turner* and the PLRA is to lessen the likelihood that prisoners will prevail on civil rights claims,<sup>68</sup> a dynamic that benefits the private prison industry by reducing litigation costs and avoiding court-ordered remedies. Despite the change in the legal landscape, the initial period of vigorous judicial vindication of prisoners’ rights created a policy window that opened long enough for the private prison industry to establish itself.<sup>69</sup> Once companies could show an operating track record (even a checkered one), pitching new contracts to policy-makers became easier. Even though *Turner* and the PLRA provide legal cover for prison operators (both private and governmental), private operators were dealt a small setback when the United States Supreme Court held that contractors are not entitled to a qualified immunity defense in section 1983 suits.<sup>70</sup>

The third and final factor that catalyzed the industry is the maturation of the fiscal conservatism movement that began in the 1970s. As fiscal conservatives claimed policy victories on the national level, states were expected to take on increased responsibilities.<sup>71</sup> But at the same time federal responsibilities were devolving to the states, citizens demanded protection from state tax increases, frequently imposing constitutional restrictions on taxing and borrowing.<sup>72</sup> When states encountered the recession of the early 1980s, these new revenue constraints led to profound turmoil in government budgeting.<sup>73</sup> Private prisons benefited from this movement in two ways. First, despite the overall pressure to reduce

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67. Prison Litigation Reform Act of 1995 §§ 801–810, 18 U.S.C. § 3626 (2006).

68. *See, e.g.*, DOROTHY SCHRADER, CONG. RESEARCH SERV., PRISON LITIGATION REFORM ACT: AN OVERVIEW, at CRS-9 (1996) (describing the PLRA’s main effect as “limit[ing] the authority of the federal courts to fashion remedies to correct violations of federal rights.”).

69. *See* McDONALD ET AL., *supra* note 41, at 8.

70. *See infra* note 184 and accompanying text.

71. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 42 (2007) (“The federal retreat [from social spending] required subnational polities and institutions to take responsibility for social problems whether they wanted to or not, forcing them to deal with the newly dispossessed, who ranged from unemployed youth to financially needy students to homeless families. The contemporary rise of the local state, celebrated by so many geographers, represents in part a generally reactionary move to reexternalize, or keep external, such social burdens and fiscal costs.”). While Gilmore’s work is specific to California, it is generally an excellent portrayal of a narrative that was repeated in many states. *See id.* at 40–42. Not only is the California story indicative of other states’ experiences because all states, to some degree, face similar challenges as actors in the federalist system, but California’s policy innovations (especially in the realm of taxpayer activism) were often exported to other states. For example, understanding Colorado’s recent fiscal policy necessitates an understanding of ballot-measure activist Douglas Bruce (author of the Taxpayers’ Bill of Rights), who formed his political ideology in southern California during the 1970s and 1980s. *See Off Limits*, DENV. WESTWORD, Aug. 31, 1994, at 9.

72. GILMORE, *supra* note 71, at 42–43.

73. *Id.* at 42–50.

spending, prisons often enjoyed favored status due to public fear of crime and the ability of the state to justify public safety as an essential governmental function.<sup>74</sup> Second, even though incarceration as a concept received favored political status, fiscal constraints made borrowing for new construction difficult—thus privatization emerged as a popular alternative.<sup>75</sup> This popularity depended on the notion that contract facilities would avoid the need for state borrowing or expansion of public payrolls.<sup>76</sup> At the same time, by expanding prison capacity through private facilities, policy-makers could claim cost savings through private sector “innovations.”<sup>77</sup>

After its initial growth stage, the private prison industry encountered a period of financial distress in the late 1990s.<sup>78</sup> Highly publicized operating failures battered the image of the industry. The failures included a barrage of escapes, assaults, and murders at CCA’s Northeast Ohio Correctional Center<sup>79</sup> and a series of assaults, murders, and guard brutality at two Wackenhut prisons in New Mexico.<sup>80</sup> Industry observers expected that two pieces of Congressional legislation in 1996 and 1997 would provide an infusion of new contracts for the industry.<sup>81</sup> In anticipation of those new

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74. *Id.* at 83–86 (“The central contradiction for the waning welfare-warfare, or military Keynesian, state was this: the outcomes of tax struggle translated into delegitimation of programs the state could use to put surpluses back to work, while at the same time, the state retained bureaucratic and fiscal apparatuses from the golden age. The massive restructuring of the state’s tax base in effect made surplus the Keynesian state’s capacities. However, the state did not disappear . . . . Rather, what withered was the state’s legitimacy to act *as* the Keynesian state . . . . [T]he new state built itself in part by building prisons . . . . The result was an emerging apparatus that, in an echo of the Cold War Pentagon’s stance on communism, presented its social necessity in terms of an impossible goal—containment of crime, understood as an elastic category spanning a dynamic alleged continuum of dependency and depravation. The crisis of state capacity then became, peculiarly, its own solution, as the welfare-warfare state began the transformation, bit by bit, to the permanent crisis workfare-warfare state, whose domestic militarism is concretely recapitulated in the landscapes of depopulated urban communities and rural prison towns.”).

75. *Id.* at 122.

76. *See id.*

77. *See id.* at 122–25.

78. *See, e.g.,* PHILIP MATTERA ET AL., GOOD JOBS FIRST, JAIL BREAKS: ECONOMIC DEVELOPMENT SUBSIDIES GIVEN TO PRIVATE PRISONS 13–17 (2001).

79. JOHN L. CLARK, REPORT TO THE ATTORNEY GENERAL: INSPECTION AND REVIEW OF THE NORTHEAST OHIO CORRECTIONAL CENTER (Nov. 25, 1998), *available at* <http://www.usdoj.gov/ag/youngstown/youngstown.htm>.

80. DOUGLAS McDONALD ET AL., ABT ASSOCS., INC., GOVERNMENTS’ MANAGEMENT OF PRIVATE PRISONS xxii–xxiii (2003).

81. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 increased the use of immigrant detention, a field which has historically relied upon contractor-operated facilities. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 div. C, § 303, 8 U.S.C. § 1226 (2006) (creating restrictions for release of apprehended aliens); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 div. C, § 305(a)(3), 8 U.S.C. § 1231(a)(2) (prohibiting the release of aliens pending execution of a deportation order). The National Capital Revitalization and Self-Government Improvement Act of 1997 dissolved the District of Columbia prison system and placed sentenced District of Columbia felons in the custody of the federal Bureau of Prisons (“BOP”). Pub. L. No. 105-33, § 11201(b), 111 Stat. 251, 735. The Act directed BOP to house at least half of all District of

contracts, prison companies embarked on aggressive financing plans which ultimately left the industry in even greater turmoil. CCA and Wackenhut both experimented with real estate investment trusts (“REIT”s) and ultimately saw their stock prices decline precipitously due to investor disapproval.<sup>82</sup> CCA’s REIT-financing experience was so disastrous that in 2000 its independent auditor expressed “substantial doubt” about the ability of CCA (then operating under the name Prison Realty Trust) to continue.<sup>83</sup> Although CCA and Wackenhut both recovered from their late 1990s financial slumps, they remain highly leveraged and depend on further expansion to decrease corporate debt.

By 2000, growth in private prisons seemed to be slowing.<sup>84</sup> No state was soliciting new private prison contracts, and some existing contracts had been curtailed or rescinded.<sup>85</sup> Yet, between 2000 and 2005 (the most recent year for which data is currently available), 151 new privately operated prisons came on-line, and the private sector share of all U.S. correctional facilities jumped from sixteen to twenty-three percent.<sup>86</sup> What caused this resurgence? Although there are several contributing factors, the primary catalyst has been the birth of the “national market” for private prison beds.<sup>87</sup>

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Columbia inmates in private facilities by 2003. *Id.* § 11201(c)(1). Although the Deputy Attorney General is required to submit annual progress reports to Congress, detailing the BOP’s compliance with this privatization requirement, the Department of Justice has yet to provide these reports to the author as requested. *See* Letter from James Killens III, FOIA Specialist, Office of Info. & Privacy, U.S. Dep’t of Justice, to Stephen Rahe (Mar. 10, 2009) (on file with author) (indicating that the records requested “require a search in another office” and that staff has not been “able to complete a search to determine whether there are records within the scope of your request”); Letter from Carmen L. Mallon, Chief of Staff, Office of Info. & Privacy, U.S. Dep’t of Justice, to Stephen Rahe (Apr. 8, 2009) (on file with author) (denying author’s request for expedited processing).

82. *See* AUSTIN & COVENTRY, *supra* note 49, at 28–29.

83. Prison Realty Trust, Inc., Annual Report (Form 10-K), at F-16 (Mar. 30, 2000).

84. AUSTIN & COVENTRY, *supra* note 49, at 6 (“[I]ndications show that growth in privatization may be slowing. For example . . . private facility bed capacity has not increased since January 1, 1998. Additionally, stock prices for most of the major firms have dropped substantially in the past year. There have also been a number of highly publicized management problems with several privately operated facilities.”).

85. Judith Greene, *Bailing Out the Private Prison Industry*, PRISON LEGAL NEWS, May 2002, at 1.

86. JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at 1 (2008). In 2005, there were a total of 415 privately operated prisons in the United States, housing an average daily population of 105,451 inmates. *Id.* at app. tbl.9. Although the Bureau of Justice Statistics issues annual revisions to these figures, the data does not provide information on company-specific market shares, nor the total capacity of the private prison system. Periodic data on the industry’s total capacity used to be reported by the Private Corrections Project at the University of Florida—a research organization that abruptly shut down when its founder and director, Professor Charles Thomas, resigned after being fined by the Florida Ethics Commission for accepting compensation from CCA’s real estate investment trust. *See generally* Gilbert Geis, Alan Mobley & David Shichor, *Private Prisons, Criminological Research, and Conflict of Interest: A Case Study*, 45 CRIME & DELINQ. 372 (1999).

87. McDONALD ET AL., *supra* note 80, at v.

### III. CURRENT DEVELOPMENTS

#### A. Dueling Markets

The most important recent development in private prisons is the emergence of two distinct markets for prison beds, which can be labeled the “dominant mode” and the “national market.”<sup>88</sup> The dominant mode, the model originally presented to policy-makers as the “private prison fix,” entails a state agency contracting for some of its needed prison beds and forming a one-to-one relationship with a contractor.<sup>89</sup> The national market for private prisons is an outgrowth of the speculative prison-building boom of the 1980s.<sup>90</sup> In the national market, prison operators advertise available capacity to jurisdictions across the country, often filling a facility with inmates from multiple agencies.<sup>91</sup> Despite the growing prevalence of facilities in the national market,<sup>92</sup> little research has been done on the effects of this system.

Not surprisingly, there is qualitative evidence to suggest that inmate management is more difficult when prisoners are shipped to foreign jurisdictions.<sup>93</sup> Not only are prisoners less happy when serving time far away from family and friends, but housing inmates from different jurisdictions (who are subject to different administrative regulations) in one facility often breeds tension.<sup>94</sup> There are systemic problems as well. A 1998 survey of private prisons found that states paid higher per diem rates for out-of-state facilities than for in-state contracts, suggesting upward price

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88. *Id.*

89. *Id.* (“[T]he state prison system is the contractor’s sole client at the facility; the only prisoners held in the facility are those under the jurisdiction of the client state agency. Moreover, the prison is in the same state as the publicly operated prisons, which creates at least some of the conditions supportive of a close integration between the publicly operated facilities and the privately operated prisons.”).

90. *See, e.g.,* Patrice Hill, *Private Prisons Are Riskiest COP Deals Going, “Fundamentally Flawed,” Nuveen Report Says*, BOND BUYER, Nov. 2, 1993, at 1 (describing 1990s speculative prison financing).

91. McDONALD ET AL., *supra* note 80, at v (“Many of these facilities that are oriented to the national market may not have any prisoners at all from the correctional agencies in the states in which they are located. Indeed, they may have no relationship with the state governments in these states, other than an obligation to pay corporate income taxes. Owners of private property do not need licenses from state correctional agencies to build and operate imprisonment facilities and, until recently, most state legislatures have not established regulatory systems to govern private prison operations.”).

92. *Id.* at 7 (identifying eighty-four privately operated prisons in 1998 which had contracts to house state inmates from a foreign jurisdiction).

93. *E.g.,* Matthew T. Clarke, *Uprisings at CCA Prisons Reveal Weaknesses in Out-of-State Imprisonment Policies*, PRISON LEGAL NEWS, Jan. 2005, at 26.

94. *Id.*; NOLIN RENFROW ET AL., COLO. DEP’T OF CORR., AFTER ACTION REPORT: INMATE RIOT: CROWLEY COUNTY CORRECTIONAL FACILITY, JULY 20, 2004, at 14 (Oct. 1, 2004) (on file with author) [hereafter “CCCF AFTER ACTION REPORT”] (citing “[i]nmates’ allegations of treatment disparity between Colorado inmates and Washington inmates regarding allowable property and food portions” as a contributing factor in the 2004 riot at the CCA-operated Crowley County facility).

pressure confronting states that must resort to the national bed market.<sup>95</sup> The same survey revealed monitoring problems attendant to use of the national market. Survey data show that fifty-two percent of in-state contract facilities are monitored by government staff devoting over eighty hours per month to the facility—with nearly half (forty-eight percent) of these facilities covered by full-time monitors.<sup>96</sup> In contrast, ninety percent of national-market facilities received less than twenty hours of monitoring a month.<sup>97</sup> Moreover, in-state contract monitors were four times as likely to receive job-specific training than those assigned to out-of-state facilities.<sup>98</sup> Predictably, qualitative data from the survey showed that correctional staffers generally perceived service from out-of-state facilities to be of lower quality.<sup>99</sup> Despite the problems inherent in the national market, states with inadequate prison capacity (and a lack of political will to reduce prison populations) are left with no immediate alternative other than seeking beds from this non-traditional market. While utilization of out-of-state beds is more expensive in the long term, it avoids immediate outlays for new prison construction, thus allowing short-term budget balancing.<sup>100</sup>

While the 1998 survey focused on state governments' utilization of out-of-state prisons,<sup>101</sup> the national market has been significantly enhanced through the workings of a federal agency, the Office of the Federal Detention Trustee ("OFDT"). Created in 2000,<sup>102</sup> the OFDT was formed in response to Congressional "concerns about the problem of inadequate planning and management of detention space in the Department of Justice."<sup>103</sup> The House committee report accompanying the enabling legislation anticipated the Office would be given responsibility for "oversight of detention management, as well as improvement and

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95. MCDONALD ET AL., *supra* note 80, at 7, 9 (finding that all national-market contracts examined in the survey charged per diem rates over thirty-five dollars, which exceeded the price charged by fifty-five percent of in-state contracts).

96. *Id.* at 30.

97. *Id.*

98. *Id.*

99. *Id.* at 31 ("Not surprisingly, the most publicly visible troubles in privately operated prisons have occurred most often in these arrangements whereby governments contract with out-of-state facilities to hold prisoners. State contract administrators and monitors also rated their performance below that observed at in-state facilities with which states had (mostly) exclusive relationships. In 38 percent of all contracts or agreements with out-of-state facilities, the monitors or administrators rated the quality of the service as below that of comparable facilities in their own department of correction, compared with 7 percent of the contracts with in-state facilities.")

100. *Id.* at 87.

101. *See id.* at 8 tbl.1.2 (listing ten states that housed inmates in out-of-state facilities as of December 31, 1997).

102. Pub. L. No. 106-553, app. B, 114 Stat. 2762, 2762A-52 (2000).

103. H.R. REP. NO. 106-680, at 13 (2000).

coordination of detention issues” throughout the Department of Justice.<sup>104</sup> As enacted, the bill contained slightly broader language, authorizing the trustee to “exercise all power and functions authorized by law relating to the detention of *Federal prisoners* in non-Federal institutions.”<sup>105</sup> At the time the bill was enacted, all federal non-military prisoners were held by one of three Department of Justice agencies—the Bureau of Prisons (“BOP”), U.S. Marshals Service (“USMS”), or the Immigration and Naturalization Service (“INS”).<sup>106</sup> Because the final language was not limited to the Department of Justice, OFDT has retained power over certain aspects of immigrant detention, even when INS moved to the new Department of Homeland Security.<sup>107</sup> OFDT has changed the dynamics of the modern private prison industry, with many of these changes distorting what little competition existed.<sup>108</sup> OFDT utilizes contractual terms that are unusually favorable to contractors, and its role as a centralized federal procurer of beds on the national market has disadvantaged state governments that depend on private prison capacity.<sup>109</sup>

During its short existence, the OFDT has carried out two types of prison procurement activities: contracting for entire facilities and more piecemeal “bed brokering.”<sup>110</sup> The facility-level contracting—which follows the traditional, dominant mode of state contracting—has provided a new source of revenue for the private prison industry. Ironically, while OFDT has played a crucial role in the constructive federal bailout of the industry, its procurement processes contradict many of the economic arguments in favor of privatization. Industry supporters frequently point to competition as a benefit of correctional outsourcing.<sup>111</sup> OFDT’s procurement practices,

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104. *Id.*

105. Pub. L. No. 106-553, app. B, 114 Stat. 2762, 2762A-52 (emphasis added).

106. Office of the Fed. Det. Tr., U.S. Dep’t of Justice, About OFDT, <http://www.justice.gov/ofdt/about-ofdt.htm> (last visited Jan. 15, 2010).

107. It is not clear, however, whether OFDT exercises any substantial power over Immigration and Customs Enforcement (“ICE”) detention operations. Although OFDT claims to “manage[] all OFDT awarded private facilities providing services to the ICE,” it does not specify how many facilities fall into this category. OFFICE OF THE FED. DET. TR., DETENTION STANDARDS AND COMPLIANCE DIVISION (information brochure), available at <http://www.justice.gov/ofdt/qap-brochure.pdf>. Moreover, OFDT’s description of its “Quality Assurance Review” program specifies that the only Intergovernmental Service Agreement facilities subject to OFDT quality reviews are those that house an average daily population of 500 or more USMS detainees. *Id.*

108. See OFFICE OF THE FED. DET. TR., U.S. DEP’T OF JUSTICE, FINANCING DETENTION FACILITIES 1–2 (2009), available at <http://www.justice.gov/ofdt-handbook-20090422.pdf> [hereinafter FINANCING DETENTION FACILITIES].

109. See *id.* at 2.

110. See *id.* at 61–62.

111. E.g., Ass’n of Private Corr. & Treatment Orgs., Increased Accountability, <http://www.apcto.org/increaseaccountability.html> (last visited Jan. 15, 2010) (“Private operators must . . . [c]ompete to earn the privilege of operating a correctional facility, and then re-bid on a regular basis.”); see also Bruce L. Benson, *Do We Want the Production of Prison Services to be More “Efficient”?*, in CHANGING THE

however, vitiate any pretense of competitive bidding.<sup>112</sup> OFDT frequently issues sole-source contracts for entire facilities.<sup>113</sup> In other cases, OFDT has issued a “sources sought” notice seeking bids, but defined the eligibility requirements so narrowly as to limit the pool of eligible bidders to one company, subsequently announcing a sole-source award.<sup>114</sup> Notably, most of OFDT’s solicitations are limited to bidders with an existing facility—a requirement that not only limits the potential pool of bidders, but also increases the incentive for companies to eschew or terminate state contracts in favor of more lucrative federal contracts.<sup>115</sup>

OFDT’s other major procurement activity is the Detention Services Network (“DSNetwork”), a national online bed-brokering platform which has fused the national private corrections market with advanced information technology.<sup>116</sup> OFDT advertises DSNetwork as “a multifaceted, full-service Internet site to meet all detention service needs.”<sup>117</sup> Other than a

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GUARD: PRIVATE PRISONS AND THE CONTROL OF CRIME 163, 175 (Alexander Tabarrok ed., 2003) (“Private producers cannot simply cut costs by cutting quality and continue to count on an undiminished flow of revenues because consumers will turn to substitutes that are of higher quality for the price or to lower-price substitutes of comparable quality. Thus, competition forces private firms to offer relatively high-quality services at relatively low prices. Technological efficiency results from competitive pressures and from the profit motive.”). Although Benson provided a general discussion of competition, he proceeded to note some ways in which the private prison industry has not, and should not, follow classical economic theory. Benson, *supra* note 111, at 176–77.

112. See FINANCING DETENTION FACILITIES, *supra* note 108, at 61.

113. *E.g.*, Office of Fed. Det. Tr., U.S. Dep’t of Justice, Award for Detention Services in Clayton County, Georgia, Solicitation No. 101507 (Oct. 16, 2007) (awarding sole source contract to GEO Group on behalf of the USMS for a detention facility in Clayton County, Georgia); Office of Fed. Det. Tr., U.S. Dep’t of Justice, Queens/Brooklyn Detention Services, Solicitation No. ODT-7-R-0002 (Jun. 4, 2007) (issuing a non-competitive contract on behalf of the USMS); Office of Fed. Det. Tr., U.S. Dep’t of Justice, Contract Detention Facility, Solicitation No. ODT-USMS-7-0001 (May 18, 2007) (awarding sole source contract to CCA on behalf of the USMS for Pinal County, Arizona detention facility).

114. *Compare* Office of Fed. Det. Tr., U.S. Dep’t of Justice, Comprehensive Secure Detention Services: Sources Sought Notice, Solicitation No. ODT-6-R-0002 (Jan. 6, 2006) (seeking an “existing secured detention facility located within the geographic boundaries of Leavenworth, Kansas with a capacity of not less than 802 beds”), *with* Office of Fed. Det. Tr., U.S. Dep’t of Justice, Contract Detention Center: Presolicitation Notice, Solicitation No. ODT-6-R-0002 (Feb. 8, 2006) (declaring one responsible source and awarding sole-source contract to CCA); *compare* Office of Fed. Det. Tr., U.S. Dep’t of Justice, Contract Detention Facility: Sources Sought Notice, Solicitation No. ODT-USMS-5-0001 (Mar. 30, 2005) (seeking an “existing secured detention facility located within the geographic boundaries of San Diego County, California with a capacity of not less than 700 beds”), *with* Office of Fed. Det. Tr., U.S. Dep’t of Justice, Contract Detention Facility: Presolicitation Notice, Solicitation No. ODT-5-R-0004 (May 10, 2005) (declaring one responsible source and awarding sole-source contract to GEO Group).

115. *E.g.*, Office of Fed. Det. Tr., U.S. Dep’t of Justice, Comprehensive Secure Detention Services: Sources Sought Notice, Solicitation No. ODT-6-R-0002 (Jan. 6, 2006) (seeking an “existing secured detention facility located within the geographic boundaries of Leavenworth, Kansas”); Office of Fed. Det. Tr., U.S. Dep’t of Justice, Contract Detention Facility: Sources Sought Notice, Solicitation No. ODT-USMS-5-0001 (Mar. 30, 2005) (seeking an “existing secured detention facility located within the geographic boundaries of San Diego County, California”).

116. Office of the Fed. Det. Tr., U.S. Dep’t of Justice, DSNetwork, <http://www.justice.gov/ofdt/dsnetwork.htm> (last visited Jan. 15, 2010).

117. OFFICE OF THE FED. DET. TR., DSNETWORK INITIATIVE (information brochure), *available at*



cursory explanation of the features and technology behind DSNetwork, OFDT provides no information on the system, such as the identity of entities providing beds through the system, the number of inmates placed through the system, or the amount of money disbursed for DSNetwork placements.<sup>118</sup> In fact, other than one webpage with USMS statistics,<sup>119</sup> OFDT has released little information about its operations. While OFDT also performs work for the BOP and Immigration and Customs Enforcement (“ICE”), almost all publicly available data concerning the agency’s operations are limited to USMS.<sup>120</sup> The three federal civil detention agencies (BOP, ICE, and USMS) are the only agencies who use DSNetwork to purchase prison beds.<sup>121</sup> Because these federal agencies are generally better funded than state corrections departments, DSNetwork’s facilitation of federal bed procurement runs the risk of applying upward price pressure on state governments in need of immediate bed space. Moreover, because DSNetwork appears to be available to any local government or private agency that wishes to make beds available,<sup>122</sup> it has the potential to radically increase the scope and size of the national bed market.

#### B. The New Growth Market: Immigrant Detention

The Immigration and Naturalization Service (now known as Immigrations and Customs Enforcement (“ICE”)) has always relied heavily on privatized facilities. Not only did INS issue the first modern contract for a privately operated adult correctional facility, but it continues to utilize a growing network of privately operated detention centers.<sup>123</sup> Precise data on ICE privatization is difficult to find. The Bureau of Justice Statistics reported that in 2007, ICE housed 20,711 immigrant detainees in Intergovernmental Service Agreement (“IGSA”) and BOP facilities.<sup>124</sup> While ICE does not regularly publish a list of the IGSA facilities, it did include such a list in a 2008 solicitation for a telecommunications services

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[http://www.usdoj.gov/ofdt/dsn\\_brochure.pdf](http://www.usdoj.gov/ofdt/dsn_brochure.pdf).

118. *See id.*

119. Office of Fed. Det. Tr., U.S. Dep’t of Justice, OFDT Statistics, <http://www.usdoj.gov/ofdt/statistics.htm> (last visited Jan. 15, 2010).

120. *See id.*

121. OFFICE OF THE FED. DET. TR., U.S. DEP’T OF JUSTICE, THE ELECTRONIC BUSINESS PROCESS FOR INTERGOVERNMENTAL AGREEMENTS 6 fig.1 (Oct. 2009).

122. *Id.*

123. Corr. Corp. of Am., Our History, <http://www.correctionscorp.com/about/cca-history/> (last visited Jan. 15, 2010).

124. Heather C. West & William J. Sabol, *Prisoners in 2007*, BUREAU OF JUST. STAT. BULL., Dec. 2008, at 26 app. tbl.18.

contract.<sup>125</sup> The IGSA facilities are mostly county jails, although a few state prisons appear on the list as well.<sup>126</sup> The solicitation separates IGSA facilities into two categories: those which hold detainees for seventy-two hours or less and those which hold for over seventy-two hours.<sup>127</sup> In total, the solicitation lists 206 “Over 72 hours” facilities and 139 “Under 72 hours” facilities, but does not provide information on the total size of each contract.<sup>128</sup> While the majority of ICE detainees are held in IGSA facilities, about one-third are held in ICE facilities.<sup>129</sup> These ICE facilities consist of both contractor-owned-and-operated detention centers, as well as ICE-owned facilities.<sup>130</sup> The ICE website lists eighteen such facilities, of which five are contractor-owned-and-operated.<sup>131</sup> The remaining detention centers listed are owned by ICE, but operated by contractors.<sup>132</sup>

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125. Immigrations and Custom Enforcement, U.S. Dep’t of Homeland Sec., Statement of Objectives, Solicitation No. HSCETE-08-R-00001, at 28–36 (Jan. 3, 2008) (on file with author). The solicitation documents have subsequently been removed from the Federal Business Opportunities website.

126. *Id.*

127. *Id.*

128. *Id.*

129. West & Sabol, *supra* note 124.

130. *Id.*

131. U.S. Immigration and Custom Enforcement, Immigration Detention Facilities, <http://www.ice.gov/pi/dro/facilities.htm> (last visited Jan. 15, 2010). The webpage actually lists 22 facilities, however, one (San Pedro Service Processing Center) is closed, and three (Pinal County Adult Detention Center, Stewart Detention Center, and Willacy County Detention Center) appear to be IGSA facilities. *See id.*

132. *See* Immigrations and Custom Enforcement, U.S. Dep’t of Homeland Sec., Detention Services, Solicitation No. HSCEDM-09-R-00001 (May 29, 2009) (Florence Service Processing Center); Immigrations and Custom Enforcement, U.S. Dep’t of Homeland Sec., Detention Services, Solicitation No. HSCEDM-09-R-00008 (May 22, 2009) (El Centro Service Processing Center); Immigrations and Custom Enforcement, U.S. Dep’t of Homeland Sec., 6-Month Extension of Contract ACD-3-C-0007 for Detention Services at El Paso Service Processing Center, Solicitation No. HSCEDM-08-R-00012 (Aug. 21, 2008) (El Paso Service Processing Center); Immigrations and Custom Enforcement, U.S. Dep’t of Homeland Sec., Detention Services at the Krome Service Processing Center, Solicitation No. HSCEDM-08-R-00009 (Aug. 4, 2008) (Krome Service Processing Center); Immigrations and Custom Enforcement, U.S. Dep’t of Homeland Sec., Detention Services at the Port Isabel Service Processing Center, Solicitation No. HSCEDM-08-R-00007 (Jan. 15, 2008) (Port Isabel Service Processing Center); Immigrations and Custom Enforcement, U.S. Dep’t of Homeland Sec., Transportation & Detention Services, Solicitation No. PRO-8-L011 (Nov. 9, 2007) (Broward Transitional Center); Immigrations and Custom Enforcement, U.S. Dep’t of Homeland Sec., 6-Month Extension of ACB-3-C-0002 for Detention Services at Batavia Service Processing Center, Solicitation No. HSCEDM-08-R-00014 (Aug. 21, 2008) (Batavia Service Processing Center); Immigrations and Custom Enforcement, U.S. Dep’t of Homeland Sec., Aguadilla Detention Support, Solicitation No. HSCEOP-06-R-00012 (Jan. 19, 2007) (Aguadilla Service Processing Center). The remaining four facilities do not have procurement information listed in Federal Business Opportunities. However, two (LaSalle Detention Facility and South Texas Detention Facility) are listed as management contract facilities in Wackenhut/GEO’s annual report. GEO Group, Inc., Annual Report (Form 10-K), at 10, 12 (Feb. 15, 2008). ICE’s website states that the remaining two facilities are operated under contract by CCA (Otay Detention Facility) and Ahtna Technical Services, Inc. (Varick Federal Detention Facility). U.S. Immigration and Customs Enforcement, San Diego Field Office: Otay Detention Facility, <http://www.ice.gov/pi/dro/facilities/otay.htm> (last visited Jan. 15, 2010); U.S. Immigration and Customs Enforcement, New York City Filed Office: Varick Federal Detention Facility,

In August 2009, ICE announced an initiative to reform its immigrant detention operations.<sup>133</sup> Although the proposal is framed in terms of improving conditions of confinement, few details have been provided.<sup>134</sup> Initial information from ICE indicates that the federal government will rely less on IGSA facilities.<sup>135</sup> Nonetheless, total detention population may not change,<sup>136</sup> and ICE does not appear to be questioning the use of private prisons.<sup>137</sup> Indeed, to the extent that detainees are shifted from IGSA detention to contractor-operated facilities, overall revenue to private prison operators may increase.

Although immigrant detention policy necessarily begins with ICE, it does not end there. Perhaps the single greatest salvation of the industry (and certainly of CCA) has been the series of Criminal Alien Requirements (“CARs”) issued by the Federal Bureau of Prisons. Since 1999, the BOP has issued several contracts for privately operated facilities to hold low-security foreign nationals who are serving criminal sentences prior to deportation.<sup>138</sup> There have been a total of twelve solicitations under the CAR series, although the two most recent (CARs 11 and 12) are still pending.<sup>139</sup> Two phases (CARs 3 and 9) were cancelled prior to award.<sup>140</sup>

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<http://www.ice.gov/pi/dro/facilities/varick.htm> (last visited Jan. 15, 2010).

133. U.S. Immigration and Customs Enforcement, 2009 Immigration Detention Reforms (Aug. 6, 2009), [http://www.ice.gov/pi/news/factsheets/2009\\_immigration\\_detention\\_reforms.htm](http://www.ice.gov/pi/news/factsheets/2009_immigration_detention_reforms.htm) (last visited Jan. 15, 2010) [hereinafter 2009 Immigration Detention Reforms].

134. *See id.*

135. *Id.* (describing ICE’s intent to “move away from our present decentralized, jail-oriented approach to a system wholly designed for and based on ICE’s civil detention authorities.”).

136. Nina Bernstein, *U.S. to Overhaul Detention Policy for Immigrants*, N.Y. TIMES, Aug. 6, 2009, at A1 (“Janet Napolitano, the secretary of homeland security, said last week that she expected the number of detainees to stay the same or grow slightly.”).

137. 2009 Immigration Detention Reforms, *supra* note 133 (describing ICE’s plans to increase “direct federal oversight” of privately operated facilities by providing one on-site monitor for each of the twenty-three major contract detention facilities).

138. *See, e.g.*, Fed. Bureau of Prisons, U.S. Dep’t of Justice, Statement of Work, Solicitation No. RFP-PCC-0010 (“CAR-6 RFP”), at 11 (May 26, 2006) (setting “forth the contract requirements for management of a contract correctional institution(s) to accommodate approximately 7,000 beds for a low security adult male population consisting primarily of criminal aliens. The criminal alien population will ordinarily be low security non-U.S. citizen, primarily Mexican, adult males with sixty months or less remaining to serve on their sentences.”).

139. *See infra* notes 140–44 and accompanying text.

140. *See* Notice of Cancellation of Environmental Impact Statement Process: Criminal Alien Requirement Phase III—Arizona and California, 67 Fed. Reg. 31,826 (May 10, 2002) (although the notice references a cancellation notice in *Commerce Business Daily*, this notice, along with many other documents pertaining to the early CARs is no longer available); Fed. Bureau of Prisons, U.S. Dep’t. of Justice, Solicitation No. RFP-PCC-0013, Amendment 12 (Mar. 1, 2010) (cancellation of CAR-9 RFP).

Obtaining salient information about the CAR contracts is extremely difficult.<sup>141</sup> Based on available solicitation documents, the six CAR contracts for non-federal facilities<sup>142</sup> may potentially provide capacity of up to 22,000 beds.<sup>143</sup> Award notices for CAR phases 4 through 10 estimate that the aggregate price for the five contracts, over their respective four-year base periods, will be near \$2.19 billion.<sup>144</sup> BOP's pricing terms are far more favorable to contractors than most state contracts. Most notably, after an introductory period, once facility population exceeds fifty percent of contract capacity, the contractor is paid a fixed monthly operating price for the remainder of the contract term, regardless of actual inmate

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141. The author requested documents pertaining to four CAR contracts under the Freedom of Information Act ("FOIA"). The BOP denied the author's request for a FOIA fee waiver and demanded payment of \$1,642.95 before it would produce the responsive documents. Letter from Wanda M. Hunt, Fed. Bureau of Prisons, to Stephen Raheer (Dec. 2, 2008) (on file with author). The author promptly appealed the fee waiver denial, but the Department of Justice failed to comply with the statutory timeline for administrative adjudication and did not respond to repeated inquiries concerning the status of the appeal. *See infra* note 147147.

142. CAR-7 is excluded from this analysis, as it is a "management only" contract for the federally-owned correctional institution in Taft, California. *See* Fed. Bureau of Prisons, U.S. Dep't of Justice, Solicitation No. PCC-RFP-0011 ("CAR-7 RFP") (Aug. 8, 2006).

143. *See* Fed. Bureau of Prisons, U.S. Dep't of Justice, Solicitation No. RFP-PCC-0012 ("CAR-8 RFP") (Apr. 29, 2008) (seeking approximately 4,000 beds); Fed. Bureau of Prisons, U.S. Dep't of Justice, Solicitation No. RFP-PCC-00010 ("CAR-6 RFP") (May 26, 2006) (seeking approximately 7,000 beds); Fed. Bureau of Prisons, U.S. Dep't of Justice, Solicitation No. RFP-PCC-0009 ("CAR-5 RFP") (Jun. 21, 2005) (seeking approximately 1,200 beds); Fed. Bureau of Prisons, U.S. Dep't of Justice, Solicitation No. RFP-PCC-0008 ("CAR-4 RFP") (Feb. 13, 2004) (seeking approximately 1,000 beds); Fed. Bureau of Prisons, U.S. Dep't of Justice, Solicitation No. RFP-PCC-0006 ("CAR-2 RFP") (Apr. 5, 2000) (seeking approximately 1,500 beds); Fed. Bureau of Prisons, U.S. Dep't of Justice, Solicitation No. RFP-PCC-0005 ("CAR-1 RFP") (Aug. 10, 1999) (seeking up to 7,500 beds). This analysis does not include the two most recent contracts, awarded under CAR-10. These two contracts appear to be replacements for the CAR-1 contracts, which were set to expire in 2010. *See* Fed. Bureau of Prisons, U.S. Dep't. of Justice, Contract Award No. DJB1PC011 (Jan. 12, 2010) (awarding contract to CCA); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1PC012 (Jan. 12, 2010) (awarding contract to Cornell Companies).

144. *See* Fed. Bureau of Prisons, U.S. Dep't. of Justice, Contract Award No. DJB1PC011 (Jan. 12, 2010) (\$306 million contract to CCA for CAR-10); Fed. Bureau of Prisons, U.S. Dept. of Justice, Contract Award No. DJB1PC012 (Jan. 12, 2010) (\$553 million contract to Cornell Companies for CAR-10); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1PC010 (Apr. 1, 2009) (\$226 million contract to CCA for CAR-8); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1BPC009 (Apr. 25, 2007) (\$143 million contract to Management and Training Corp. for CAR-7); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1PC005 (Jan. 17, 2007) (\$119 million contract to CCA for CAR-6); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1PC004 (Jan. 17, 2007) (\$269 million contract to Cornell Companies for CAR-6); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1PC008 (Jan. 17, 2007) (\$63 million contract to LCS Corrections Servs. for CAR-6); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1PC006 (Jan. 17, 2007) (\$122 million contract to Management and Training Corp. for CAR-6); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1PC007 (Jan. 17, 2007) (\$187 million contract to Reeves County, Texas for CAR-6); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1PC003 (May 24, 2006) (\$76 million contract to Reeves County, Texas for CAR-5); Fed. Bureau of Prisons, U.S. Dep't of Justice, Contract Award No. DJB1PC002 (Feb. 13, 2004) (\$129 million contract to CCA for CAR-4).

population.<sup>145</sup> Such payment structures could arguably benefit the contracting agency if consistently high population levels were expected, but the CAR contracts do not even offer this protection to the government, since contractors receive an *additional* “fixed incremental unit price” when inmate population exceeds ninety percent of the contracted capacity.<sup>146</sup> Analyzing the actual budgetary impact of the CAR pricing structure is not possible, since the BOP has refused to release the payment formulae contained in the executed CAR contracts.<sup>147</sup>

Given the favorable terms and pricing structures utilized by the BOP,<sup>148</sup> the CAR contracts are particularly valuable to prison operators. Not only have the CAR awards infused cash into an industry that might otherwise be on the brink of insolvency, but the BOP’s preference for contracting with pre-existing facilities places the agency in a superior competitive position vis-à-vis state corrections departments that are in need of additional prison capacity.<sup>149</sup>

#### IV. EFFECT OF NON-GOVERNMENTAL STATUS

Supporters of privatization frequently cite the industry’s non-governmental status as a benefit, insofar as it allows for “innovation.”<sup>150</sup>

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145. See, e.g., Fed. Bureau of Prisons, U.S. Dep’t of Justice, Contract Award No. DJB1PC003 (May 24, 2006).

146. *Id.*

147. When the author originally requested CAR procurement data from BOP under FOIA, BOP refused to produce the requested documents. See *supra* note 141141. When the author filed suit in U.S. District Court, the BOP provided several operating contracts, but redacted the relevant pricing formulae, saying such information falls within FOIA’s exemption for trade secrets. See Vaughn Index, *Raher v. Fed. Bureau of Prisons*, No. CV-09-526-ST (D. Or., July 23, 2009) (on file with author) (claiming that “[r]elease of such pricing information would cause substantial harm to the competitive position of the submitter [i.e., contractor] on future bidding and would reveal elements crucial in determining the submitters [sic] pricing structure.”).

148. See *supra* notes 109–15 and accompanying text.

149. See *supra* note 115 and accompanying text.

150. Notably, leading privatization supporter Charles Thomas recently admitted that promises of innovation were oversold. See Charles W. Thomas, *Correctional Privatization in America: An Assessment of Its Historical Origins, Present Status, and Future Prospects*, in CHANGING THE GUARD: PRIVATE PRISONS AND THE CONTROL OF CRIME 57, 81–82 (Alexander Tabarrok ed., 2003) (“I expected that the private sector would bring much by way of creativity and innovation to corrections that would then cause the diffusion of innovative approaches to public correctional agencies. I was more wrong than right in this regard. I have seen a great deal of creativity and innovation on the front of facility design and construction as well as in the greater willingness of the private sector to accept technological innovation in, for example, the area of security. Thus far, however, I am unimpressed by the creativity that the private sector has brought to the table in such areas as staffing patterns, performance incentive programs for employees, fringe benefit and retirement programs for employees, and innovative programs for prisoners that include adequately sophisticated measures of in-program and postrelease outcomes.”).

Although this assertion is questionable to begin with,<sup>151</sup> it also fails to take into account the detriments associated with carceral operations by non-governmental entities. The disadvantages of non-governmental prison operations are numerous and varied. This section begins with a general discussion of the problems of prison operators' non-governmental status. It then focuses on the two most prominent issues: liability and public access to information.

At the broadest level of analysis, government outsourcing serves to diffuse state sovereignty. White has framed the problem of prison privatization as representing

neither the straightforward retreat of sovereignty, nor its outright expansion. Rather the private prison is fundamentally premised on a dynamic that combines these tendencies, that seems to represent both the apparent retreat and the advance of the state in the prison context. It is in this sense that private prisons must be understood in terms of the *extension and diffusion* of sovereignty.<sup>152</sup>

In other words, states can expand the prison system (arguably the most extreme use of state's coercive powers) while simultaneously relinquishing government control over many features of the carceral apparatus.<sup>153</sup> As White elaborates, "the juridical structure of the private prison attenuates and ultimately insulates the state from accountability of a more symbolic, political kind. Private prisons tend to distance public officials from responsibility for the way private prisons are run."<sup>154</sup> Although White describes corruption as the most obvious example, he also notes that "the private prison converts the problems of prisons—which are endemic and substantial in every case—into management questions and questions of relative performance, efficiency, contract interpretation, and so forth."<sup>155</sup>

Private prison supporters cite a number of positive performance

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151. See, e.g., AUSTIN & COVENTRY, *supra* note 49, at 37–38 ("[A] coherent theory of why privately operated prisons would outperform public facilities has yet to emerge. Instead, one could argue that the private sector has simply drawn upon the methods used by the public sector with respect to inmate management and staffing and only attempted to reduce the costs associated with that model. In effect, the private sector may be applying a more efficient model that is essentially mimicking the public sector . . . . Should this approach be considered by policymakers, the future of privatization may be very limited as the public sector in turn copies the private sector's methods." (citing Gerald G. Gaes, Scott D. Camp & William G. Saylor, U.S. Bureau of Prisons, *The Performance of Privately Operated Prisons: A Review of Research*, in DOUGLAS McDONALD ET AL., ABT ASSOCS. INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE app. 2, at 31–33 (1998))).

152. White, *supra* note 11, at 137 (emphasis in original).

153. *Id.*

154. *Id.* at 139.

155. *Id.*

evaluations as proof of success.<sup>156</sup> To the extent that supporters admit shortcomings in the industry, they often rationalize failures by claiming that prisons are messy enterprises that will never be perfect.<sup>157</sup> Of course, this argument is not limited to private operators. State corrections officials also seek to explain their failures with similar logic.<sup>158</sup> The diffusion of sovereignty can be illustrated by the different ways in which private and public actors employ these arguments. Using a hypothetical, suppose a concerned party (e.g., a family member of a prisoner, an inmate's attorney, or a policy advocate) identifies a failure within a prison system. The process of ameliorating this failure begins quite similarly whether the prison is publicly or privately operated. Assuming, as is often the case, the concerned party cannot resolve the issue with the corrections department,

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156. E.g., Corr. Corp. of Am., Public-Private Partnership in Corrections: A Series of Evaluation Studies, <http://www.correctionscorp.com/cca-resource-center/research-findings/independent-studies-prison-privatization/> (last visited Jan. 15, 2010) [hereinafter CCA Evaluation Studies]. CCA's webpage of "independent" research prominently features an abstract of a 2007 study by Vanderbilt University professors James F. Blumstein and Mark A. Cohen. *See id.* It does not mention that the research project was funded by CCA and the Association for Private Correctional and Treatment Organizations, a private prison trade organization. *See id.*; James F. Blumstein et al., *Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons*, 15 VA. J. SOC. POL'Y & L. 446, 446 n.\* (2008). The CCA webpage then lists seventeen additional studies purporting to present favorable evidence of correctional privatization. *See* CCA Evaluation Studies, *supra* note 156. Two of the studies are from 1993, before meaningful performance data was available. *See id.* Eight are published by conservative think-tanks who have broad pro-privatization agendas (including three publications from the Reason Public Policy Institute, two chapters from a book published by the Independent Institute, and one publication each from the Rio Grande Foundation and the Alabama Policy Institute). *See id.* Three of the listed publications are not "studies," but rather presentations made by industry advocates to various boards or legislative committees. *See id.* One article is an unsigned student law review note which, although published in a prominent journal, is a discussion of legal theory rather than performance evaluation. *See id.*; *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838 (2002). The remaining three items consist of a 1999 report by the Florida Office of Program Analysis and Government Accountability (which has been followed by several more critical reports), a three page 1997 study of three prisons in Louisiana, and a 1996 article by privatization supporter Charles Logan. *See* CCA Evaluation Studies, *supra* note 156; William G. Archambeault & Donald R. Deis, Jr., *Cost Effectiveness Comparisons of Private Versus Public Prisons in Louisiana: A Comprehensive Analysis of Allen, Avoyelles, and Winn Correctional Centers*, 4 J. OKLA. CRIM. JUST. RES. CONSORTIUM 566 (1997); Fla. Office of Program Policy Analysis & Gov't Accountability, *While DMS Has Improved Monitoring, It Needs to Strengthen Private Prison Oversight and Contracts* (Rep. No. 08-71) (Dec. 2008); Charles H. Logan, *Public vs. Private Prison Management: A Case Comparison*, 21 CRIM. JUST. REV. 62 (1996).

157. *See, e.g.*, Corr. Corp. of Am., Facts vs. Myths, <http://www.thecca360.com/facts.php> (last visited Jan. 15, 2010) ("The nature of the industry means that the potential for incidents and disruptions always exists."). Although this CCA-created webpage declares "as a result of CCA's dedication to safety and continual improvement of services, average rates for violent incidents and escapes at CCA facilities are lower than rates at similar public facilities," CCA provides no substantiating evidence, thus raising questions of data analysis and methodology. *See id.* CCA's unsubstantiated claim is even more suspect in light of Austin and Coventry's data analysis, which found that although for some operations metrics there is not a statistically significant difference between public and private facilities, there is "one major exception: in this comparison [of controlling facility security level], the privately operated facilities have a much higher rate of inmate-on-inmate and inmate-on-staff assaults and other disturbances." AUSTIN & COVENTRY, *supra* note 49, at 52, 57 tbl.20.

158. *See infra* note 160 and accompanying text.

she can raise the issue with the legislature.<sup>159</sup> Often, general apathy toward prison conditions will preclude any meaningful response. But in cases where legislators are motivated to seriously inquire about the operating failure, prison administrators (public or private) will often respond by arguing, in essence, that they have a difficult job which cannot be understood by those outside the corrections profession.<sup>160</sup> After the opening inquiry and response, the argument becomes a garden-variety policy debate—both sides will articulate their own narrative, and the outcome will be determined through the legislative process. If the prison administrator can persuade the legislature that his job is complex and specialized, the status quo will prevail.

The difference between the public and private prison systems comes when the concerned party prevails in her argument. The legislature is able to demand immediate change from a state corrections agency. In contrast, the legislature is constitutionally prohibited from impairing an existing contract with a private operator. Even if the needed change can be accomplished without unconstitutionally impairing the operator's contractual rights, an unwelcome change may provoke the private operator to terminate the contract at the soonest opportunity.<sup>161</sup> Moreover, the legislature must rely on the corrections agency to effectively resolve problems with private operators. This reliance on administrators not only inserts another layer of bureaucracy in an already opaque accountability system, but may ultimately fail to solve problems if the agency is timid in enforcing contractual terms because of a dependency on private-sector capacity.

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159. A party could, in theory, address his concerns directly to a private prison operator, but if the issue is at all serious, the contractor is quite unlikely to negotiate with a private citizen. Contracts and corporate literature are quite clear that private prison operators view their only "customers" as contracting agencies rather than inmates, family members, or policy advocates.

160. This argument has deep historical roots. See Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 151, 152 (Norval Morris & David J. Rothman eds., 1998) (When late nineteenth century prisons devolved into a state of "pervasive overcrowding, corruption, and cruelty . . . [.] Wardens did not so much deny this awful reality as explain it away, attributing most of the blame not to those who administered the system but to those who experienced it."). This dynamic, which implicitly or explicitly blames inmates for the systemic failings of the prison system, can also be seen in the growth of the corrections industry as a "profession" complete with its own vocabulary and framework of technical rationality—tools which help to dehumanize inmates and channel prison employee dissatisfaction by directing it against inmates, politicians, and prisoner rights advocates who "don't understand" the challenges facing the profession. See generally GUY B. ADAMS & DANNY L. BALFOUR, *UNMASKING ADMINISTRATIVE EVIL* (1998).

161. For example, when Nevada Department of Corrections raised concerns about CCA's operations of the Southern Nevada Women's Correctional Center, CCA elected not to renew its contract, citing operating losses. See *Corr. Corp. of Am.*, Annual Report (Form 10-K) (Mar. 7, 2005), at 32.



A recent example of the “prisons are messy” argument and the concomitant muddying of the waters of accountability played out in an eight-year court battle in Texas. While serving a six-month sentence in a Wackenhut-operated prison, Gregorio de la Rosa, Jr. was murdered in a prison yard when two inmates smuggled a weapon out of their housing unit.<sup>162</sup> De la Rosa’s estate argued that Wackenhut was negligent because it failed to search the attackers when they left their housing unit, as required by Texas prison regulations.<sup>163</sup> The jury found Wackenhut negligent, but the company appealed, saying the verdict could not stand because it was not supported by expert testimony.<sup>164</sup> The court “disagreed that specialized knowledge was required to show [it] had a duty to search the inmates passing through the crash gate or that the failure to search the inmates violated this duty.”<sup>165</sup> The Texas Court of Appeals ruled against Wackenhut, noting that the company had not cited a single relevant case to support its argument.<sup>166</sup>

The de la Rosa case shows that the “prisons are messy” argument does not always prevail. Indeed, due to the particularly egregious facts of de la Rosa’s murder, it is not entirely surprising that the jury overcame any potential bias based on de la Rosa’s status as a prisoner.<sup>167</sup> Given the weakness of Wackenhut’s legal arguments, it is also unsurprising that the company lost on appeal.<sup>168</sup> Nonetheless, the same arguments may well have prevailed in a legislative venue, where the focus is on generally applicable policy, not vindicating the rights of an individual crime victim. Moreover, unlike an appellate court, legislators are overtly guided by value judgments, such as legitimate policy beliefs (e.g., an inherent bias in favor of outsourcing), and less principled factors, such as campaign contributions.

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162. Wackenhut Corr. Corp. v. de la Rosa, No. 13-06-00692-CV, 2009 WL 866791, at \*1–2 (Tex. App. Apr. 2, 2009).

163. *Id.* Wackenhut conceded that it was obligated to comply with a state regulation that stated, “The officer *shall* conduct pat-searches of inmates before permitting entrance or exit to or from any department within the area of responsibility.” *Id.* at \*1 (emphasis in original). But, Wackenhut argued that its employee’s failure to search the attackers did not violate the policy because the housing unit did not constitute a “department.” Brief of Appellant at 32, Wackenhut Corr. Corp. v. de la Rosa, No. 13-06-00692-CV, 2009 WL 866791 (Tex. App. Apr. 2, 2009) [hereafter Wackenhut Appellant Brief].

164. Wackenhut Appellant Brief, *supra* note 163, at 26 (“In this case, proof of negligence required expert testimony. Expert testimony in a prison case is essential to support a claim because jurors are not familiar with what is reasonable care in a prison environment.”).

165. Wackenhut Corr. Corp. v. de la Rosa, No. 13-06-00692-CV, 2009 WL 866791, at \*21 (Tex. App. Apr. 2, 2009).

166. *Id.* at \*21 n.33.

167. *Id.* at \*1 (“A few days before his expected release, Gregorio was beaten to death by two other inmates using a lock tied to a sock, while Wackenhut’s officers stood by and watched and Wackenhut’s wardens smirked and laughed.”).

168. *See supra* note 166 and accompanying text.

An example of legislative acquiescence to industry arguments can be found in the 2008 Congressional hearings concerning the Private Prison Information Act.<sup>169</sup> Tom Jawetz, an ACLU staff attorney, testified concerning the need for increased public access to information on private prison operations.<sup>170</sup> While raising doubts about Jawetz's credibility, Representative Louie Gohmert (R-TX) asked him if he had ever requested a tour of a private prison.<sup>171</sup> When Jawetz replied that a two-hour tour does not give the visitor a comprehensive picture of facility operations, Gohmert flippantly replied, "Well, there is a way to have an opportunity to live in a facility."<sup>172</sup> Most importantly, Gohmert's colloquy misses Jawetz's point. Jawetz testified that he *had* taken a tour of the Willacy County Detention Center operated by Management and Training Corporation ("MTC") and noted substandard housing conditions, but could not use the Freedom of Information Act to access MTC's records pertaining to maintenance of the housing units because the records were not held by a federal agency.<sup>173</sup>

While cases such as the de la Rosa murder show that serious operating failures can be addressed by courts, in reality inmate access to courts is curtailed by judicial doctrine and the PLRA.<sup>174</sup> In addition, interested parties outside the prison system typically do not have standing to challenge prison operations in court.<sup>175</sup> Thus, many legitimate concerns that do not involve the loss of life or limb must be raised with non-judicial oversight bodies, usually legislatures. When prison operators are able to diffuse legislative attention by arguing that the only appropriate remedy is through contract procedures or renegotiation (which are less public processes than legislation), the state's control of its carceral apparatus is diminished.

On a more practical level, outsourcing is an effective way for governments to evade numerous generally applicable accountability measures. The most prominent such evasion in the realm of federal correctional outsourcing has been avoidance of environmental planning laws. As a general rule, contractors are subject to the National Environmental Policy Act ("NEPA") when constructing a prison destined for use under a federal contract.<sup>176</sup> The federal government's recent habit of

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169. See *infra* notes 205–16 and accompanying text.

170. *Private Prison Information Act of 2007 (Part II): Hearing before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 190 (2008), at 65 (testimony of Tom Jawetz, Immigration Det. Staff Attorney, Am Civil Liberties Union Nat'l Prison Project) [hereafter H.R. 1889 Part II Hearing].

171. *Id.*

172. *Id.* at 66.

173. *Id.* at 56.

174. See *supra* notes 66–68 and accompanying text.

175. See, e.g., *Darring v. Kincheloe*, 783 F.2d 874, 877–78 (9th Cir. 1986).

176. 42 U.S.C. §§ 4321–4370f (2006).

contracting with pre-existing facilities avoids the meaningful application of NEPA since there is no federal nexus at the time of construction.<sup>177</sup> The interest of contractors and the federal government in avoiding NEPA is more than theoretical. Federal courts have held that one purpose of NEPA is to ensure public participation in the planning process—a goal in direct conflict with prison-planners’ objective of “managing” public opposition.<sup>178</sup>

While private prison companies’ non-governmental status can be exploited in numerous ways, two particularly salient areas are considered in the following sections. First is a discussion of contractor liability for violations of inmates’ civil rights. Second is an exploration of the problems concerning public access to information regarding private prison operations.

### A. Liability

Questions of liability largely center around allocating the risk for contractor violations of inmate civil rights. In the early stages of the twentieth century prison privatization movement, many issues of contractor liability implicated unsettled areas of the law. In 1988, the Supreme Court issued its first ruling addressing the liability of contractors in the prison system.<sup>179</sup> In *West v. Atkins*, the Court held that a contract physician performing work in a state prison system acted under color of state law and was thus amenable to suit under section 1983 for alleged violations of an inmate’s Eighth Amendment rights.<sup>180</sup> This rule has subsequently been applied several times to allow section 1983 suits against private prison operators.<sup>181</sup> The *West* holding provided some encouragement to prisoner

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177. *See, e.g.*, *City of Highland Park v. Train*, 519 F.2d 681, 695 (7th Cir. 1975); *Citizens Alert Regarding the Env’t v. EPA*, 259 F. Supp. 2d 9, 16–17 (D.D.C. 2003) (holding that the possibility of future federal funding of a project is not sufficient to make NEPA applicable).

178. *E.g.*, *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1029 (2d Cir. 1983); *Env’t. Defense Fund, Inc. v. Stamm*, 430 F. Supp. 664, 667 (N.D. Cal. 1977); *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F. Supp. 908, 922 (D. Or. 1977); NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, AN INFORMATION BRIEF: ISSUES IN SITING CORRECTIONAL FACILITIES iv (1992) (“We must learn better ways to manage public opposition because we can expect that the future will hold more, not fewer, decisions about where to locate correctional facilities.”).

179. *West v. Atkins*, 487 U.S. 42, 54 (1988).

180. *Id.* (“Respondent, as a physician employed by North Carolina to provide medical services to state prison inmates, acted under color of state law for purposes of § 1983 when undertaking his duties in treating petitioner’s injury. Such conduct is fairly attributable to the State.”).

181. *E.g.*, *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (per curiam) (holding that a corporation operating a prison under a contract with Texas was performing a public function and thus was subject to the limitations of the Eighth Amendment); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 550–51 (5th Cir. 2005) (implying approval of defendant prison corporation’s concession that it acts under color of state law when providing juvenile correctional services, but holding that defendant was *not* a state actor when making personnel decisions). *But see* *Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (declining to rule on whether a private prison corporation was acting under color of state law for purposes of a prisoner’s section 1983 suit); *George v. Pac.-CSC Work*

rights advocates, since section 1983 is an important mechanism for vindicating inmates' constitutional rights. Because a section 1983 action may only be brought against a person acting under color of state law,<sup>182</sup> the *West* holding was a necessary step in clarifying the applicability of section 1983 to private contractors in a correctional system.

Once the Court had established the applicability of section 1983 to corrections contractors, the next major question was whether a contractor was entitled to the defense of qualified immunity.<sup>183</sup> The Supreme Court addressed this question in *Richardson v. McKnight* and held that prison guards employed by CCA could not raise a qualified immunity defense against a prisoner's section 1983 suit for personal injuries.<sup>184</sup> Although *Richardson* increased the potential accountability of private prison operators, its enduring effect is somewhat uncertain for two reasons. First, the Court's holding relied at least in part on a finding that CCA's operations were not heavily supervised by the State.<sup>185</sup> Thus, it is unclear whether the same result would follow in a state with a more aggressive monitoring program. Second, four justices (three of whom are still on the Court) dissented from the *Richardson* holding, citing both legal and policy objections.<sup>186</sup>

Today's confused jurisprudence regarding section 1983 and private prisons raises important fiscal questions. The government-supervision factor articulated in *Richardson* presents an uncertain relationship with vicarious liability in the context of section 1983.<sup>187</sup> It is settled law that the doctrine of respondeat superior does not apply to section 1983 actions.<sup>188</sup> Accordingly, a prisoner bringing a section 1983 claim against corrections

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Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996) ("An entity may be a state actor for some purposes but not for others.").

182. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999).

183. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("The conception animating the qualified immunity doctrine . . . is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences.'" (internal citation omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982))).

184. 521 U.S. 399, 401–02 (1997).

185. *Id.* at 409 ("The firm is systematically organized to perform a major administrative task for profit. It performs that task independently, with relatively less ongoing direct state supervision." (internal citations omitted)).

186. *Id.* at 414, 422–23 (Scalia, J., dissenting) ("Today's decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners . . . are to be treated quite differently in the matter of their financial liability. The only sure effect of today's decision—and the only purpose, as far as I can tell—is that it will artificially raise the cost of privatizing prisons . . . . Neither our precedent, nor the historical foundations of § 1983, nor the policies underlying § 1983, support this result.").

187. *See supra* note 185 and accompanying text.

188. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981).

officials must prove that the defendants had personal involvement in the alleged deprivation of rights.<sup>189</sup> But courts have not specified how *Richardson's* supervision factor interfaces with the respondeat superior doctrine. In other words, if state supervision is not sufficient to allow a contractor to raise a qualified immunity defense, might a state monitoring employee nonetheless have enough personal involvement in a deprivation of rights to impose liability? The outcome is fiscally important, since most government agencies voluntarily indemnify employees against section 1983 judgments. Thus, if a contractor and government supervisor can both be held liable, the government may have to pay the employee's judgment (through indemnification) and the contractor's judgment (by means of passed-through costs in future rate adjustments).

Ultimately, the application of section 1983 to private prisons presents a policy paradox. If private operators are more susceptible to liability than their state counterparts (under continued adherence to *Richardson*), then the increased costs will presumably be passed on to contracting agencies, thus raising the fiscal burden of privatization. On the other hand, if the courts equalize treatment of public and private prisons, contractors will have reduced incentive to improve conditions (and correspondingly reduce profit margins) in an effort to avoid section 1983 liability.

#### B. Public Access to Information

Another problematic aspect of prison privatization is the extent to which outsourcing obscures public understanding of prison operations. At the same time private prison operators defend their track record, they obstruct evidence-based counterarguments by shielding important operating information from public disclosure.<sup>190</sup> As a general matter, federal and state statutes mandating disclosure of government records frequently provide protections for information relating to contractor activities—either through express disclosure exemptions for trade secrets or judicial doctrines holding disclosure laws inapplicable to records in possession of a contractor.<sup>191</sup> These protections are often based on the premise that contractors provide specialized services to the government as part of a larger business model.<sup>192</sup>

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189. *See, e.g.*, *Schnitzler v. Reisch*, 518 F. Supp. 2d 1098, 1114 (D.S.D. 2007) (denying defendant's motion for summary judgment because alleged involvement of the Warden and Corrections Department Secretary in programming decision raised material issue of fact).

190. *See* Melanie Bengston, *Legislation, Lawsuits Seek to Shine Light on Private Prisons*, PRISON LEGAL NEWS, July 21, 2008, [https://www.prisonlegalnews.org/\(S\(btvxax45gubnpb55vkwsfq45\)\)/191\\_displayNews.aspx](https://www.prisonlegalnews.org/(S(btvxax45gubnpb55vkwsfq45))/191_displayNews.aspx) (last visited Jan. 15, 2010).

191. *E.g.*, 5 U.S.C. § 552(b)(4) (2006).

192. U.S. Dep't of Justice, Freedom of Information Act Guide: Exemption 4 (May 2004),

For example, if a hypothetical aviation manufacturer, AirCo, was forced to disclose information about its design process simply because it sold planes to the government, the company would risk revealing trade secrets and would be at a competitive disadvantage solely because the government happened to be among its customers. Such disclosure would not only harm AirCo, but this disadvantage would distort the entire market, thus imposing spill-over effects on all participants. This logic does not apply easily in the realm of private prisons.

Governments are the *only* customers of private prison operators. Thus, the only private parties harmed by mandated disclosure are the contractors themselves. Moreover, there are no substantial trade secrets in the private prison industry. A trade secret can consist of “any information that can be used in the operation of a business... that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”<sup>193</sup> However, the term most commonly applies to formulas, patterns, data compilations, computer programs, devices, methods, techniques, or processes.<sup>194</sup> Although private prison operators likely employ methods and processes in the conduct of their business (e.g., operating procedures and educational programs), such information is only entitled to trade secret protection if it is valuable, secret, and definite.<sup>195</sup> Notably, information does not qualify as a trade secret if it is “generally known or readily ascertainable through proper means... by others to whom it has potential economic value....”<sup>196</sup>

The ill fit between trade secrets law and private prisons can be illustrated through an example. Private prison operators typically assert a proprietary interest in facility staffing plans.<sup>197</sup> Case law is not entirely clear whether such information is eligible for trade secret protection as a matter of law.<sup>198</sup> But assuming for purposes of argument that government contractors’

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<http://www.justice.gov/oip/exemption4.htm> (last visited Jan. 15, 2010).

193. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1993).

194. *See id.* § 39 cmt. d.

195. *See id.*

196. *Id.* § 39 cmt. f.

197. *See, e.g.*, Aff. of Ron Maddux, Vice President Project Dev., GEO Group, Inc. (Mar. 20, 2009) (on file with author) (requesting that the Florida Department of Management Services invoke trade secret exemption from disclosure of the following documents submitted as part of GEO’s response to Invitation to Negotiate DMS 08/09-077 (Operation and Management of South Bay Correctional Facility): federal facility performance review reports; unannounced security audit reports; letters of reference; lists of contract values and per diem information for existing contracts; listings of previous lawsuits, prior contracts, and facility disturbances; facility staffing requirements; job descriptions; and lists of salary ranges).

198. *E.g.*, *E. T. Moye v. Eure*, 204 S.E.2d 221, 223–24 (N.C. Ct. App. 1974) (indicating that list of plaintiff’s sales personnel does not qualify as trade secret); *Finish Line, Inc. v. Foot Locker, Inc.*, No. 1:04CV877RLYWTL, 2006 WL 146633, at \*8 (S.D. Ind. Jan. 18, 2006) (holding list of contact information for plaintiff’s district managers not eligible for trade secret protection).

staffing plans are protected, the AirCo hypothetical again illustrates the policy justification for such protection. A party concerned with the quality of products being sold by AirCo to the government would not usually have a need for AirCo's personnel data. Potential problems with AirCo's planes can be determined by examining the product itself, and whether the plane is manufactured by ten employees or a hundred employees is not material. In the case of a privately operated prison, however, facility staffing *is* the object of the government procurement. Thus, shielding such information under a claim of trade secret protection unnecessarily hinders independent evaluation of whether the government has received a fair bargain under the contract. Moreover, without access to a contractor's proposed staffing plan, interested parties have no way of knowing whether the supervising agency is vigorously enforcing the terms of its contract.

To the extent that private prison operators do have a proprietary interest in operational data, this private interest is almost always outweighed by public disclosure, except in cases of bona fide sensitive security information (e.g., facility architectural drawings). Scholarly research on the efficacy of private prisons has been hampered by a lack of reliable data. To the extent that such data is kept secret due to the inapplicability of public records statutes to private contractors, policy-makers will never receive adequate information to determine the operational success or failure of the prison privatization experiment.

Access to federal records is governed by the Freedom of Information Act ("FOIA").<sup>199</sup> Commentators have long noted that FOIA raises serious questions vis-à-vis private prison operators.<sup>200</sup> Although FOIA presumptively requires disclosure of records actually held by the contracting agency,<sup>201</sup> federal agencies that contract with private prisons may receive summarized reports which misrepresent the underlying data.<sup>202</sup>

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199. 5 U.S.C. § 552 (2006).

200. *E.g.*, United Techns. Corp., Pratt & Whitney Aircraft Group v. Marshall, 464 F. Supp. 845, 847-48 (1979) (finding that government contractor could not prevent defendant federal agency from releasing, under FOIA, a mandatory annual statistical report the contractor had submitted to defendant pursuant to procurement regulations); Malcolm Russell-Einhorn, *Legal Issues Relevant to Private Prisons*, in DOUGLAS McDONALD ET AL., ABT ASSOCS. INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE app. 3, at 37-38 (1998).

201. Russell-Einhorn, *supra* note 200, at 37.

202. *See, e.g.*, Getahn Ward & Bill Theobald, *Ex-CCA Official: Puryear Misled Clients*, TENNESSEAN (Nashville), Mar. 14, 2008; Adam Zagorin, *Scrutiny for a Bush Judicial Nominee*, TIME.COM, Mar. 13, 2008, <http://www.time.com/time/printout/0,8816,1722065,00.html> (last visited Jan. 15, 2010) (reporting allegations of Ronald Jones, a former CCA employee, who claimed he was required to manipulate operational data so as to withhold damaging information from contracting agencies). Although CCA issued a vehement denial, the company has never denied Jones' allegation that the company keeps different sets of self-monitoring data, only some of which is made available to contracting agencies in the ordinary course of business. *See* Corr. Corp. of Am., Letter to Customers (Form 8-K), Exhibit 99.1 (Mar. 17, 2008).

When critical information is held by the contractor and not the supervising agency, FOIA is likely not applicable.<sup>203</sup> Although no court has ruled on this question in the context of private prisons, the District of Columbia Circuit has held as a general matter that a government contractor (even one exercising an adjudicatory function under “detailed government control”) is not an “agency” for purposes of FOIA.<sup>204</sup>

In 2007, Representative Tim Holden (D-PA) introduced House Bill 1889, which would have made FOIA applicable to entities operating prisons under contract with the federal government.<sup>205</sup> The House Subcommittee on Crime, Terrorism, and Homeland Security initially held a hearing on House Bill 1889 on November 8, 2007, at which Representative Holden cited problems with escapes and inmate assaults at CCA’s Northeast Ohio Correctional Center (“NOCC”).<sup>206</sup> Although the NOCC operated under federal contract, CCA did not submit any operational reports to federal agencies so there was no meaningful information accessible to FOIA requesters.<sup>207</sup> According to Representative Holden’s testimony, state legislators and the media had been unsuccessful in obtaining information on the problems occurring at the NOCC.<sup>208</sup> As Subcommittee Chairman Bobby Scott (D-VA) later explained, House Bill 1889 appeared uncontroversial at the time of the November 2007 hearing.<sup>209</sup> Soon after the hearing, however, CCA contacted subcommittee staff “to express its strong opposition to the legislation and question the necessity of the bill.”<sup>210</sup>

Due to CCA’s opposition, Chairman Scott held a second hearing on June 26, 2008.<sup>211</sup> Although CCA declined to testify at the hearing, it submitted a written statement calling House Bill 1889 “a solution in search of a problem.”<sup>212</sup> In its statement, CCA claimed that government oversight is sufficient to allay any problems with access to information and cited one isolated example of a FOIA requester being able to obtain facility reports from the contracting agency.<sup>213</sup> In addition to its own in-house lobbying

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203. Russell-Einhorn, *supra* note 200, at 37.

204. *Wolfe v. Dep’t of Health & Human Servs.*, 711 F.2d 1077, 1078 (D.C. Cir. 1983).

205. Private Prison Information Act of 2007, H.R. 1889, 110th Cong. § 2 (2007).

206. *Private Prison Information Act of 2007 (Part I): Hearing before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 62 (2007), at 6 (testimony of Rep. Tim Holden).

207. *Id.*

208. *Id.*

209. H.R. 1889 Part II Hearing, *supra* note 170, at 1 (statement of Rep. Bobby Scott, Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec.).

210. *Id.*

211. *Id.* at 1–2.

212. *Id.* at 3 (statement of Corr. Corp. of Am.).

213. *Id.* at 4. CCA’s argument does not address the problem of contractors providing insufficient information to the supervisory agency. See *supra* note 202 and accompanying text.



efforts, CCA employed three lobbying firms in its fight against House Bill 1889.<sup>214</sup> Moreover, the Reason Foundation (a conservative think-tank) testified against House Bill 1889 at the 2008 hearing, and the U.S. Department of Justice expressed concerns about the bill's potential costs.<sup>215</sup> The committee took no action on House Bill 1889.<sup>216</sup>

Of course FOIA is only part of the access to information debate, since many private prison contracts are with state and local governments, thus implicating state open records statutes.<sup>217</sup> While state statutes generally do not, on their face, apply to contractor records, some courts have recognized the unique status of private entities which are the functional equivalents of state agencies.<sup>218</sup>

Not surprisingly, CCA also vocally opposes the application of state open records law to private prison operators. In 2009, a Tennessee trial court held that CCA was the functional equivalent of a state agency and was required to fulfill a request for records under Tennessee's Public Records Act.<sup>219</sup> In reaching its decision, the trial court relied on Tennessee's functional equivalency test, articulated in *Memphis Publishing Co. v. Cherokee Children & Family Services*.<sup>220</sup> Stating that privatization should not act to curtail access to information on government operations,<sup>221</sup> the *Cherokee* court established a four-factor test to determine functional

214. See Akin, Gump, Strauss, Hauer & Feld, Lobbying Report (2008) (reporting H.R. 1889 lobbying on behalf of CCA) (on file with author); McBee Strategic Consulting, LLC, Lobbying Report (2008) (reporting H.R. 1889 lobbying on behalf of CCA) (on file with author); Podesta Group, Inc., Lobbying Report (2008) (reporting H.R. 1889 lobbying on behalf of CCA) (on file with author).

215. H.R. 1889 Part II Hearing, *supra* note 170, at 11–12 (testimony of Michael Flynn, Dir. of Gov't Affairs, Reason Found.); *Id.* at 68–69 (Letter from Keith B. Nelson, Principal Deputy Assistant Attorney Gen., to Rep. Howard Coble, Member, Subcomm. on Crime, Terrorism, and Homeland Sec.).

216. See Govtrack.us, H.R. 1889: Private Prison Information Act of 2007, <http://www.govtrack.us/congress/bill.xpd?bill=h110-1889> (last visited Jan. 15, 2010).

217. See Scott D. Camp & Gerald G. Gaes, *Growth and Quality of U.S. Private Prisons: Evidence from a National Survey*, 1 CRIMINOLOGY & PUB. POL'Y 427, 429 (2002).

218. *E.g.*, State *ex rel.* Oriana House, Inc. v. Montgomery, 854 N.E.2d 193, 198–202 (Ohio 2006) (holding that private entities that are functionally equivalent to state agencies are subject to Ohio's Public Records Act but also concluding that a private non-profit organization operating a halfway house did not meet the functional equivalency test). This does not, however, necessarily lead to the conclusion that private prisons meet the functional equivalency test in all situations. *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996).

219. *Friedmann v. Corr. Corp. of Am.*, No. M2008-01998-COA-R3-CV, 2009 WL 3131610, at \*1 (Tenn. Ct. App. Sept. 16, 2009).

220. *Id.* at \*5 (citing *Memphis Publ'g Co. v. Cherokee Children & Family Servs, Inc.*, 87 S.W.3d 67, 78–79 (Tenn. 2002)).

221. *Cherokee Children & Family Servs, Inc.*, 87 S.W.3d at 77 (“Privatization may be desirable in itself, but it should not come without . . . leaving public accountability intact. Not only should the public be able to monitor the private company's activities, but the monitoring should be on the same terms as when the public agency was the information vendor.” (quoting Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information under State Law*, 27 FLA. ST. U. L. REV. 825, 833 (2000))).

equivalency.<sup>222</sup> The first, “cornerstone” factor is “whether and to what extent the entity [e.g., a contractor] performs a governmental or public function....”<sup>223</sup> The remaining three factors are the level of government funding of the private entity, the extent of governmental control over the entity, and whether the entity was created by legislative action.<sup>224</sup>

Although the trial court admitted the fourth *Cherokee* factor weighed against a finding of functional equivalency, it found that the remaining three factors all favored subjecting CCA to the Public Records Act.<sup>225</sup> Not surprisingly, CCA appealed the decision, advancing several counterintuitive arguments.<sup>226</sup> For example, when addressing the first *Cherokee* factor (the cornerstone governmental function test), CCA cited Tennessee’s eighteenth- and nineteenth-century history of privately operated prisons as grounds for concluding it does not perform a governmental function.<sup>227</sup> While CCA’s argument is historically interesting, it disregards the last 150 years of changes in correctional administration and the relevant statutory language.<sup>228</sup> Even more incredibly, CCA addressed the second *Cherokee* factor (the level of government funding) by arguing it receives *no* funding from the State of Tennessee.<sup>229</sup> Despite the fact that *Cherokee* itself involved a private entity operating under a contract with the State,<sup>230</sup> CCA argues that its revenue from the State constitutes payment for services, not “funding.”<sup>231</sup>

Despite its efforts to overcome the *Cherokee* test, CCA did not persuade the Tennessee Court of Appeals. In holding that CCA performs tasks

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222. *Id.* at 79.

223. *Id.*

224. *Id.*

225. *Friedmann v. Corr. Corp. of Am.*, No. M2008-01998-COA-R3-CV, 2009 WL 3131610, at \*4–6 (Tenn. Ct. App. Sept. 16, 2009).

226. *Id.* at \*1.

227. Brief of Appellant at 24–32, *Friedmann v. Corr. Corp. of Am.*, No. M2008-01998-COA-R3-CV, 2009 WL 3131610 (Tenn. Ct. App. Sept. 16, 2009) [hereinafter CCA Appellant Brief].

228. The *Cherokee* court explained the purpose of the first factor as “ensur[ing] that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity.” *Memphis Publ’g Co. v. Cherokee Children & Family Servs, Inc.*, 87 S.W.3d 67, 79 (Tenn. 2002). Accordingly, the focus of the analysis is properly on the government agency’s responsibilities at the time of contracting, not 150 years in the past. Regardless of CCA’s characterization of historical correctional practices, it is unquestioned that the twenty-first century corrections system in Tennessee is the sole responsibility of government.

229. CCA Appellant Brief, *supra* note 227, at 32.

230. *Cherokee Children & Family Servs, Inc.*, 87 S.W.3d at 79.

231. CCA Appellant Brief, *supra* note 227, at 32–36. CCA’s position seems to misinterpret *Cherokee*, which focused on the extent, not the nature of government funding. *Cherokee Children & Family Servs, Inc.*, 87 S.W.3d at 79. *Cherokee* held that Cherokee Children & Family Services met the government funding factor because “over ninety-nine percent of its funding came from governmental sources.” *Id.* This standard presumably covers CCA, a company that candidly admits it is “dependent on government appropriations.” *Corr. Corp. of Am.*, Annual Report (Form 10-K) at 21 (Feb. 25, 2009).

functionally equivalent to the state, the court noted that “[w]ith all due respect to CCA, this Court is at a loss as to how operating a state prison could be considered anything less than a government function.”<sup>232</sup> Nonetheless, although the court declared “without difficulty” that CCA falls within *Cherokee*’s functional equivalency test,<sup>233</sup> the practical impact of the ruling remains in doubt for two reasons. First, although CCA operates several facilities in Tennessee, only one is operated under a direct contract with the State.<sup>234</sup> Thus, the functional equivalency determination for purposes of Tennessee’s Public Records Act applies only to the South Central Correctional Center.<sup>235</sup> Second, the court’s opinion interprets Tennessee’s prison privatization statute in such a way as to severely limit the applicability of the holding.<sup>236</sup> CCA contended that Tennessee’s Private Prison Contracting Act of 1986 (“PPCA”) was the operative law for purposes of information disclosure.<sup>237</sup> In particular, CCA argued that their obligation to disclose information is limited to a narrow category of inmate records.<sup>238</sup> The Court of Appeals adopted CCA’s position, stating that the inmate records provision of the PPCA controls, rather than the more general and expansive requirements of the Public Records Act.<sup>239</sup> Thus, according to the court’s reasoning, imposing the entire Public Records Act on CCA (via *Cherokee*) would render the PPCA’s provision regarding inmate records superfluous.<sup>240</sup> Not only does this ruling sustain CCA’s ability to hinder public understanding of its operations in Tennessee, but the court’s method of statutory interpretation is questionable.

The court writes that the inmate records disclosure provision in the PPCA must be interpreted *in pari materia* with the Public Records Act, so as to give meaning to all parts of the respective statutes.<sup>241</sup> The Public Records Act applies only to records held by public entities “unless otherwise provided by state law.”<sup>242</sup> The court reasons that the PPCA is

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232. *Friedmann v. Corr. Corp. of Am.*, No. M2008-01998-COA-R3-CV, 2009 WL 3131610, at \*8 (Tenn. Ct. App. Sept. 16, 2009).

233. *Id.*

234. *Id.* at \*7.

235. *Id.* at \*7, 11.

236. *Id.* at \*10.

237. CCA Appellant Brief, *supra* note 227, at 48–49.

238. *Id.* at 47; *see* TENN. CODE ANN. § 41-24-117 (2006) (“The records and other documents concerning any inmate who is sentenced to the custody of the department of correction and is being housed in a prison or facility operated by a private prison contractor shall be public records to the same extent such records are public if an inmate is being housed in a department of correction facility.”).

239. *Friedmann v. Corr. Corp. of Am.*, No. M2008-01998-COA-R3-CV, 2009 WL 3131610, at \*10 (Tenn. Ct. App. Sept. 16, 2009).

240. *Id.*

241. *Id.* at \*9 (quoting *In re Estate of Nelson*, No. W2006-00030-COA-R3-CV, 2007 WL 851265, at \*10 (Tenn. Ct. App. Mar 22, 2007)).

242. TENN. CODE ANN. § 10-7-503(a)(2)(A) (2009).

such a law that provides otherwise by limiting disclosure only to certain inmate records.<sup>243</sup> The problem with this construction is that it ignores the chronology of Tennessee law. The PPCA was enacted in 1986, sixteen years before *Cherokee* was decided.<sup>244</sup> Thus, at the time of the PPCA's enactment, CCA would clearly have been under no duty to disclose information under the Public Records Act, and the inmate records provision simply clarified the treatment of a certain category of records.

Moreover, the court's contention that the two statutes are *in pari materia* is questionable from the outset. Typically, statutes are considered *in pari materia* if they "have the same purpose or object."<sup>245</sup> In addition, "[t]he rule of *in pari materia* is generally used when there is some doubt or ambiguity in the wording of the statute under consideration."<sup>246</sup> Because there is no ambiguity in either statute, nor are the two statutes inherently contradictory,<sup>247</sup> the court's use of the PPCA to carve out an exception to *Cherokee* is misguided. Given the lack of any preemptive language in the PPCA's inmate records provision and given the general rule that statutes regulating public affairs should be liberally construed in favor of public disclosure,<sup>248</sup> *Friedmann* should be reconsidered by the Tennessee Supreme Court.

The impact of reduced access to information is ubiquitous in the private corrections industry. Private prison operators are exceedingly protective of information regarding their operations, thus making informed analysis of the policy successes (or failures) of correctional privatization difficult to conduct. One recurring issue in this context is data on personnel recruitment and retention.<sup>249</sup> This is an area in which federal and state contracts differ markedly. Federal contracts for private prisons are generally covered by the provisions of the Service Contract Act of 1965,<sup>250</sup> which requires contractors to pay wages at least equal to the local prevailing wage for same job class.<sup>251</sup> Thus, once a bidder identifies the location of its proposed facility, the contracting agency provides the minimum wages,<sup>252</sup>

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243. *Friedmann v. Corr. Corp. of Am.*, No. M2008-01998-COA-R3-CV, 2009 WL 3131610, at \*10 (Tenn. Ct. App. Sept. 16, 2009).

244. Private Prison Contracting Act of 1986, 1986 Tenn. Pub. Acts, ch. 932, § 1; *Memphis Publ'g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67 (Tenn. 2002).

245. 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51:3 (7th ed. 2008).

246. *Id.*

247. TENN. CODE ANN. § 10-7-503 (1999); TENN. CODE ANN. § 41-24-117 (2006).

248. 3A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 73:10 (6th ed. 2003).

249. *See infra* notes 250–65.

250. 41 U.S.C. §§ 351–358 (2006).

251. *Id.* § 351(a); *see also* 48 C.F.R. §§ 22.1000–22.1026 (2009) (implementing regulations).

252. *E.g.*, Fed. Bureau of Prisons, U.S. Dep't of Justice, Solicitation RFP-PCC-0015 ("CAR-11 RFP")

and the contractor is able to incorporate those costs into its proposed price. In stark contrast, state contracting procedures typically do not contain comparable requirements, nor do most states require detailed wage information as part of a bidder's proposal. For example, a CCA proposal submitted to the Commonwealth of Virginia contained a seven-page "Plan for Obtaining Qualified Workers," which consisted solely of generalizations<sup>253</sup> and vague descriptions of personnel programs such as "[u]se of employee development activities to promote positive employee relations."<sup>254</sup> Thus, while the proposal is publicly accessible through Virginia's open records statute, CCA controls access to the meaningful data that would show the extent to which its performance is consistent with its promises.

Compensation and other personnel information is of particular interest when measuring the effectiveness of correctional privatization. Because approximately sixty-five to seventy percent of a typical prison budget is spent on labor, the key to a contractor's profit margin lies in controlling personnel costs.<sup>255</sup> This is done either through reducing staff or reducing compensation—an approach that the industry says it can do without sacrificing quality of operations.<sup>256</sup> But there is good reason to doubt the private industry's claims because compensation effects staff turnover, which in turn impacts facility safety.<sup>257</sup> Industry-wide staff-turnover data used to be included in a privately published statistical compendium and reported annual staff turnover rates as high as fifty-three percent in the private prison industry.<sup>258</sup> More recent editions, however, do not contain

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(June 12, 2008).

253. CORR. CORP. OF AM., VIRGINIA DEPARTMENT OF CORRECTIONS PPEA PROPOSAL: DESIGN, BUILD, FINANCE, AND OPERATE A MEDIUM SECURITY CORRECTIONAL FACILITY IN CHARLOTTE COUNTY, VIRGINIA 59 (Aug. 17, 2007) ("Methods of recruitment for vacant positions are designed to attract qualified applicants from outside the organization, as well as within. The procedures will include, at a minimum:

Recruitment strategies designed to attract qualified applicants from outside the organization;

Schedules and post assignments that include cross sex staffing; and

Establishing qualifications for applicants that permit experience to be substituted for education when that experience is extensive and pertinent to the duties of the position.").

254. *Id.* at 60.

255. AUSTIN & COVENTRY, *supra* note 49, at 16.

256. *Id.*

257. *E.g.*, CCCF AFTER ACTION REPORT, *supra* note 94, at 65 (concluding that "[h]igh staff attrition rate and inexperience has contributed to lack of ability to appropriately respond to emergencies"); *see also id.* at 62 ("It became apparent to responding CDOC Investigators and the CDOC SORT ["Special Operations Response Team"] Commander arriving on scene that a quicker and stronger response by the facility security staff at the initial onset of the riot would have limited the extent of the riot. Investigators believe that the lack of response was due to indecisive command level decision making or inadequate staffing and resources, or both. The facility's command staff either could not or would not deal with the situation at its inception.").

258. CRIMINAL JUSTICE INST., INC., THE 2000 CORRECTIONS YEARBOOK: PRIVATE PRISONS 101

turnover data.<sup>259</sup> The only reliable compensation data for private operators is limited to high-level employees whose salaries and benefits must be reported to the Securities and Exchange Commission.<sup>260</sup> While this information does not allow for a comprehensive analysis of industry compensation patterns, it does at least raise the question of where private sector cost savings come from. In 2007, GEO/Wackenhut reported total base salary and cash bonuses for five senior executives ranging from \$575,269 to \$2.7 million (with a mean of \$1.2 million).<sup>261</sup> During the same time, CCA paid base salaries and cash bonuses for seven senior executives ranging from \$353,550 to \$1.7 million (with a mean of \$765,406)—although executives were also eligible for bonuses of up to 150 percent of base salary.<sup>262</sup> None of these figures includes stock options, deferred compensation, or fringe benefits.<sup>263</sup> In 2001 (the most recent year for which data is available), the national average salary for a state corrections director was \$106,893, with no state paying over \$150,000.<sup>264</sup> During the same year, CCA and GEO/Wackenhut had a mean senior executive cash compensation of \$458,492 and \$576,900, respectively.<sup>265</sup>

In addition to hindering research, contractor control of operational information disadvantages local communities selected for new private facility construction. The financial incentive for private operators to control public relations is not merely theoretical—CCA and GEO/Wackenhut are both candid about the risks posed by local opposition.<sup>266</sup> One apparent strategy in private facility siting is to locate new prisons in economically depressed rural communities.<sup>267</sup> Despite mounting evidence that prisons are

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(Camille Graham Camp & George Camp eds., 2000); cf. Mark P. Couch, *Private Prison Operator Pitches Savings to State in Capitol Hearing*, DENVER POST, Mar. 7, 2007, at B5 (reporting turnover of “30 percent to 40 percent of its Colorado workforce a year” for CCA).

259. See CRIMINAL JUSTICE INST., INC., THE 2002 CORRECTIONS YEARBOOK: ADULT CORRECTIONS (Camille Graham Camp ed., 2002) [hereinafter 2002 CORRECTIONS YEARBOOK].

260. See *infra* notes 261–62 and accompanying text.

261. GEO Group, Inc., Definitive Proxy Statement (Form DEF 14A), at 21 (Apr. 3, 2008).

262. Corr. Corp. of Am., Definitive Proxy Statement (Form DEF 14A), at 40 (Apr. 15, 2008).

263. See Corr. Corp. of Am., Definitive Proxy Statement (Form DEF 14A), at 40 (Apr. 15, 2008); GEO Group, Inc., Definitive Proxy Statement (Form DEF 14A), at 21 (Apr. 3, 2008).

264. 2002 CORRECTIONS YEARBOOK, *supra* note 259, at 150.

265. Corr. Corp. of Am., Definitive Proxy Statement (Form DEF 14A), at 18 (Apr. 16, 2002); GEO Group, Inc., Definitive Proxy Statement (Form DEF 14A), at 10 (Apr. 1, 2002).

266. Corr. Corp. of Am., Annual Report (Form 10-K), at 24 (Feb. 27, 2008) (“Our success in obtaining new awards and contracts sometimes depends, in part, upon our ability to locate land that can be leased or acquired, on economically favorable terms . . . . When we select the intended project site, we attempt to conduct business in communities where local leaders and residents generally support the establishment of a privatized correctional or detention facility.”); GEO Group, Inc., Annual Report (Form 10-K), at 23 (Feb. 15, 2008) (providing a similar description of siting risks).

267. *E.g.*, Corr. Corp. of Am., Annual Report (Form 10-K), at 24 (Feb. 27, 2008) (“Some locations may be in or near populous areas and, therefore, may generate legal action or other forms of opposition from residents in areas surrounding a proposed site.”); GEO Group, Inc., Annual Report (Form 10-K), at 23

not good economic development tools,<sup>268</sup> prison developers often sway local opinion leaders by promising robust payrolls and large property tax payments.

Although academic researchers have produced sound evidence questioning the economic development aspects of prisons,<sup>269</sup> such studies—written in the jargon of peer-reviewed journals and frequently using fairly abstract variables as indicators of economic impact—are often ineffective in influencing public opinion. Without access to reliable and salient data on private prison compensation, it is difficult for potential host communities to make an informed decision on a proposed private prison, although anecdotal evidence often suggests promises of high-paying jobs are overreaching.<sup>270</sup> Notably, private prison operators—particularly CCA—have recently increased their public relations efforts related to facility siting. In early 2008, CCA launched a specialized website based on the marketing slogan “Caring for Our Communities. Serving Our Neighbors.”<sup>271</sup> Although the site contains little hard data, it inundates users with repetitive claims of healthy economic development, typically couched in generalized platitudes.<sup>272</sup> While CCA has become increasingly adept at

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(Feb. 15, 2008) (“Otherwise desirable locations may be in or near populated areas and, therefore, may generate legal action or other forms of opposition from residents in areas surrounding a proposed site.”).

268. Terry L. Besser & Margaret M. Hanson, *Development of Last Resort: The Impact of New State Prisons on Small Town Economies in the United States*, 35 J. COMMUNITY DEV. SOC’Y 1, 12–14 (2004); Susan E. Blankenship & Ernest J. Yanarella, *Prison Recruitment as a Policy Tool of Local Economic Development: A Critical Evaluation*, 7 CONTEMP. JUST. REV. 183, 196–97 (2004); Ryan Scott King et al., *An Analysis of the Economics of Prison Siting in Rural Communities*, 3 CRIMINOLOGY & PUB. POL’Y 453, 477 (2004); David Shichor, *Myths and Realities in Prison Siting*, 38 CRIME & DELINQ. 70, 83–84 (1992); Douglas Clement, *Big House on the Prairie*, FEDGAZETTE (Minneapolis), Jan. 2002, available at [http://www.minneapolisfed.org/publications\\_papers/pub\\_display.cfm?id=2048](http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=2048).

269. See *supra* note 268.

270. E.g., E-mail from Kindra Mulch, Dir. of Soc. Servs., Kit Carson County, Colo., to Linda Fairbairn, Adm’r of Soc. Servs., Prowers County, Colorado (Aug. 15, 2003, 15:24 MST) (on file with author) (“I would tell you that the average salary paid @ our prison [CCA’s Kit Carson Correctional Center] qualifies most people for WIC, Family Planning and Child Health Plan Plus, and in a few cases a small food stamp and child care allotment.”).

271. Corr. Corp. of Am., CCA Community, <http://www.ccacommunities.com> (last visited Jan. 15, 2010).

272. E.g., *Economic Development*, LOC. COMMUNITY ECON. DEV. NEWS (Corr. Corp. of Am.), May 25, 2007, at 1–2, available at [http://www.ccacommunities.com/static/assets/EconDev\\_Tabloid\\_5.25.07.pdf](http://www.ccacommunities.com/static/assets/EconDev_Tabloid_5.25.07.pdf). This is a newsletter apparently designed for distribution in communities selected for new CCA development. See *id.* The newsletter consists mostly of vague statements such as “[h]osting a CCA correctional institution can potentially mean hundreds of jobs with an annual payroll in the millions” and “CCA provides competitive salaries, job training that leads the industry, and excellent opportunities for rapid advancement nationwide.” *Id.* The newsletter also states, “CCA pays applicable property taxes on the facilities it owns.” *Id.* at 1. This is a cleverly-worded half-truth, since it refers only to “applicable” property taxes and does not address the numerous situations in which CCA has negotiated tax abatements with local economic development authorities. MATTERA ET AL., *supra* note 78, at 28–46.

using strategic marketing to frame such generalizations in compelling and aesthetically pleasing media, it has simultaneously prevented dissemination of the hard data that could prove or disprove the company's claims.<sup>273</sup>

CCA's most common response is that operational data is available to contracting agencies.<sup>274</sup> Setting aside the issue of whether agency monitors receive accurate and complete data, this argument still misconstrues the purpose of public information laws. Because corrections departments so often depend on private prisons to provide needed bed space, agency staff is not necessarily motivated to request information such as compensation data.<sup>275</sup> Public records laws are designed to counteract agency hesitancy by allowing interested parties to independently analyze government operations.<sup>276</sup> Without articulating a compelling justification for secrecy, prison operators have been largely successful in their efforts to prevent or hinder release of salient operating information.

## V. CONCLUSION

The history of United States correctional policy is decidedly cyclical. Reforms are followed by dissatisfaction, followed by inaction, followed by more reforms.<sup>277</sup> Historically, most prison reform movements have been motivated, at least initially, by ideals of rehabilitation and society's responsibilities to wayward individuals.<sup>278</sup> Twentieth century private prisons can be viewed as a reform movement, but the motivations were not benevolent. Rather, the primary objective underlying the modern private prison industry was rapid expansion of the nation's prison system.<sup>279</sup> Private prisons delivered on the promise of quick expansion, but carceral growth came at a cost. Most obviously, states are now struggling under the fiscal impact of large prison populations.<sup>280</sup>

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The only objective operational data contained in the entire eight-page newsletter are nationwide totals of inmates and employees. See *Economic Development*, LOC. COMMUNITY ECON. DEV. NEWS (Corr. Corp. of Am.), May 25, 2007, at 1–2, available at [http://www.ccacommunities.com/static/assets/EconDev\\_Tabloid\\_5.25.07.pdf](http://www.ccacommunities.com/static/assets/EconDev_Tabloid_5.25.07.pdf).

273. See *supra* notes 210–16 and accompanying text.

274. See *supra* notes 212–13 and accompanying text.

275. See MATTERA ET AL., *supra* note 78, at 46.

276. See 5 U.S.C. § 552 (2006).

277. See *supra* Part II.

278. See *supra* Part II.

279. See *supra* notes 51–65 and accompanying text.

280. See *supra* note 59 and accompanying text.



While private prison operators relentlessly claim that their services are beneficial and efficient, they prevent public access to information which could substantiate or refute these claims.<sup>281</sup> Meanwhile, many contracting agencies have little interest in seriously analyzing the efficacy of privatization because they are dependent on contractor-owned infrastructure.<sup>282</sup> In the early days of contemporary prison privatization, states had some bargaining leverage since prison operators were fledgling entities that would be financially harmed by contract cancellation. But the end of the twentieth century witnessed the explosive growth of the secretive and lucrative immigrant detention sector.<sup>283</sup> Along with other components of the national prison-bed market, immigrant detention has changed the landscape of prison outsourcing. States that depend on privately owned prison capacity are increasingly vulnerable, as prison operators can now shop for customers.

Certainly, as states begin to reduce prison populations through sentencing changes and other policy reforms,<sup>284</sup> they should prioritize the withdrawal of inmates from private facilities. But such a process could be exceedingly difficult. After a certain number of contract terminations, private operators—saddled with large amounts of corporate debt—will destabilize with potentially catastrophic results for those states still dependent on private facilities. Such a process would combine the complexity of the nation’s current financial crisis with the difficult and dangerous arena of criminal justice administration.

Since the federal government is largely responsible for the emergence of the national prison market,<sup>285</sup> it must provide the solution to the nation’s current private prison problem. A federal solution must begin with immigration policy, which has been the primary driver behind the private prison industry in recent years. But immigrant detention policy cannot be addressed in a vacuum. Although a rapid draw-down in immigrant detention populations is desirable from a practical and humanitarian perspective, it would likely wreak havoc on the private prison industry. If the industry destabilizes, state correctional systems would be beset by uncertainty and many local governments would be forced to service debt on empty detention facilities. Accordingly, immigration policy reform must be integrated with a specific “private prison fix.” There are many potential

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281. *See supra* notes 271–73 and accompanying text.

282. *See supra* note 18 and accompanying text.

283. *See supra* notes 43–50 and accompanying text.

284. *See* JUDITH GREENE & MARC MAUER, *DOWNSCALING PRISONS: LESSONS FROM FOUR STATES* (2010), available at [http://sentencingproject.org/doc/publications/publications/inc\\_DownscalingPrisons2010.pdf](http://sentencingproject.org/doc/publications/publications/inc_DownscalingPrisons2010.pdf).

285. *See supra* notes 43–50 and accompanying text.

policy approaches. The federal government could provide funding for states to acquire private facilities (hopefully tied to prison population reduction goals). Alternatively, Congress could develop a specialized bankruptcy or receivership process for the industry. Yet another possibility is a federal “deprivatization” process, modeled after the creation of Amtrak.

Whatever specific form the federal response to the private prison industry takes, now is the ideal time to undertake the challenge. President Obama recently issued a memorandum instructing all federal agencies to thoroughly reexamine outsourcing practices and procedures.<sup>286</sup> The directive emphasizes the need to appropriately monitor contractors and ensure that the federal government maximizes value.<sup>287</sup> When applying this process to prison contracting, federal agencies would be well-advised to take a broad, inter-governmental view of the problem. If the federal government extricates itself from the private prison industry (as it should), the negative impacts will be felt by the states.

Massive prison growth in the late twentieth century is a social experiment that has failed. Embedded in this experience is the subsidiary privatization experiment. Due to government reliance on private capacity and complex financial engineering, winding down the industry will be challenging. Nonetheless, the track record of private corrections shows that it is a challenge that must be undertaken.

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286. Memorandum on Government Contracting, 74 Fed. Reg. 9,755, 9,756 (Mar. 6, 2009).

287. *Id.*