
PRIVATE PRISONS, PRIVATE RECORDS

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INTRODUCTION

This Note seeks to explain how practitioners and advocates can ensure that private prisons provide cost-effective services of sufficient quality when they contract to incarcerate individuals on behalf of government entities. It focuses primarily on the two largest industry competitors, Corrections Corporation of America (“CCA”) and the GEO Group (“GEO”), who together control the vast majority of the private prison ownership and management market.¹ These companies are the only publicly traded entities in this field, and both are engaged in a broad range of correctional services, including facility management and ownership, prisoner transportation, and community supervision.² There are also many smaller companies that manage hundreds of thousands of prisoners, probationers,³ and parolees for profit in the United States.⁴

Preserving human rights in prison is valuable both as a distinct goal and as it relates to reducing recidivism, improving public health, and providing meaningful opportunities for former prisoners to reintegrate. At a more basic level, governments are ultimately responsible for the treatment of their prisoners. The goal of regulating prison operations should be primarily to promote the well-being of prisoners; while luxurious conditions are neither warranted nor advisable, governments must provide some level of humane treatment and basic rights to all prisoners.

¹ See Kopin Tan, *Private Prison Companies Have a Lock on the Business*, WALL ST. J., Oct. 25, 2009, archived at <http://perma.cc/LSY6-FHRV> (stating that together, CCA and GEO control sixty-four percent of all private-prison beds).

² See, e.g., *Company Profile for Corrections Corp of America*, BLOOMBERG, archived at <http://perma.cc/W6BK-N5BM> (last visited July 6, 2014).

³ See HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY 1 (2014), available at http://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf, archived at <http://perma.cc/836T-X3P4>.

⁴ A non-exhaustive list includes the following: Management and Training Corporation, LCS Corrections Services, G4S Secure Solutions, Community Education Centers, Amazon Correctional Services, Emerald Correctional Management, LaSalle Corrections, Youth Services International; Corizon Health, Wexford Health Sources; Aramark, and Sodexo.

Part I evaluates the current state of law and practice regarding access to information from private prisons. The need for greater oversight is especially pronounced for private prisons, which have incentives to cut corners and are funded primarily by tremendous taxpayer investments.⁵ In seeking to offer mechanisms to enhance oversight, Part II analyzes how litigants have utilized “functional equivalency” standards for public records suits and § 1983 liability to require private prisons to comply with public records requests. Part II also evaluates how attorneys in states with favorable statutory frameworks could use these tests to similarly bind private prisons. Part III concludes with a set of modest recommendations for increasing private prison transparency and oversight, including litigation-oriented approaches, legislative reforms, and improved contract drafting and enforcement.

I. THE VALUE OF TRANSPARENCY IN PRIVATE CORRECTIONS

Effective oversight is a challenge for both public and private prisons. While attorneys and advocates have developed some successful methods of prison oversight, privatizing prison operations limits the effectiveness of these methods. As oversight through litigation has diminished in effectiveness over the past few decades, federal and state governments dramatically increased their use of private companies.⁶ In the vast majority of United States jurisdictions, private prisons are not required to disclose information pursuant to public records requests in the same manner as government prisons.⁷ Extending public records laws to private prison companies can provide a meaningful route for independent oversight to ensure that overcrowded, budget-strained prison systems are effectively policed.⁸

Many state governments have responded to mounting calls for austerity and efficiency by privatizing core government functions, including correctional services. This trend has had significant consequences for the independent oversight of government operations traditionally provided by media and advocacy organizations that utilize public records laws.⁹ According to a 2012 report by In the Public Interest,

⁵ David Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1461-62 (2010).

⁶ *Id.* at 1462.

⁷ *Id.* (“As private corporations, they are typically not subject to open meeting and freedom of information laws that apply to state and local departments of corrections.”).

⁸ Craig D. Feiser, *Privatization and the Freedom of Information Act: An Analysis of Public Access to Private Entities Under Law*, 52 FED. COMM. L.J. 21, 22-24 (1999) (discussing the ramifications of government agencies “turn[ing] to private entities in order to function more efficiently”).

⁹ IN THE PUBLIC INTEREST, FLOODLIGHTS INSTEAD OF FLASHLIGHTS: SUNSHINE LAWS OUT OF STEP WITH GOVERNMENT CONTRACTING LEAVES PUBLIC AND LAWMAKERS IN THE DARK 7-9 (2012), available at http://www.inthepublicinterest.org/sites/default/files/0212%20ITPI%20Privatization_Report_f_0.pdf, archived at <http://perma.cc/78AE-QVYY>.

Without information to help answer . . . important questions, watchdog organizations, journalists, advocacy groups, and interested residents lose the ability to understand government policies and actions, monitor public spending, inform their positions on various issues, advocate for what they believe in, and hold the government accountable. A well-functioning democracy relies on the public having honest answers to these key questions. Privatization should not make this information more difficult for the public to obtain.¹⁰

Contracting with private prison companies implicates two important concerns regarding public accountability: liability for violations of prisoners' rights and access to operational information.¹¹ In addition to seeking cost savings, governments may seek to reduce liability by contracting for the provision of core functions.¹² But privatization presents obstacles to the traditional means of checking government power available to members of the public, such as litigation and access to information. Increased transparency of private prisons could make up for shortcomings in oversight resulting from both conditions generally applicable to corrections and to conditions unique to the industry.

A. *Effective Oversight and Accountability in Corrections*

Overseeing prison operations to ensure humane prisoner treatment is a complex and difficult task for both government-run and private facilities.¹³ Effective oversight involves a combination of mechanisms, including direct government action, public transparency, and litigation.¹⁴ Direct government action often comes from oversight personnel or departments tasked with regulating components of prison operations and protecting basic human rights; sometimes legislatures and executive officers use their powers to force reform. Public oversight comes primarily from media, watchdog, and religious

¹⁰ *Id.* at 4.

¹¹ Stephen Rahe, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*, 13 RICH. J.L. & PUB. INT. 209, 229 (2010) ("Private prisons tend to distance public officials from responsibility for the way private prisons are run.") (citing 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 *Id.* at 234 ("While private prison companies' non-governmental status can be exploited in numerous ways, two particularly salient areas are . . . a discussion of contractor liability for violations of inmates' civil rights [and] . . . an exploration of the problems concerning public access to information regarding private prison operations.").

¹³ Fathi, *supra* note 5, at 1453 (explaining that a combination of factors "creates a significant risk of mistreatment and abuse" in prisons). For a comprehensive bibliography of significant correctional oversight resources, see Michele Deitch, *Annotated Bibliography on Independent Prison Oversight*, 30 PACE L. REV. 1687, 1687 (2010) (explaining that "[t]he body of literature regarding correctional oversight is both limited and fragmented . . .").

¹⁴ See Fathi, *supra* note 5, at 1453-54, 1461-62.

organizations, which report on and analyze operational and performance data. Through public education and political organizing efforts, these groups advocate for reform of prison and jail conditions, programs, and outcomes.

Litigation has historically been the most common and effective means of improving prison operations and conditions, but its effectiveness in recent years has been curtailed by statutory reform and judicially imposed limitations.¹⁵ Over the past two decades, the Prison Litigation Reform Act (“PLRA”)¹⁶ drastically restricted judicial prison oversight and the ability of prisoners to file suit.¹⁷ Similarly, federal restrictions on legal services funding practically eliminated a chief source of indigent prisoner representation, and the Supreme Court broadly redefined what could constitute adequate access to the courts for prisoners in *Lewis v. Casey*,¹⁸ requiring only an abstract “access to the courts” rather than access to a law library or legal assistance.¹⁹

Despite the changed nature of prison litigation, oversight mechanisms have struggled with some consistent obstacles. Different jurisdictions monitor their facilities in different ways, to varying degrees of success. Systemic problems plague prison systems across the country, ranging from sanitation and classification issues to deficiencies in security and delivery of services.²⁰ A review of prison conditions across the country is beyond the scope of this Note, but these problems are not unique to either government or privately run prisons.

Without a comprehensive oversight mechanism in the United States, prison oversight could be enhanced by increased access to operational information,

¹⁵ *Id.* at 1454-59; Michael B. Mushlin & Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383, 1406 (2010) (“While the major thrust of this volume focuses on non-judicial forms of oversight, it cannot be overlooked that, in the United States to date, the most significant form of oversight has come about through civil rights litigation brought before the federal courts of the United States.”). The PLRA imposed substantial limitations on the abilities of both individuals and classes of prisoners to bring lawsuits challenging prison conditions. Fathi, *supra* note 5, at 1454-59. For a thorough explanation of its restrictions and their impact on prisoner-rights litigation, see generally, MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS, 566-67 (2009) (explaining that certain provisions of the PLRA make litigation more difficult for inmates); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557 (2003) (reviewing filing trends seven years after the PLRA’s passage and finding that all filings in federal court declined by forty percent and that meritorious claims became significantly more difficult to litigate successfully).

¹⁶ Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

¹⁷ Fathi, *supra* note 5, at 1454-58 (explaining the various ways in which the PLRA has confined the federal courts’ oversight role).

¹⁸ 518 U.S. 343, 350-51 (1996).

¹⁹ Fathi, *supra* note 5, at 1458-60.

²⁰ See *infra* Parts I.D.1, I.D.2 (detailing these problems and the need for heightened transparency).

for both government entities and the public.²¹ Outside of judicial enforcement, “regulation and oversight of correctional facilities in the United States is spotty and in many jurisdictions nonexistent. . . . [E]xternal monitoring and oversight mechanisms . . . in many places exist only in rudimentary form or not at all.”²² Increasing public access to information permits for greater scrutiny of prison conditions and operations, and would likely improve monitoring and oversight of all facilities.²³

B. *Overview of the Private Prison Industry*

The modern private prison industry was born in the mid-1980s when CCA, a Tennessee company, attempted to contract with the state of Tennessee to operate its entire state prison system.²⁴ Though its bid failed, CCA began to purchase and build individual facilities, steadily increasing its market share throughout the United States until the turn of the millennium.²⁵ GEO was founded in Boca Raton, Florida in 1984 and expanded along with CCA throughout the 1990s.²⁶ After increased public scrutiny of poor contract performance damaged the industry’s reputation and relationships with many governments, the industry experienced a resurgence, in large part due to its increased role in immigration detention.²⁷

²¹ Fathi, *supra* note 5, at 1460-61 (explaining that the adoption of a non-judicial oversight model “would dramatically enhance transparency and accountability”); Stan Stojkovic, *Prison Oversight and Prison Leadership*, 30 PACE L. REV. 1476, 1478, 1482-85 (2010) (indicating that prison oversight mechanisms can illuminate means by which prisons can become more effective).

²² Fathi, *supra* note 5, at 1460.

²³ See, e.g., Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL’Y REV. 455, 477-80 (arguing the need for a “fully informed public to monitor our criminal justice institutions” because judicial and other forms of oversight are insufficient to protect prisoners in the southern United States from harm).

²⁴ GRASSROOTS LEADERSHIP, *THE DIRTY THIRTY: NOTHING TO CELEBRATE ABOUT 30 YEARS OF CORRECTIONS CORPORATION OF AMERICA 19* (2013), available at http://grassrootsleadership.org/sites/default/files/uploads/GRL_Dirty_Thirty_formatted_for_web.pdf, archived at <http://perma.cc/Y3FA-TCGG>.

²⁵ PHILIP MATTERA, MAFRUZA KHAN & STEPHEN NATHAN, GRASSROOTS LEADERSHIP, *CORRECTIONS CORPORATION OF AMERICA: A CRITICAL LOOK AT ITS FIRST TWENTY YEARS 11-20* (2003), available at <http://www.goodjobsfirst.org/sites/default/files/docs/pdf/CCA%20Anniversary%20Report.pdf>, archived at <http://perma.cc/478E-5NBR> (detailing CCA’s operating history from the 1980s through 2000).

²⁶ E.g., *History*, THE GEO GROUP (last visited Aug. 19, 2014), archived at <http://perma.cc/38T3-2PVA>.

²⁷ See generally SCOTT D. CAMP & GERALD G. GAES, FEDERAL BUREAU OF PRISONS, *GROWTH AND QUALITY OF U.S. PRIVATE PRISONS: EVIDENCE FROM A NATIONAL SURVEY 3-5* (2001), available at

CCA now controls 92,500 beds across 67 prisons;²⁸ GEO controls more than 61,000 corrections beds in 56 facilities, as well as many community-based and prerelease facilities.²⁹ Based on the most recent data available, the private prison industry houses more than 8% of the nation's prisoners, nearly 18% of federal prisoners,³⁰ and nearly half of immigration detainees in the United States.³¹ States use private prisons to varying degrees: some states do not house any prisoners in private facilities, while others house over 40% of their prisoners in private facilities.³² From 2000 to 2011, the number of federal prisoners in private facilities increased almost 150%, while the number of state prisoners in private facilities increased nearly 23%.³³ GEO took in more than \$1.48 billion in revenue in 2012 from various government contracts, 36% of which came from the federal government, and earned more than \$208 million

http://www.bop.gov/resources/research_projects/published_reports/pub_vs_priv/orepres_note.pdf, archived at <http://perma.cc/88RM-VFBX> (discussing the history of the early modern private prison industry to set context for analysis of industry performance); JUDITH GREENE & ALEXIS MAZÓN, JUSTICE STRATEGIES, PRIVATELY OPERATED FEDERAL PRISONS FOR IMMIGRANTS: EXPENSIVE. UNSAFE. UNNECESSARY 17-20 (2012), available at <http://www.justicestrategies.org/sites/default/files/publications/Private%20Operated%20Federal%20Prisons%20for%20Immigrants%209-13-12%20FNL.pdf>, archived at <http://perma.cc/337G-6HB8> (recounting the history of prison privatization in the United States and discussing the effects of immigration detention).

²⁸ CORR. CORP. OF AM., 2012 ANNUAL REPORT ON FORM 10-K, 5 (2013), available at <http://thomson.mobular.net/thomson/7/3368/4799/>, archived at <http://perma.cc/FSN8-GZ2T>.

²⁹ *Locations*, THE GEO GROUP, archived at <http://perma.cc/PC9A-7KY4> (last visited Jan. 18, 2014).

³⁰ E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 13, 32 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>, archived at <http://perma.cc/S6TG-7UV3>.

³¹ DETENTION WATCH NETWORK, THE INFLUENCE OF THE PRIVATE PRISON INDUSTRY IN THE IMMIGRATION DETENTION BUSINESS 1 (2011), available at <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/PrivatePrisonPDF-FINAL%205-11-11.pdf>, archived at <http://perma.cc/SJ8S-LRN4> ("In total, private corporations administer 49% of beds [for detained immigrants].").

³² PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 31-32 (2011), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>, archived at <http://perma.cc/JNQ5-4R46> (reporting that in 2010, Montana housed 40.4% of its prisoners in private facilities, and New Mexico 43.6%). Interestingly, New Mexico and Mississippi, two of the top seven states in terms of housing state prisoners in private jails, had the two lowest prisoners-to-capacity ratios in the country in 2011. CARSON & SABOL, *supra* note 30, at 13.

³³ LEONARD GILROY, REASON FOUNDATION, ANNUAL PRIVATIZATION REPORT 2013: CRIMINAL JUSTICE AND CORRECTIONS (2013), available at <http://reason.org/news/show/apr-2013-corrections-overview>, archived at <http://perma.cc/PML2-XCGR> ("The number of those state prisoners housed in private facilities rose from 75,291 in 2000 to 92,395 in 2011 over that same time period, a 22.7% increase.").

in profit.³⁴ CCA received nearly \$1.76 billion in revenue in 2012 (43% from the federal government), and earned \$156 million in net profit.³⁵ Government contracts contribute the vast majority of industry revenue in the form of taxpayer dollars.³⁶

C. *Obstacles to Private Prison Oversight*

Restrictions on judicial oversight of private prisons have limited the role of the courts in ensuring safe and adequate conditions. Seemingly routine inability or unwillingness to identify and remedy deficient contract performance has likewise resulted in private prisons potentially escaping liability for problematic conditions.

1. Litigation Reforms Restricting Judicial Oversight of Private Prisons

The viability of § 1983³⁷ claims, long a powerful weapon for individuals challenging government misconduct, is less than clear in the private prison context.³⁸ Prisoners whose rights are violated in private facilities can try to hold a number of parties liable: an individual guard, the private prison company, a specific government actor (such as a monitor), or a government entity that contracts out a core function. Courts have largely refused to consider private prison companies to be the functional equivalent of government entities for purposes of liability for harm stemming from treatment or conditions in their facilities:

Federal prisoners may not sue private prison corporations for damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* . . . [and t]he Eleventh Circuit has recently held that private prison operators are not “public entities” under the Americans with Disabilities Act, and therefore, unlike publicly operated prisons, cannot be sued under Title II of that statute.³⁹

Prisoners in privately run facilities are also prohibited from suing individual private prison employees for violations of their rights under *Bivens v. Six*

³⁴ THE GEO GROUP, 2012 ANNUAL REPORT 1 (2013), available at https://materials.proxyvote.com/Approved/36159R/20130314/AR_159415/, archived at <http://perma.cc/69PD-93FZ>.

³⁵ CORR. CORP. OF AM., *supra* note 28, at 7, 50.

³⁶ AM. CIVIL LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 13 (2011), available at https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf, archived at <http://perma.cc/MGJ9-TB6S> (“Government contracts [state, local, and federal] provide the dominant source of private prison revenue.”).

³⁷ 42 U.S.C. § 1983 (2012).

³⁸ Raheer, *supra* note 11, at 234-46 (indicating that there is a “confused jurisprudence regarding section 1983 and private prisons”).

³⁹ Fathi, *supra* note 5, at 1462.

*Unknown Named Agents of Fed. Bureau of Narcotics*⁴⁰ when state tort remedies exist to address their alleged injuries.⁴¹ Preclusion of such § 1983 claims against both individual guards and the companies that employ them prevents prisoners from utilizing what could be a very effective litigation tactic. As noted by Professor Jack Beermann, “[A § 1983 claim] is relatively cheap to add to a set of other claims. The payoff . . . may be great, including the availability of federal jurisdiction and the possibility of an award of attorneys’ fees.”⁴² Within the prison context specifically, Beermann believes that two primary distinctions between the nature of government and private operations make § 1983 claims the best option to hold private parties liable for harm.⁴³ First, it may be easier to impose liability on a private prison company than the government, as plaintiffs would have to meet the “municipal liability” standard for local government, which does not allow for vicarious liability.⁴⁴ Second, the Supreme Court has refused to extend qualified immunity to private defendants under § 1983.⁴⁵ Crucially, § 1983 claims could provide a federal right of action where state law does not reach and give plaintiffs an effective alternative to the forum of state courts, which are “oriented to support the state, not to constrain state action.”⁴⁶

Further, *respondeat superior* liability usually does not apply to private corporations⁴⁷ or to § 1983 claims.⁴⁸ Prisoners suing in federal court under

⁴⁰ 403 U.S. 388 (1971) (allowing a federal cause of action when federal agents arrested petitioner after a warrantless search of his apartment).

⁴¹ *Minneeci v. Pollard*, 132 S. Ct. 617, 620 (2012) (holding that *Bivens* does not apply where “state tort law authorizes adequate alternative damages actions . . . that provide both significant deterrence and compensation”).

⁴² Jack M. Beermann, *Why do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 33 (2004).

⁴³ *Id.* at 23-26 (discussing numerous factors that might make plaintiffs pursue § 1983 claims instead of, or in addition to, available state law claims).

⁴⁴ *Id.* at 24 (“Local governments are not immune but can only be held liable under the Supreme Court’s ‘municipal liability’ test, a strict standard of causation and culpability under which vicarious liability is not allowed.”).

⁴⁵ *Id.* at 24-25 (“Second, the Supreme Court has decided that private section 1983 defendants are not entitled to the qualified immunity that applies in section 1983 litigation against government employees.”).

⁴⁶ *Id.* at 20.

⁴⁷ *See, e.g., Fresquez v. Minks*, No. 11-CV-02712-REB-KMT, 2013 WL 452292, at *15 (Tenn. Ct. App. Feb. 26, 2013) (holding that private corporations may not be found liable under the doctrine of vicarious liability), *rev’d* 2014 WL 2579899 (10th Cir. June 10, 2014); Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1452-53 (2009) (“Currently, however, [§ 1983] encourages private entities to give constitutional rights short shrift because it does not expose private entities that perform public functions to the traditional tort principle of respondeat superior liability . . .”).

⁴⁸ Raheer, *supra* note 11, at 235 (“It is settled law that the doctrine of respondeat superior does not apply to section 1983 actions.”).

Bivens may be likewise precluded from applying principles of *respondeat superior* to hold private prison companies liable for employee actions.⁴⁹ The Supreme Court has held that guards at private facilities where state oversight is weak cannot raise a qualified immunity defense to a § 1983 personal injury claim,⁵⁰ but “it is unclear whether the same result would follow in a state with an aggressive monitoring program.”⁵¹ Prisoners seeking to hold state or local governments accountable for harms imposed by a private contractor would therefore need to prove vicarious liability by demonstrating a nexus between some government actor’s conduct and the deprivation of a right.⁵² Most likely, a prisoner would have to show that a government monitor’s actions caused a violation of his or her rights, by failing to ensure compliance intentionally or willfully.⁵³ Extending liability to both private prison companies and government actors could have important fiscal implications, for “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).”⁵⁴

Therefore, under § 1983, prisoners in private facilities cannot sue individuals or private prison companies when state tort remedies suffice, and they cannot sue companies or governments for individual actions under a *respondeat superior* theory. Essentially, these prisoners would either have to prove vicarious liability or that the company operated as the functional equivalent of a government agency to sue the company or its employees under § 1983.⁵⁵ In any event, litigation challenging individual harms would only have a limited impact on broader reform and may actually undermine such efforts due to the paradoxical nature of § 1983 applicability.⁵⁶ As Stephen Raher explains,

⁴⁹ *Minneci v. Pollard*, 132 S. Ct. 617, 625 (2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)) (“[A] *Bivens* plaintiff, unlike a state tort law plaintiff, normally could not apply principles of *respondeat superior* and thereby obtain recovery from a defendant’s potentially deep-pocketed employer.”).

⁵⁰ *Richardson v. McKnight*, 521 U.S. 399, 401 (1997) (finding that prison guard employees of a private management firm are not “entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983”).

⁵¹ Raher, *supra* note 11, at 235.

⁵² *Id.* at 235-36 (“[A] prisoner bringing a section 1983 claim against corrections officials must prove that the defendants had personal involvement in the alleged deprivation of rights.”).

⁵³ *See id.* (hypothesizing how the *Richardson* supervision factor would apply to the doctrine of *respondeat superior*).

⁵⁴ *Id.* at 236.

⁵⁵ *See id.* at 234-35 (recounting the questions of liability that have arisen from § 1983 claims).

⁵⁶ *Id.* at 236 (“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.⁵⁷

While litigation could help some individuals in private facilities (assuming they successfully navigate the complexities described), as with litigation in other arenas, many meritorious cases result in settlement. However, settlements of prison conditions cases are increasingly rare and unlikely to lead to larger systemic reform through deterrence.⁵⁸

Transparency enhances accountability by permitting interested parties to focus more attention on government operations. In the prison context, information about things like staffing ratios, provision of medical and mental health care, use of solitary confinement, rates of violence, and protection of prisoners' fundamental rights such as access to the courts⁵⁹ and correspondence with the outside world⁶⁰ can shed much-needed light on prison conditions and operations.⁶¹ When a government runs a prison, it must comply with public records requests regarding an array of operational information. Access to such information helps advocates identify deficiencies and improve conditions without resorting to costly and increasingly difficult litigation.⁶² Private prisons, in contrast, are not so obligated, which creates unique obstacles to the effective oversight necessary to address systemic deficiencies and problems.

⁵⁷ *Id.*

⁵⁸ Schlanger, *supra* note 15, at 1680 (“The rarity of substantial judgments, or even substantial settlements, poses a major challenge to any defense of inmate litigation based on its deterrent effect.”).

⁵⁹ *Bounds v. Smith*, 430 U.S. 817, 817 (1977) (declining to overrule precedent holding that prisoners have access to the courts).

⁶⁰ *Procunier v. Martinez*, 416 U.S. 396, 407-14 (1974) (formulating a standard of review for prisoner mail censorship), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

⁶¹ JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM’N ON SAFETY AND ABUSE IN AMERICA’S PRISONS, *CONFRONTING CONFINEMENT* 97-99 (2006), *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf, *archived at* <http://perma.cc/784H-MYFT> (advocating for greater transparency in the prison system); Raheer, *supra* note 11, at 243-47 (discussing the ubiquity of reduced access to information in the industry of prison corrections).

⁶² Stojkovic, *supra* note 21, at 1482, 1488-89 (indicating that there has been diminishing transparency in prison oversight).

2. States' Failures to Hold Private Prison Companies Accountable for Contract Violations

Absent public oversight through enforcement of public records laws, regulation of the private prison industry becomes more difficult. Transparency for the sake of general public information is an important dynamic of oversight in its own right, but the lack of transparency makes legal reform and contract monitoring more difficult as well.⁶³ Aside from litigation, the impact of which is limited for prison oversight purposes,⁶⁴ private prison oversight could come primarily from governments who contract with these companies. Insofar as such contracts contain oversight provisions and enforcement mechanisms, governments can theoretically employ them to improve private prison operations.⁶⁵ However, both the history of contract enforcement and the current state of affairs seem to indicate that contractual obligations are an insufficient oversight mechanism to ensure accountability in the private prison industry.⁶⁶

Private prison contracts often require compliance with standards promulgated by independent professional organizations such as the American Correctional Association (“ACA”) or National Commission on Correctional Healthcare (“NCCHC”).⁶⁷ These bodies conduct inspections of government

⁶³ See CHRISTOPHER HARTNEY & CAROLINE GLESMANN, NAT’L COUNCIL ON CRIME AND DELINQUENCY, PRISON BED PROFITEERS: HOW CORPORATIONS ARE RESHAPING CRIMINAL JUSTICE IN THE U.S. 15-16 (2012), available at http://nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profiteers.pdf, archived at <http://perma.cc/DR-4XXT> (“Oversight and monitoring provide a way for the government to measure contract compliance, and must concentrate on the contractor’s adherence to contract terms as well as its success in securing the safety of the public, inmates, and staff.”). The ABA Standards for Treatment of Prisoners also recognizes the importance of transparency – as David Fathi appropriately summarized, “[w]hen private facilities are used, the Standards require multiple means of oversight, including applicability of freedom of information laws; contract provisions for oversight; and on-site monitoring by the contracting agency.” Fathi, *supra* note 5, at 1462; see also ABA CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS, §§ 23-10.5(a), (d), (f), (g).

⁶⁴ See *supra* Part I.C.1.

⁶⁵ Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 161 (2010) (“[C]ontract terms are likely to be imprecise, providing an insufficient basis for gauging contractor performance. This problem is exacerbated in the prison setting, where the quality of performance—from the provision of medical care to the use of force—can mean the difference between life and death for inmates. . . . [O]bstacles to public accountability suggest the challenges to effective oversight in precisely those circumstances that call for special vigilance.”).

⁶⁶ *Id.* at 161-62.

⁶⁷ David W. Miller, *The Drain of Public Prison Systems and the Role of Privatization: A Case Study of State Correctional Systems*, in PROQUEST SOCIAL SCIENCES DISCOVERY GUIDE 6 (2010), available at <http://www.csa.com/discoveryguides/prisons/review.pdf>, archived at <http://perma.cc/46XV-F564> (“[A]ll private prisons are either accredited or must become

and private prisons to see how they comply with each organization's respective standards regarding conditions, treatment, and facilities.⁶⁸ Despite this ostensible source of external oversight and simple metric for determining contract violations, these bodies have not ensured that prisoners in private facilities receive constitutionally adequate treatment.⁶⁹ The objectivity of these organizations has also been questioned, as the private prison industry has spent thousands of dollars sponsoring conferences held by each.⁷⁰

A recent report by the National Council on Crime and Delinquency ("NCCD") found significant problems in contract enforcement pervasive throughout the industry.⁷¹ The NCCD identified three major concerns regarding contract-based oversight: transparency, guaranteed payments, and monitoring.⁷² The lack of transparency results from the industry's exemption from reporting requirements, its obstruction of monitors, and the fact that the companies "are [not] even aware of the documentation and reporting requirements intrinsic to the operation of public agencies."⁷³ The NCCD also identified bed quotas, or "minimum-occupancy guarantees," as a common component of contracts favorable to the private prison industry.⁷⁴ Finally, it discussed how privatization incentives discourage transparency and accountability, creating obstacles to effective monitoring beyond that seen in the realm of public prisons.⁷⁵ The NCCD concluded,

[t]he experience of various jurisdictions has demonstrated that contracts executed with private prison companies are often poorly drafted and may minimize or omit key provisions, which can lead to numerous problems

accredited to remain open, unlike public prisons which only voluntarily seek accreditation, leading to a lower percentage meeting accreditation standards.").

⁶⁸ *Id.* at 6-7.

⁶⁹ *See, e.g.,* Morales Feliciano v. Rosello Gonzalez, 13 F. Supp. 2d 151, 158 & n.3 (D.P.R. 1998) (finding medical care unconstitutionally deficient despite recent accreditation by NCHC); LaMarca v. Turner, 662 F. Supp. 647, 655 (S.D. Fla. 1987) (affirming the magistrate's finding that ACA accreditation is of "virtually no significance" in determining whether prisoners receive adequate treatment because constitutional violations have been found in accredited facilities).

⁷⁰ Press Release, Private Corr. Working Grp., American Correctional Association Meets in Tampa – Organization Tainted by Conflicts of Interest, Private Prison Influence, Financial Incentives (Jan. 31, 2014), *archived at* <http://perma.cc/HBM2-CDJ5>.

⁷¹ HARTNEY & GLESMANN, *supra* note 63, at 15-16 (citing contracting, oversight, and monitoring issues in prison contracting).

⁷² *Id.*

⁷³ *Id.* at 15.

⁷⁴ *Id.* at 16 ("Contracts often guarantee a minimum occupancy rate—usually 90% or more . . .").

⁷⁵ *Id.* at 15-16 ("Further, from a financial perspective, it is in the contractor's best interest to minimize the reporting of data that could provide important—though potentially negative—information about conditions of confinement, such as the number of assaults that take place in the facility, incident reports, and grievances filed.").

including inadequate contractor performance, absence of transparency, abuse of prisoner rights, and an overall lack of accountability. Oversight and monitoring has also proven to be difficult and tends to be lax and ineffective.⁷⁶

Numerous states have recently found deficient contract performance upon reviewing private prisons, often identifying transparency concerns as obstacles to effective enforcement of such contracts.⁷⁷ Even when state governments utilize specific oversight mechanisms for the private prisons with which they contract, many have found internal oversight inadequate to address systemic problems and deficiencies.

Idaho. Idaho's experience with private prison oversight is demonstrative of government inability to effectively monitor private prisons. The State had been made aware of contract violations years before those problems resulted in litigation from prisoners whose constitutional rights were violated by extreme violence.⁷⁸ A supervising officer at the Idaho Correctional Center ("ICC") informed superiors of staffing irregularities months before the litigation was filed, detailing staffing positions for which the State paid but no officers were actually on duty.⁷⁹ Further, the officer claimed that superiors at the facility intentionally misrepresented staffing reports to the State, deceiving officials as to the existence and extent of CCA's contract noncompliance.⁸⁰

Following the problems at ICC and the subsequent protracted litigation, Idaho sought bids to take over operations at the facility following the automatic termination of CCA's contract. Interestingly, CCA declined to even bid on the new contract, apparently no longer interested in operating the facility.⁸¹ Eighty percent of Democratic state legislators opined that private operation of the facility no longer seemed a viable option and recommended the state take control of ICC.⁸² In January 2014, the state began its official takeover of ICC when the legislature voted to remove the facility from private

⁷⁶ *Id.* at 15 (footnote omitted).

⁷⁷ See *infra* notes 90-94, 142-48, and accompanying text.

⁷⁸ *Staffing Issues Known for Years at Idaho's Private Prison*, BOISE STATE PUBLIC RADIO, Oct. 23, 2013, archived at <http://perma.cc/NQX2-9XA5> ("Administrators and staff at Idaho's prison agency knew since at least 2010 that private prison contractor [CCA] was understaffing the state's largest prison in violation of the state contract.").

⁷⁹ Rebecca Boone, *Documents Unsealed in Private Prison Contempt Case*, IDAHO STATESMAN, Aug. 20, 2013, archived at <http://perma.cc/GPU9-FL3W> ("All three [of the former and current CCA employees] described what they said was a well-known understaffing problem that prison officials routinely tried to hide.").

⁸⁰ *Id.* (stating that CCA employees regularly falsified staffing logs and staff rosters).

⁸¹ *GEO Group, CCA Won't Bid on Idaho Prison Contract*, TIMES FREE PRESS, Nov. 8, 2013, archived at <http://perma.cc/7WG9-DQ5Y> (stating that both CCA and GEO declined to bid on the contract to operate ICC).

⁸² *Democrats to Idaho Prisons Board: Let State Run ICC*, IDAHO STATE J., Oct. 15, 2013, archived at <http://perma.cc/RY8F-7UVJ> (observing that sixteen out of twenty Democrats signed on to a letter in favor of the State taking over ICC).

hands after failing to find an adequate partner.⁸³ A subsequent investigation by a private firm found extensive misreporting of staff hours, and CCA reached an agreement to pay the state \$1 million to remedy the deficiencies.⁸⁴ The State, however, failed to launch a criminal investigation as the Department of Corrections had claimed it had.⁸⁵

New Mexico. Most contracts with private prison companies contain enforcement mechanisms, such as financial penalties for noncompliance.⁸⁶ But some states have failed to utilize these provisions, missing out on opportunities to both encourage important reforms and collect potential sources of additional revenue. New Mexico's former Secretary of Corrections declined to collect nearly \$20 million dollars in fines from GEO and CCA for repeated contract violations.⁸⁷ His actions were particularly questionable because GEO had previously employed him as a warden at one of its prisons.⁸⁸ The State had known for years it was paying more for private prisons than government facilities and that it had paid for vacant staff positions at private facilities.⁸⁹ Of all the states, New Mexico also houses one of the largest percentages of its prison population in private prisons – more than 40%⁹⁰ – therefore, a

⁸³ *Idaho to Begin Process of Taking Over Private Prison*, BOISE STATE PUBLIC RADIO, Jan. 10, 2014, archived at <http://perma.cc/79ZU-ALEA> (“The Idaho Board of Correction has officially ordered the state’s prison department to begin the process of taking over operations at the privately run Idaho Correctional Center.”); Editorial, *Our View: Otter’s Plan for State-Run Prison a Good Step*, IDAHO STATESMAN, Jan. 4, 2014, archived at <http://perma.cc/G4SU-24L2> (“Gov. Butch Otter and Idaho took a step in the right direction Friday when Otter announced that the state will take over management of a prison that has been operated by Corrections Corporations of America for several years.”).

⁸⁴ Rebecca Boone, *Idaho Attorney General Seeks Prison Investigation*, WASH. TIMES, Feb. 7, 2014, archived at <http://perma.cc/3S8T-FT36>.

⁸⁵ Press Release, Leo Morales, Am. Civil Liberties Union, ACLU Files Open Record Request to Government Agencies Relating to CCA “Criminal Case” (Feb. 6, 2014), archived at <http://perma.cc/77QQ-TFTS> (explaining that no criminal investigation was conducted and advocating that “a complete audit and disgorgement of all profits made from the ICC be returned to the state”).

⁸⁶ Susan Turner et al., *Changing Prison Management: Strategies in Response to VOI/TIS Legislation 112* (Jan. 2003) (unpublished manuscript), archived at <http://perma.cc/R7YF-44Z6> (explaining that monetary sanctions may be imposed to enforce contract requirements).

⁸⁷ Deborah Baker, *Ex-Prison Official Back at Firm*, ALBUQUERQUE J., Nov. 11, 2011, archived at <http://perma.cc/WDQ9-98MP>; Zaid Jilani, *NM Corrections Secretary Refusing to Penalize Contract-Breaching Private Prison Company He Used to Work for*, THINK PROGRESS, Sept. 7, 2010, archived at <http://perma.cc/9WED-VCJ7>.

⁸⁸ Baker, *supra* note 87.

⁸⁹ *New Mexico Pays More For Private Prisons, Report Says*, ALBUQUERQUE TRIB., May 24, 2007, archived at <http://perma.cc/U8ZD-5ANJ> (indicating that New Mexico not only tried to justify higher operating costs in 2007, but it also had been paying for services that it never received).

⁹⁰ GUERINO ET AL., *supra* note 32, at 31 (using figures from 2010).

significant portion of New Mexico's prisoners rely almost exclusively on their government to ensure fair treatment through enforcing contracts with private prisons. When the former Secretary went back to work for GEO, his successor began to use the penalty provisions more aggressively, levying millions of dollars in penalties against the industry for staffing and other violations.⁹¹

Vermont. Vermont contracts with a private company to provide medical care to its prisoners. A recent report by the state auditor found that the State was not saving any money by contracting out medical care to a private company and that the State paid more than \$4.2 million beyond its prison healthcare budget between 2010 and 2012.⁹² Performance guarantees were built into the contract, allowing the State to penalize the company for failures to meet certain benchmarks or provide certain services, with a provision that such penalties be applied in the first payment period after a violation is discovered.⁹³ However, the State took years to assess penalties against the company for known violations, and failed to collect more than \$11,000 worth of penalties.⁹⁴ In so doing, "[the Vermont] DOC lost the opportunity to offer a monetary incentive for [Correct Care Solutions] to correct its deficiencies in a timely manner."⁹⁵ In fact, the Vermont auditor identified failures in oversight as among the most significant factors in the company's failure to save money: "[M]onitoring was lacking because [the company] did not provide complete and accurate reports in a timely manner and [the Vermont Department of Corrections] did not assess penalties until many months after the performance period in which the deficiency occurred."⁹⁶

Ohio. Ohio recently found that private prisons struggle to offer the same quality of services and care as the government while saving money. Ohio became the first state to sell a state-owned facility to a private corporation for ownership and management when it sold the Lake Erie Correctional Institution

⁹¹ Deborah Baker, *Bouncing Between Private, Public*, ALBUQUERQUE J., Nov. 20, 2011, archived at <http://perma.cc/P2K8-UV86> ("The administration of Republican Gov. Susana Martinez, who took office in January, has decided to collect some penalties for this year.").

⁹² DOUGLAS R. HOFFER, OFFICE OF THE STATE AUDITOR, STATE OF VERMONT, CORRECTIONAL HEALTH CARE: ANNUAL COST OVERRUNS, BUT CONTRACT OVERSIGHT HAS IMPROVED 2 (2013), available at <http://www.leg.state.vt.us/reports/2013ExternalReports/294178.pdf>, archived at <http://perma.cc/WRP3-2QLB> (stating that the Vermont Department of Corrections' monitoring of its contracts with Correct Care Solutions "has not ensured that costs are minimized, and the State paid \$4.2 million more than the \$49.1 million that was budgeted in the first three years of the contract").

⁹³ *Id.* at 18 ("The policy goes on to state that penalties should generally be assessed and reflected in the next invoice payment. Performance guarantee penalties were included in the [Correct Care Solutions] contract for times when the contractor failed to meet certain requirements, but assessment of penalties was at the discretion of DOC.").

⁹⁴ *Id.* at 19.

⁹⁵ *Id.*

⁹⁶ *Id.* at 22.

to CCA in 2010.⁹⁷ The State, which employs one of the most vigorous prison oversight programs in the nation,⁹⁸ conducted inspections of the facility in 2011 and 2012; the 2011 inspection was not disclosed prior to its execution.⁹⁹ Two years after the transition, the State's audit revealed lingering deficiencies in many areas of institutional operations.¹⁰⁰ CCA struggled to prevent inmate drug use and to protect inmates from assault.¹⁰¹ The rate of prisoners logging grievances against staff actions increased dramatically after CCA assumed operations.¹⁰² The audit curiously omitted a review of medical care and recreation,¹⁰³ two issues that tend to be among the most prone to grievances, making Lake Erie's grievance rate even more troubling.

Arizona. Following the escape of three men from a private prison in Arizona, the State conducted a comparison of costs and conditions at state and private prisons for the first time, though it had ostensibly been required to do so for over twenty years.¹⁰⁴ The state auditor found that private prisons may

⁹⁷ *Ohio Becomes First State to Sell State Prison to Private Company*, TOLEDO BLADE, Sept. 1, 2011, archived at <http://perma.cc/7QHP-PSRZ> (explaining that the Lake Erie Correctional Institution “has become the first state prison in the nation to be sold to a private company”).

⁹⁸ Fathi, *supra* note 5, at 1461 (explaining that in Ohio, “the Correctional Institutions Inspection Committee of the legislature, aided by a full-time professional staff, conducts oversight of the state prison system”).

⁹⁹ German Lopez, *Audit: Private Prison Retains Increased Levels of Violence*, CINCINNATI CITY BEAT (Oct. 24, 2013), archived at <http://perma.cc/3W2-A8N9> (explaining that the CCA had time to prepare for its 2012 inspection, a potential explanation for its mixed improvements from 2011 to 2012).

¹⁰⁰ *Id.* (“But for all the improvements, [the Correctional Institution Inspection Committee] found issues of safety, security and inmate discipline linger.”).

¹⁰¹ JOANNA E. SAUL, CORR. INST. INSPECTION COMM., REPORT ON THE INSPECTION AND EVALUATION OF LAKE ERIE CORRECTIONAL INSTITUTION 3 (2013), available at <http://www.scribd.com/doc/178705366/Lake-Erie-Correctional-Institution-Re-inspection-2013>, archived at <http://perma.cc/9DH3-RTSA> (“[T]he percentage of inmates reporting that they feel unsafe or very unsafe is still high. The rate of assaults and disturbances appears unchanged from the prior inspection and the number of inmates testing positive for drugs remains high.”).

¹⁰² *Id.* at 27 (indicating that while there were only 11 reported grievances in 2011, in 2012, the number rose to 29, and as of the time of the report in 2013, there have already been 50 incidents).

¹⁰³ *Id.* at 19, 24.

¹⁰⁴ CHARLES L. RYAN, ARIZ. DEP'T OF CORR., BIENNIAL COMPARISON OF “PRIVATE VERSUS PUBLIC PROVISION OF SERVICES” REQUIRED PER A.R.S. § 41-1609.01(K)(M) 6 (2011), available at https://corrections.az.gov/sites/default/files/ars41_1609_01_biennial_comparison_report122111_e_v.pdf, archived at <http://perma.cc/V7XU-CHHB> (explaining that the department undergoes a systematic review in order to compare the costs associated with public and private prison facilities); Bob Ortega, *Arizona Prisons Slow to Fix Flaws in Wake of Kingman Escape*, ARIZ. REPUBLIC, June 26, 2011, archived at <http://perma.cc/CS98-KT2V> (stating that in the wake of three inmates escaping Arizona's

actually cost the State more than it would spend by operating prisons itself.¹⁰⁵ Rather than reconsidering the State's experiment with prison privatization, Arizona legislators passed a law eliminating the requirement to conduct the comparisons,¹⁰⁶ and the State continues to rely on private prisons to house thousands of its prisoners.

While the Bureau of Justice Statistics and the Arizona State Auditor have both found that private prison savings may be illusory,¹⁰⁷ a recent study from Temple University, funded in part by the private prison industry, found prison privatization to offer substantial savings for governments.¹⁰⁸ CCA and GEO have cited the Temple study extensively on their websites and in publications, and the report authors wrote multiple op-eds supporting the study in mainstream newspapers.¹⁰⁹ Many of these references omitted discussion of the industry funding, and the companies and authors only acknowledged it after an advocate filed an ethics complaint with Temple.¹¹⁰ Other research finding that private prisons save money compared to government operation has also been

Kingman prison, the Arizona Department of Corrections and the Management and Training Corporation, which manages that facility, "have made sweeping changes meant to prevent another escape").

¹⁰⁵ RYAN, *supra* note 104, at 60-61.

¹⁰⁶ Compare Sasha Abramsky, *Arizona's Private Prisons: A Bad Bargain*, THE NATION, Apr. 23, 2012, archived at <http://perma.cc/NY5P-BHE6> ("Since 1987, Arizona's Department of Corrections has been legislatively mandated to produce cost and quality reviews for its private prisons, in part to judge how they compare with state-run facilities."), with Jason Barry, *State Lawmakers Look to Ease Oversight on Private Prisons*, KPHO CBS 5 ARIZ., (May 17, 2013), archived at <http://perma.cc/9W4A-T6W9> (explaining that Arizona has eliminated its annual review of how private prisons operate).

¹⁰⁷ See JAMES AUSTIN & GARY COVENTRY, EMERGING ISSUES ON PRIVATIZED PRISONS 29 (2001) ("[T]he cost benefits of privatization have not materialized to the extent promised by the private sector. Although there are examples of cost savings, there are other examples in which such benefits have not been realized. Moreover, it is [unclear whether] initial cost savings can be sustained over a long time period."); DEBRA K. DAVENPORT, ARIZ. OFFICE OF THE AUDITOR GENERAL, DEPARTMENT OF CORRECTIONS—PRISON POPULATION GROWTH 19 (2010) ("[D]epartment analysis of private prison and state prison costs indicated that it may be more costly to house inmates in private prisons."); Richard A. Opper, *Private Prisons Found to Offer Little in Savings*, N.Y. TIMES, May 18, 2011, archived at <http://perma.cc/FVJ8-Z5C3> (recounting the research done by Arizona suggesting that privately run prisons may be more costly than state-run prisons).

¹⁰⁸ Matt Stroud, *Study Funded by Private Prison Dollars Praises Private Prisons; No Comment, Says Public University, The Prison Complex*, IN THESE TIMES (Jan. 9, 2014, 8:00 AM), archived at <http://perma.cc/E8SH-H3KY>.

¹⁰⁹ *Id.* ("Both CCA and GEO have cited the study extensively; both have published info about the study and links to the study press release on their website and/or [Facebook] pages; CCA also launched a Twitter campaign when the study was released.")

¹¹⁰ *Id.* (explaining that following an advocate's complaint, CCA, while still repeatedly citing the Temple University study, now makes note of that study's "industry funding").

questioned due to industry funding and connections.¹¹¹ Cost comparisons between public and private prisons are far from straightforward,¹¹² but greater public access to information could help illuminate both sides of the debate.

Prisoners, a uniquely disempowered political population, are ill-equipped to convince their representatives to increase scrutiny of private prison companies.¹¹³ Prisoners' inability to advocate for legislative reform or increase government oversight stands in stark contrast to the industry's substantial political influence, generated by a complex approach involving lobbying, campaign contributions, and fostering close relationships between the industry and government.¹¹⁴ A significant aspect of the general failure of governments to strictly enforce contracts against private prison operators is the practical difficulty of housing so many prisoners. As Professor Mary Sigler notes, "[p]ublic officials dissatisfied with a contractor's performance—or rate increases—cannot realistically cancel the contract before finding alternative placements for hundreds of inmates."¹¹⁵ Additionally, legislatures would not necessarily have the same authority to demand change from private corporations as they would over a department of corrections.¹¹⁶

Regardless of where prisoners are housed – in public or private facilities – states are ultimately responsible for providing for their fair treatment and preventing them from suffering cruel and unusual punishments.¹¹⁷ Some states,

¹¹¹ *Id.* (identifying a "pattern of specious academic research into prison privatization that is funded by the private prison industry," including a study by Vanderbilt University and one by the University of Florida).

¹¹² See HARRIS KENNY & LEONARD GILROY, REASON FOUNDATION, THE CHALLENGE OF COMPARING PUBLIC AND PRIVATE CORRECTIONAL COSTS 4-6 (2013), available at http://reason.org/files/comparing_correctional_costs.pdf, archived at <http://perma.cc/GZE8-77XW> (identifying numerous reasons why cost comparisons are difficult to ascertain by type and indicating that the actual costs of operations among prisons are also extremely varied).

¹¹³ Fathi, *supra* note 5, at 1453 ("Prisons also house a uniquely powerless population. . . . [N]o other group in American society is so completely disabled from defending its rights and interests."); Sigler, *supra* note 65, at 160 (stating that inmates "are virtually powerless to effect change in the face of unsatisfactory prison conditions. Most lack the basic right to vote; and in any case, they constitute an unpopular minority without political influence or efficacy").

¹¹⁴ See generally, PAUL ASHTON, JUSTICE POLICY INST., GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 3, (2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf, archived at <http://perma.cc/U8RV-4LSF> (identifying the for-profit strategy triangle undertaken by private prison companies).

¹¹⁵ Sigler, *supra* note 65, at 160.

¹¹⁶ Raher, *supra* note 11, at 231 ("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.").

¹¹⁷ See *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (reiterating that the Eighth

including Tennessee, either have provisions in their constitutions or have enacted statutes that require the state to provide certain levels of care for their prisoners.¹¹⁸ While the evidence on private prison performance is not conclusive, recent criticism of contract compliance and concerns about human rights seem justified. State governments have largely failed to hold private prison companies accountable for contract violations, including staffing deficiencies and inability to reduce prison spending.

D. *The Heightened Need for Transparency in Private Prisons*

Increasing public access to operational information could help to develop more effective oversight and ensure contract compliance and humane treatment in private prisons. Despite holding hundreds of thousands of prisoners, “private prisons are subject to even less scrutiny than their public counterparts. As private corporations, they are typically not subject to open meeting and freedom of information laws that apply to state and local departments of corrections.”¹¹⁹

Heightened oversight of private prisons is essential for two reasons: the drive to generate profit gives private prison operators incentives to “cut corners on staffing, medical care, and other essential services”;¹²⁰ and private prisons receive billions of taxpayer dollars from government contracts, reaping hundreds of millions of dollars annually in profits from these contracts.¹²¹ Governments are obliged to protect prisoners from cruel and unusual punishment.¹²² Additionally, taxpayers have the right to know that government revenue is spent appropriately. In the private prison context, taxpayers deserve to have an accounting of how and why private corporations are able to earn such enormous profits by performing an inherently governmental function – a function that, in the public context, produces no profit and is by its nature often restricted to operate on the lowest possible budget.¹²³

Amendment does not allow for inhumane prisons and “places restraints on prison officials, who may not, for example, use excessive physical force against prisoners”).

¹¹⁸ See, e.g., TENN. CONST. art. I, § 32 (requiring “[t]hat the erection of safe prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for”).

¹¹⁹ Fathi, *supra* note 5, at 1462; Geraghty & Velez, *supra* note 23, at 475 (“Proponents of the [federal Private Prison Information Act] recognized that accountability must begin with transparency. . . . The companies that run private prisons have maintained they are not subject to FOIA because they are not public agencies.”).

¹²⁰ Fathi, *supra* note 5, at 1461.

¹²¹ See *supra* Part I.B.

¹²² See *supra* note 117 and accompanying text.

¹²³ See GIBBONS & KATZENBACH, *supra* note 61, at 99 (“[Public records] laws should apply equally to private companies that operate prisons or jails under government contract”); Geraghty & Velez, *supra* note 23, at 481 (“Another reason to insist on transparency in the criminal justice system is the system’s enormous cost. We can no longer afford to rely on prisons as the only solution to the problem of crime. Our current over-reliance on prison has come with crippling financial tolls.”).

The limited information available to the public concerning private prison operations, revealed through litigation, investigative reporting, and oversight entities, indicates that private prisons commonly suffer from a host of operational issues that harm prisoners and deprive them of basic constitutional rights.¹²⁴ Information from various sources also indicates that the industry often fails to provide a valuable return on investment for taxpayers.¹²⁵ Although the industry certainly has some “incentive[] to develop innovative corrections strategies and streamline [its] operations in order to win and retain government contracts,”¹²⁶ that motivation in and of itself has not sufficed to ensure that the industry performs, by and large, on a level equivalent to many governments.

To be fair, any true comparison between public and private facilities is exceedingly difficult due to differences in populations and facility design.¹²⁷ The limited information available from private prison companies renders such comparisons nearly impossible:

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 . . . making informed analysis of the policy successes (or failures) of correctional privatization difficult to conduct. One recurring issue . . . is data on personnel recruitment and retention.¹²⁸

1. Staffing Information

The difficulty of obtaining information from the private prison industry has left a sparse record on crucial information concerning staffing levels and ratios at private prisons.¹²⁹ Though the industry claims publicly that its staffing levels mirror those in government facilities, or alternatively that particular design

¹²⁴ See *infra* Parts I.D.2.a-I.D.2.b.

¹²⁵ See *supra* notes 90-112 and accompanying text.

¹²⁶ Sigler, *supra* note 65, at 159.

¹²⁷ See Christopher Petrella, *The Color of Corporate Corrections, Part II: Contractual Exemptions and the Overrepresentation of People of Color in Private Prisons*, RADICAL CRIMINOLOGY, Winter 2014, at 82, available at <http://journal.radicalcriminology.org/index.php/rc/article/download/44/pdf>, archived at <http://perma.cc/6DAD-6ZF8> (describing how a study comparing private and public prisoners is difficult because the design and population of the prisons differ greatly).

¹²⁸ Raheer, *supra* note 11, at 243.

¹²⁹ See, e.g., *id.* at 243-47 (explaining that information on contract performance, compensation of personnel, and number of staff in private prisons is not publicly available); AM. CIVIL LIBERTIES UNION, *supra* note 36, at 40-41 (observing that requests for even the most basic information about private prisons are not acknowledged); HARTNEY & GLESMANN, *supra* note 63, at 15-16 (“[F]rom a financial perspective, it is in the contractor’s best interest to minimize the reporting of data that could provide important—though potentially negative—information about conditions of confinement, such as the number of assaults that take place in the facility, incident reports, and grievances filed.”).

aspects largely absent from government institutions allow for equivalent treatment with fewer staff,¹³⁰ reports in the media tend to indicate that these claims are not well founded. The most recent comprehensive analysis took place nearly fifteen years ago, finding private prisons use significantly fewer staff than public ones.¹³¹

For staffing issues in particular, the industry regularly argues that its staffing models should be granted a “trade secret” exemption from disclosure under public records statutes.¹³² But, “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.”¹³³ Staffing is the most expensive component of a prison budget,¹³⁴ and it is arguably the most critical factor in ensuring institutional security, violence prevention, and program success.¹³⁵ Thus, a strong public interest in access to such information exists, particularly when private companies operate prison facilities at such enormous profits.

The private prison industry used to release information on staffing ratios and turnover in an industry compendium, but it no longer does so.¹³⁶ “Compensation and other personnel information is of particular interest when measuring the effectiveness of correctional privatization,” and the public’s inability to access such information deprives taxpayers of valuable information about institutional security and the efficiency of government services.¹³⁷

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. This is done either through reducing staff or reducing compensation—an approach that the industry says it can do without sacrificing quality of operations. But there is good reason to doubt the private industry’s claims because compensation effects [sic] staff turnover, which in turn impacts facility safety.¹³⁸

¹³⁰ See *Facility Design and Construction*, CORR. CORP. OF AM. (last visited July 20, 2014) <http://cca.com/facility-design-and-construction>, archived at <http://perma.cc/D2SV-G5AE>.

¹³¹ AUSTIN & COVENTRY, *supra* note 107, at xi (“Privately operated facilities have a significantly lower staffing level than publicly operated prisons . . .”).

¹³² Raher, *supra* note 11, at 237-38 (arguing that the logic of trade secrets does not easily apply to private prisons).

¹³³ *Id.* at 238.

¹³⁴ *Id.* at 244.

¹³⁵ *Id.*

¹³⁶ *Id.* at 244-45 (“Industry-wide staff-turnover data used to be included in a privately published statistical compendium . . . [but] [m]ore recent editions . . . do not contain turnover data.”).

¹³⁷ *Id.* at 244.

¹³⁸ *Id.* (footnotes omitted).

In 2005, private prisons had an average of 4.7 inmates per staff member and 7.1 inmates per correctional officer, both ratios higher than the averages in state prisons.¹³⁹ These numbers are also higher, in some cases significantly higher, than the ratios in five of the largest state prison systems in 2013.¹⁴⁰ No more recent nationwide figures exist,¹⁴¹ but Governor Jerry Brown of California recently revealed some interesting, yet vague information as the State continues to expand its use of private prisons. Brown plans to send prisoners to out-of-state correctional facilities, mainly private ones, in response to a depopulation order.¹⁴² The state's official 2014-2015 budget indicates that these private facilities have higher inmate-to-staff ratios than California prisons.¹⁴³ While California employs one individual for every two prisoners, out-of-state facilities cited in the report only employ one staff person per thirty-six inmates.¹⁴⁴ The budget authors do not disclose which facilities were analyzed, but this discrepancy is troubling both for advocates and for the prisoners who may be sent to these private prisons.

The situation at the ICC provides an instructive example both of how important proper staffing levels are for maintaining security, and how the private prison industry is able to conceal staffing information, even when under pressure from litigation to accurately report it. Guards at the facility would permit, and sometimes encourage, prisoners to fight each other, often as a means of maintaining internal discipline through violence, to the point where

¹³⁹ JAMES STEPHAN, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, app. at tbl.15 (2008), available at <http://bjs.gov/content/pub/pdf/csfcf05.pdf>, archived at <http://perma.cc/9ESQ-FQP8> (listing the average inmate per employee at 3.8 and inmate per correctional officer at 5.6 in public prisons).

¹⁴⁰ NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 24-25 (2013), available at <https://www.fas.org/sgp/crs/misc/R42937.pdf>, archived at <http://perma.cc/XBZ-2EWX> (listing the ratios of inmates to staff and inmates to correctional officers in California, Texas, Florida, New York, and Georgia).

¹⁴¹ The Bureau of Justice Statistics conducts this census every five to seven years and publishes results approximately two to three years after the census itself. Thus, the next figures may not be released before 2015. *Census of State and Federal Adult Correctional Facilities*, U.S. DEP'T OF JUSTICE, archived at <http://perma.cc/J4Z7-QP4C> (last visited Jan. 18, 2014).

¹⁴² California is still in the process of reducing its prison population as a result of the Supreme Court's decision in *Brown v. Plata*, in which it found that the California prison system violated prisoners' constitutional rights because of deficiencies in medical care stemming from overcrowded prisons. See *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011).

¹⁴³ CAL. GOVERNOR'S BUDGET, BUDGET OF THE DEPARTMENT OF CORRECTIONS AND REHABILITATION 6 (2014-2015), available at <http://www.ebudget.ca.gov/2014-15/pdf/GovernorsBudget/5210.pdf>, archived at <http://perma.cc/C5P-LPQ2> (last visited Jan. 18, 2014).

¹⁴⁴ *Id.* at 6.

prisoners called the facility “gladiator school.”¹⁴⁵ There were more assaults at the facility in 2008 than at all other prisons in Idaho combined.¹⁴⁶ Violence continued to intensify throughout litigation brought by prisoners alleging Eighth Amendment violations.¹⁴⁷ The case settled in 2011, with CCA agreeing to a two-year monitoring period to ensure compliance with certain staffing benchmarks, designed to increase supervision and reduce violence at the facility.¹⁴⁸ By early 2013, enough information had surfaced indicating CCA’s noncompliance with the staffing requirements that the Idaho state police began an investigation.¹⁴⁹ This investigation revealed that CCA had significantly overrepresented staffing hours at the facility to the court, in violation of the agreement.¹⁵⁰ The plaintiffs successfully petitioned the court to hold CCA in contempt, taking advantage of what may have been the only enforcement mechanism able to prevent further harm and potential future litigation.¹⁵¹

In holding CCA in contempt of court for violating the staffing provisions of the settlement agreement, the Idaho Supreme Court laid bare the company’s lack of transparency in its provision of staffing records to the Plaintiffs:

[CCA] had compelling reasons to regularly and thoroughly check that they were complying with the staffing requirements in the IDOC contract and Settlement Agreement. They had promised the state to improve record-keeping to make it easier to track staffing assignments. And yet it is clear that there was a persistent failure to fill required mandatory positions, along with a pattern of CCA staff falsifying rosters to make it appear that all posts were filled. Defendants did not keep clear records¹⁵²

The Court chastised CCA for failing to rectify staffing deficiencies that existed for years even prior to the settlement and about which senior staff had been warned by multiple employees, and for withholding information from its

¹⁴⁵ Amended Complaint at 2, *Riggs v. Valdez*, No. 1:09-cv-00010-BLW (D. Idaho Mar. 11, 2010), archived at <http://perma.cc/MAT3-J3GQ>.

¹⁴⁶ See Rebecca Boone, *CCA-Run Prison Remains Idaho’s Most Violent Lockup*, YAHOO! NEWS (Oct. 9, 2011), archived at <http://perma.cc/KCY5-EVKG>.

¹⁴⁷ Nathaniel Hoffman, *Assaults at ICC Accelerate*, BOISE WEEKLY, June 2, 2010, archived at <http://perma.cc/R4HQ-D3G2> (“The prison, which is also mired in a pending class-action prisoner civil rights lawsuit, reported a reduction in assaults in March, but increased violent incidents in April and May, earning a rebuke from IDOC.”).

¹⁴⁸ Rebecca Boone, *Idaho Inmates Settle Prison Lawsuit*, SPOKESMAN-REV., Sept. 20, 2011, archived at <http://perma.cc/CCM8-BQNX> (explaining that as a part of a settlement agreement, CCA agreed to increase staffing, investigate all assaults, and make other changes at the prison).

¹⁴⁹ See *Kelly v. Wengler*, No. 1:11-cv-00185-EJL, 3 (Sept. 16, 2013) (Memorandum Decision).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 9.

¹⁵² *Id.* at 2.

report to the court on its internal investigation of staffing deficiencies and improperly portraying that report as “extensive.”¹⁵³ Plaintiffs showed staffing deficiencies were “a problem from the beginning of the settlement period”¹⁵⁴ The Court went on to extend the monitoring period for two more years and appoint an independent monitor to check compliance.¹⁵⁵

Public disclosure of staffing information is crucial for private prisons – governments are the industry’s only consumers; “this private interest [in protecting staffing information] is almost always outweighed by public disclosure, except in cases of bona fide sensitive security information (e.g., facility architectural drawings).”¹⁵⁶ The industry’s ability to restrict access to staffing information in response to public records requests and litigation has hampered the efforts of scholars and advocates to study the industry and its performance.¹⁵⁷

2. Conditions, Treatment, and Security

Staffing implicates other significant concerns, including rates of violence among prisoners and between prisoners and staff; security measures, which can reduce escapes; and responsiveness to prisoners’ health needs. While staffing levels at private prisons are arguably the most important information that the public could gain access to through broader application of public records laws, the industry has likewise eluded scrutiny in other areas. The federal government last comprehensively analyzed the performance of the private prison industry more than a decade ago.¹⁵⁸ Further, the majority of private prison beds are not contracted to the federal government,¹⁵⁹ so oversight must come primarily from state and local governments, which have relatively limited resources. Difficulties in gaining access to information from private prisons have severely limited analysis of the industry’s performance.

a. *Rates of Assaults, Escapes, and Other Security Metrics*

Given the importance of staffing to all aspects of prison operations, reports of understaffing at private prisons implicate far more than a straightforward computation of man-hours to determine contract or settlement compliance.

¹⁵³ *Id.* at 7-9, 11 (discussing CCA’s failures prior to and following the settlement agreement).

¹⁵⁴ *Id.* at 14.

¹⁵⁵ *Id.* at 20-21.

¹⁵⁶ Raheer, *supra* note 11, at 237-38.

¹⁵⁷ *Id.* at 238 (“To the extent that such data is kept secret due to the inapplicability of public records statutes to private contractors, policymakers will never receive adequate information to determine the operational success or failure of the prison privatization experiment.”).

¹⁵⁸ See generally CAMP & GAES, *supra* note 27.

¹⁵⁹ GUERINO ET AL., *supra* note 32, at 31 (indicating that only 16.1 percent of all federal prisoners are housed in private facilities).

As of 1999, the rate of escape from private prisons was substantially higher than from Bureau of Prisons (“BOP”) prisons. In fact, “[t]aken together, private prisons had 18 inmates escape from inside of secure prisons . . . and 5 inmates [escaped during transfer],” while only 1 prisoner had escaped from a secure BOP prison in the past three years, despite the fact that BOP prisons house 17% more prisoners.¹⁶⁰ Unfortunately, more recent comprehensive information is not available. Escapes from prisons of all sorts are rare, but stories about violence and security issues in private prisons from lawsuits and news reports seem to indicate that security remains a significant concern at many private facilities. One high-profile incident in 2010 involved two convicted murderers and a third man escaping a private prison in Arizona where staff routinely ignored alarms.¹⁶¹ The prison took hours to notify state officials; meanwhile, the escapees carjacked and murdered an elderly couple, eluding capture for weeks.¹⁶² High staff turnover and limited training were cited in a subsequent audit as factors contributing to the escape.¹⁶³

CCA’s management of ICC provides another example of the relationship between inadequate prison staffing and violence. In settling the case, the parties agreed to a staffing schedule, recognizing the vital role of staffing in facility management.¹⁶⁴ Understaffed prisons are more difficult to manage. The more prisoners any particular guard must supervise, the less attention that guard can pay to any individual prisoner. Arguably, ICC was rife with violence precisely because staffing was inadequate. Guards used gangs to establish and keep order because they could not do so themselves.¹⁶⁵

Available information indicates that rates of violence, both among inmates and between inmates and staff, may be higher at private prisons than government facilities. An independent state commission in Ohio recently found that rates of violence soared after it sold a state prison to a private company.¹⁶⁶ Audits of the facility following the sale revealed that violence

¹⁶⁰ CAMP & GAES, *supra* note 27, at 7.

¹⁶¹ Ortega, *supra* note 104.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See Settlement Agreement at 4, Kelly v. Wengler, No. 1:11-cv-00185-EJL (D. Idaho Sept. 20, 2011), *archived at* <http://perma.cc/WH6F-NL32> (listing the requirements of the settlement agreement, including CCA agreeing to comply with a staffing pattern in order to enhance overall security at the facility).

¹⁶⁵ *Idaho: Federal Court Unseals Pleadings, Holds CCA in Contempt for Violating Settlement Agreement*, PRISON LEGAL NEWS (Oct. 2013), *archived at* <http://perma.cc/FYT6-GTYU> (“The underlying class-action lawsuit, litigated by the American Civil Liberties Union (ACLU), alleged excessive levels of violence at ICC that were in large part due to understaffing.”).

¹⁶⁶ GREGORY GEISLER, CORR. INST. INSPECTION COMM., LAKE ERIE CORRECTIONAL INSTITUTION 34-36 (2013), *available at* <http://big.assets.huffingtonpost.com/lakeeriereport.pdf>, *archived at* <http://perma.cc/4DLP-UD7F>; SAUL, *supra* note 101, at 13 (showing that the number of assaults at Lake Erie

among inmates and between inmates and staff increased significantly under private control.¹⁶⁷ Information on rates of violence at private facilities is generally very difficult to ascertain given the industry's exemption from public records requirements. However, a 2011 investigation by National Public Radio concluded that prisoners in private facilities are more likely to suffer violence at the hands of guards or other prisoners than prisoners in government facilities.¹⁶⁸

These rates of violence and other security issues are far more troubling than they appear at first glance. Most offenders housed in private prisons are classified as lower custody and are generally less costly to house relative to the general prison population.¹⁶⁹ Logically, the rates of assaults, escapes, and other security issues should be lower among this population; the nature of these prisoners' classifications demonstrates their lower relative risk to institutional security.¹⁷⁰ Indications that these sorts of security concerns appear at a higher rate in many private prisons highlight the need for greater oversight of industry operations.

b. *Medical Care*

Medical care, like staffing, comprises a substantial percentage of a prison's budget and can impact prisoners' rights even more directly than staffing issues. Deficient medical care violates prisoners' rights under the Eighth Amendment

Correctional Institution increased significantly in 2012); Chris Kirkham, *Lake Erie Prison Warden Replaced After Reports Detail Deteriorating Conditions at Private Prison*, HUFFINGTON POST, Mar. 27, 2013, archived at <http://perma.cc/Y6DK-UUC3> (explaining that Corrections Corporation of America took over the Lake Erie Correctional Institution in January 2012).

¹⁶⁷ SAUL, *supra* note 101, at 13 (discussing the number of inmate-on-inmate assaults and the number of inmate-on-guard assaults).

¹⁶⁸ *Who Benefits When a Private Prison Comes to Town?*, NAT'L PUBLIC RADIO (Nov. 5, 2011), archived at <http://perma.cc/WBL2-F6PT> (“[S]ome studies have found that the level of violence is actually higher in private prisons.”).

¹⁶⁹ KEVIN PRANIS, PRIVATE CORR. INST., COST-SAVINGS OR COST-SHIFTING: THE FISCAL IMPACT OF PRISON PRIVATIZATION IN ARIZONA 3 (2004), available at http://www.justicestrategies.org/sites/default/files/publications/Cost-saving_or_cost-shifting.pdf, archived at <http://perma.cc/AQ4Q-CTVN> (“Prisoners housed in private facilities were far less likely to be convicted of serious or violent offenses, or to have high medical and mental health needs, than prisoners housed in public facilities used to generate cost comparisons.”); see also PEW CHARITABLE TRUSTS, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 12 (2008), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf, archived at <http://perma.cc/5EJZ-U895> (“[M]edical care is one of the principal cost drivers in corrections budgets today.”).

¹⁷⁰ See Malcolm M. Feely & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections*, 24 PACE L. REV. 433, 464 (2004) (“[I]nmates are now assigned to specific institutions, units, and cells according to their propensity for violence, length of sentence, criminal history, and the like.”).

and often leads to § 1983 litigation against prison officials.¹⁷¹ Many private prisons typically house prisoners with fewer and less costly medical needs, and despite the importance of providing medical treatment, private medical care companies have struggled to deliver their services at the costs required by contracts.¹⁷²

A report by the American Friends Service Committee details the disturbing history of medical care privatization in Arizona. A 2010 request for proposals (“RFP”) required bidding companies to provide services at a reduced cost but received no viable bids on the contract.¹⁷³ Following this failed RFP, the state issued a second, without a cost savings requirement.¹⁷⁴ Wexford Correctional Services bid on and won this contract – despite mainstream reports of its poor track record – and began providing “treatment” in 2012.¹⁷⁵ Within the first six months, more than 100 prisoners were exposed to hepatitis C, resulting in a \$10,000 fine; Wexford itself declared the Arizona Department of Corrections’ medical care system “broken,” and the state severed its contract.¹⁷⁶

Facing litigation over deficient medical care, the state turned to Corizon, a private correctional healthcare provider, to manage its healthcare.¹⁷⁷ Rather than improving, however, medical care appears to have deteriorated further under Corizon’s control.¹⁷⁸ More deaths were reported in Arizona prisons after

¹⁷¹ See *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976) (explaining that the government has an “obligation to provide medical care for those whom it is punishing by incarceration,” and that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)) (citation omitted); see also *Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (finding extreme overcrowding was the primary and irremediable cause of medical care deficiencies resulting in Eighth Amendment violations, and upholding an injunction ordering drastic population reduction).

¹⁷² PRANIS, *supra* note 169 at 3 (“Prisoners housed in private facilities were far less likely . . . to have high medical and mental health needs, than prisoners housed in public facilities . . .”); Petrella, *supra* note 127, at 83-85 (describing private prisons’ treatment of prisoners with medical conditions and explaining how private prisons often exempt themselves from housing prisoners with severe medical conditions).

¹⁷³ See CAROLINE ISAACS, AM. FRIENDS SERV. COMM., DEATH YARDS: CONTINUING PROBLEMS WITH ARIZONA’S CORRECTIONAL HEALTH CARE 7-8 (Oct. 2013), available at <http://www.afsc.org/sites/afsc.civicactions.net/files/documents/DeathYardsFINAL.pdf>, archived at <http://perma.cc/ST7E-R2W9> (discussing the bidding requirement; but few, if any, bids were received).

¹⁷⁴ *Id.* at 8 (“A second RFP was issued in December of 2011, stipulating that the contract be awarded to the ‘most qualified bidder.’”).

¹⁷⁵ *Id.* at 8-9 (“The contract was finally awarded to Wexford Health Sources Inc. in July of 2012. It is unclear why this particular corporation was chosen, given their well-published history of problems in other states.”).

¹⁷⁶ *Id.* at 8-10.

¹⁷⁷ *Id.* at 10.

¹⁷⁸ *Id.* at 13-16 (“According to reports from prison medical staff, inmates, and their families, the quality of medical care . . . has actually gotten worse.”).

litigation had commenced than in the years prior, including suicides, which occur at a rate sixty percent higher than the national average.¹⁷⁹ One facility, the Tucson Complex, which deals with prisoners who have complex health issues, has seen the greatest spike in its death toll, possibly reflecting years of mismanaging chronic conditions.¹⁸⁰ An advocacy organization representing Arizona prisoners noticed a significant increase in its complaints regarding medical care after the state began using private companies to provide treatment.¹⁸¹ Given the difficulties in obtaining information from private companies, there seems to be little benefit and a rather substantial disadvantage to privatizing medical care without saving money.

c. *Programs and Services*

Ensuring successful outcomes for those released from correctional facilities will have substantial benefits for society as a component of an efficient and comprehensive criminal justice system. Access to programs that can provide education, life skills, and mechanisms for coping with trauma or addiction can have many positive impacts on individual prisoner outcomes and crime rates overall. Unfortunately, due to extremely limited information, little research has focused on the availability or efficacy of programs offered to prisoners in private facilities. To the private prison industry's credit, the last comprehensive national figures indicate that the industry widely offers educational, vocational, and drug treatment programs, and prisoners in private facilities may have greater access to such benefits than their counterparts in government prisons.¹⁸² But this information is nearly fifteen years old.¹⁸³ Current information relating to private prisons is incomplete at best, and given the industry's dramatic expansion over the past two decades, more current information is needed in order to properly evaluate the accessibility and quality of private prison programming. One recent study, comparing public and private facilities in Minnesota and their effects on recidivism, found that the state private prison offered fewer of these types of programs and services to prisoners.¹⁸⁴

¹⁷⁹ *Id.* at 13 (“[T]here were 37 deaths in Arizona prisons between 2011 and 2012. Nineteen of them were suicides—a rate of suicide 60% higher than the national average.”).

¹⁸⁰ *Id.* at 13-14 (observing that the Tucson Complex, which houses prisoners with ongoing medical and mental health needs, reported 15 deaths, which may be a result of the “cumulative effect of the poor and worsening quality of medical care over the past three years”).

¹⁸¹ *Id.* at 13 (observing that since the prison began using private medical services, “the American Friends Service Committee has observed a marked increase in the number of letters from prisoners and phone calls and emails from family members complaining of issues with medical care in state prisons”).

¹⁸² AUSTIN & COVENTRY, *supra* note 107, at 43-45, 55 (discussing “the impressive record of programming activities” at private institutions compared to those at private prisons).

¹⁸³ *Id.* at ix.

¹⁸⁴ See Grant Duwe & Valerie Clarke, *The Effects of Private Prison Confinement on Offender Recidivism: Evidence from Minnesota*, 38 CRIM. JUST. REV. 375, 389 (2013) (“We

The authors of this study further found that prisoners in private facilities may be more likely to re-offend within four years of release than those housed in public prisons.¹⁸⁵ The authors noted that research on recidivism rates from public and private prisons is extremely limited.¹⁸⁶ Of the few studies that exist, recent ones have compared larger numbers of prisoners than early studies, and they have indicated that private prisons may have a moderate negative effect on offender recidivism.¹⁸⁷ Even rarer are cost comparisons that accurately account for differences in offender populations housed at the facilities, but the available information indicates that private prisons may also be more expensive than government operated facilities.¹⁸⁸ Without passing much judgment on the exact causes, the authors essentially found that longer stays in private prisons may increase one's chances of committing new offenses upon release.¹⁸⁹ Lower visitation rates at private prisons and less prisoner access to rehabilitation programs appeared to correlate with higher rates of recidivism.¹⁹⁰ Further, in focusing on a private prison in Minnesota that houses an offender population that should be cheaper than the mean, the authors found that the state did not save any appreciable amount of money by contracting with a private prison company.¹⁹¹ Most troubling, however, was the indication that "private prisons produce slightly worse recidivism outcomes among the

posit that the recidivism results observed for private prisons may be attributable to a lack of visitation and rehabilitative programming in comparison to state-operated facilities.").

¹⁸⁵ *Id.* at 378 (citing a variety of studies with mixed findings; one conducted by Spivak and Sharp in 2008 found that "in most of the models they tested, inmates released from private prisons were more likely to return to prison compared to inmates released from public prisons").

¹⁸⁶ *Id.* at 376-78 (explaining that studies comparing recidivism rates between private and public prisons have not received enough scholarly attention).

¹⁸⁷ *Id.* ("In the most recent study that compared the recidivism rates between public and private prisons, Spivak and Sharp (2008) found that inmates released from private prisons had higher rates of recidivism compared to releases from public prisons.").

¹⁸⁸ *Id.* at 378 ("None of the above studies compared the costs of private prisons to that of public prisons."); PRANIS, *supra* note 169, at 3 ("[I]t is impossible using the available evidence [to determine] whether privatization has delivered cost-savings or merely shifted costs from the private sector onto the public sector.").

¹⁸⁹ Duwe & Clarke, *supra* note 184, at 389 ("Total private prison time served (i.e., 12 months or more) significantly increased the hazard of reconviction . . .").

¹⁹⁰ *Id.* at 389 ("We posit that the recidivism results observed for private prisons may be attributable to a lack of visitation and rehabilitative programming in comparison to state-operated facilities.").

¹⁹¹ *See id.* at 389-90 ("As such, [Prairie Correctional Facility ("PCF")] did not incarcerate these offenders less expensively than the [Minnesota Department of Corrections ("MnDOC")]. Yet, due to PCF eligibility criteria, the MnDOC confined offenders who are, compared to those placed at PCF, generally more expensive to incarcerate (i.e., older, less healthy, and more likely to have behavioral problems).").

healthiest and best-behaved inmates for the same amount of money [as state-run prisons].”¹⁹²

Like higher rates of assault and escape in private prisons, higher rates of recidivism for prisoners returning from private facilities should raise significant concern. Many prisoners come out of private facilities more likely to re-offend than those housed in public facilities.¹⁹³ Because the vast majority of prisoners will eventually be released into society, it behooves every government to ensure these individuals have the tools to refrain from crime and become productive citizens.¹⁹⁴ The limited access to information from private prisons frustrates attempts to generate informed analysis of industry performance. Stories of prisoner “disturbances” over issues involving abuse,¹⁹⁵ medical care,¹⁹⁶ and substandard conditions¹⁹⁷ in private facilities should raise concern among governments that contract with private prison companies.

E. *The Need for Greater Transparency and Accountability in Immigration Detention*

The federal government has drastically expanded its use of immigration detention in the past decade.¹⁹⁸ About 32,000 immigrants are detained on any given day, and more than 400,000 cycle through some form of detention

¹⁹² *Id.* at 391.

¹⁹³ Duwe & Clarke, *supra* note 184, at 389-91 (finding that “private prison incarceration was associated with a greater risk of recidivism,” and charting data indicating that prisoners in private prisons are more likely to re-offend than public prisoners following release).

¹⁹⁴ *Correctional Facts and Figures*, AM. CORR. ASS’N, <http://archive.org/page/3547233/2014-01-17/http://www.aca.org/government/population.asp>, archived at <http://perma.cc/VB6E-RGGD> (last visited Jan. 18, 2014) (“At least 95 percent of those currently incarcerated will be released from custody.”).

¹⁹⁵ Seth Freed Wessler, *What Started a Mississippi Prison Riot? Depends on Who You Ask*, COLORLINES, May 22, 2012, http://colorlines.com/archives/2012/05/corrections_corp_of_america_prison_riot_mississippi.html, archived at <http://perma.cc/53HZ-DHM9> (describing a fight at a Mississippi jail in which the prisoners explained that the violence was a result of abuse at the prison).

¹⁹⁶ Adriana Gomez Licon, *Inmate’s Death Focus of Lawsuit*, EL PASO TIMES, Dec. 9, 2010, archived at <http://perma.cc/C7KR-AHST> (“The ACLU and the lawyers claim that prison administrators and health workers denied appropriate medical care to Galindo, 32, who suffered from epilepsy. Instead, administrators segregated him from the inmate population in solitary confinement for complaining of being sick . . .”).

¹⁹⁷ GRASSROOTS LEADERSHIP, *supra* note 24, at 9 (“In many cases, protests have been explicitly aimed at the substandard conditions in CCA’s prisons In July 2004, guards at Colorado’s Crowley County Correctional Facility ignored prisoners’ requests to speak with the warden over conditions, resulting in a quickly escalating riot with over 400 prisoners. Prisoners began to destroy property, setting fires and smashing furniture, and using steel weights and dumbbells from the exercise yard to smash doors, windows, and walls.”).

¹⁹⁸ DETENTION WATCH NETWORK, *supra* note 31, at 1 (“Since the late 1990’s, the number of people held in immigration detention has exploded.”).

annually in the United States.¹⁹⁹ Private prison companies have helped the government accommodate this rapidly growing population.²⁰⁰ The industry's ability to quickly expand bed capacity made it an attractive partner for both Immigration and Customs Enforcement ("ICE") and the U.S. Marshals Service.²⁰¹ Private prisons now house nearly half of the immigration detainees in the United States.²⁰²

Immigration detention is still widely seen as the biggest potential growth market for private prisons, despite its already huge market share.²⁰³ In 2013, the industry benefitted from an extensive lobbying and campaign financing effort when Congress passed a mandatory quota for immigration detention beds.²⁰⁴ Up to two-thirds of immigration detainees on a given day are held by ICE, which contracts extensively with CCA and GEO.²⁰⁵ Almost a quarter of CCA's revenue comes from incarcerating non-citizens.²⁰⁶ Despite claims to the

¹⁹⁹ NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION 3 (2013), archived at <http://perma.cc/X2F8-62YY>.

²⁰⁰ GREENE & MAZÓN, *supra* note 27, at 15-20 (discussing how private prisons have housed more illegal immigrants since 9/11).

²⁰¹ *Id.* (explaining that private prisons were able to increase their number of beds in order to accommodate individuals that are to be detained).

²⁰² DETENTION WATCH NETWORK, *supra* note 31, at 1 ("In total, private corporations administer 49% of beds.").

²⁰³ See, e.g., Raheer, *supra* note 11, at 224-28 (stating that ICE continues to utilize "a growing network of private facilities"); Lee Fang, *How Private Prisons Game the Immigration System*, THE NATION, Feb. 27, 2013, archived at <http://perma.cc/73M2-JAN2> (detailing extensive lobbying by the industry, particularly of congresspersons likely to support strict immigration legislation that could provide a substantial expansion of immigration detention).

²⁰⁴ William Selway & Margaret Newkirk, *Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit*, BLOOMBERG, Sept. 24, 2013, archived at <http://perma.cc/UBC6-H6CZ> ("Congress has pressed to ensure the beds are full, and lawmakers say it forces U.S. Immigration and Customs Enforcement to find and deport the millions who are in the country illegally."); Patrick O'Connor, *Private Prisons are Likely to Benefit from Rewrite of Immigration Laws*, WALL ST. J., July 5, 2013, archived at <http://perma.cc/69G8-EYED> (detailing political influence exerted by the private prison industry vying for up to 80% of an additional 14,000 inmates and \$1.6 billion in revenue, including how "[t]he two companies have spent millions lobbying Congress and the administration on prison-related issues . . . [in] the 2012 election season, CCA and its executives contributed more than \$950,000 in campaign donations to governors, candidates for federal office and the two main political parties . . . [t]he GEO Group and its executives contributed \$418,500").

²⁰⁵ See *id.* (indicating that GEO, CCA, "and other for-profit prison operators, hold[] almost two-thirds of all immigrants detained each day in federally funded prisons as they face deportation").

²⁰⁶ Fang, *supra* note 203 ("Last year, [CCA] brought in \$1.7 billion in revenues, about a quarter of which came from contracts with the Immigration and Customs Enforcement (ICE) and federal Bureau of Prisons to incarcerate non-citizens in the United States.").

contrary, lobbying disclosure forms reveal that the industry spends tens of millions of dollars annually (essentially, taxpayer dollars) lobbying, including on immigration reform.²⁰⁷

Critics have argued that the imposition of a bed quota detracts from meaningful reform and focuses precious resources on arresting immigrants, primarily those who only commit status offenses.²⁰⁸ Reform may be particularly pressing for immigration detainees; some of the most egregious abuses and violations within the realm of private prisons have affected incarcerated immigrants.²⁰⁹ Although immigration detention facilities hold mostly those charged with or convicted of status offenses, rather than criminal offenses, the facilities used to house them largely resemble prisons.²¹⁰ Conditions at immigration detention facilities became so dire and unwieldy that, in 2009, President Obama promised comprehensive reform of the system.²¹¹ Despite this promise, significant systemic problems with conditions still exist in many facilities.²¹² Increasing public access to information from

²⁰⁷ *Id.* (stating that CCA and other private prison companies spent roughly \$45 million over the last ten years to influence state and federal governments).

²⁰⁸ William Selway & Margaret Newkirk, *Congress's Illegal-Immigration Detention Quota Costs \$2 Billion a Year*, BLOOMBERG BUS. WEEK, Sept. 26, 2013, archived at <http://perma.cc/8AVP-4GWN> (“Without the mandate the agency could free low-risk offenders and put them on supervised release to ensure that detainees show up in court for deportation hearings . . . [w]e ought to be detaining according to our priorities, according to public-safety threats, level of offense, and the like . . .”).

²⁰⁹ See HEARTLAND ALLIANCE NAT’L IMMIGRANT JUSTICE CTR. ET AL., YEAR ONE REPORT CARD: HUMAN RIGHTS & THE OBAMA ADMINISTRATION’S IMMIGRATION DETENTION REFORMS 14 (Oct. 6, 2010), available at <http://www.lawolaw.org/images/stories/icereportcard2010.pdf>, archived at <http://perma.cc/A36E-CWS2> (explaining that a guard had sexually assaulted females in an ICE facility, and that such repeated assaults indicate a clear failure by ICE to monitor the facilities); NAT’L IMMIGRATION FORUM, *supra* note 199, at 7-9 (“The influence of private prison corporations is even more troubling given persistent and numerous complaints by detainees held at private facilities, including sexual abuse, inadequate access to translators, prolonged detention, and insufficient medical treatment.” (footnote omitted)).

²¹⁰ See DETENTION WATCH NETWORK, *supra* note 31, at 1-2 (“For immigrants, this expansion has meant weeks, months, and sometimes years in jails often under inhumane conditions, with little or no access to counsel, to family, or to the outside world.”).

²¹¹ Nina Bernstein, *U.S. To Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 5, 2009, archived at <http://perma.cc/Z5LB-RFBU> (“The Obama administration intends to announce an ambitious plan on Thursday to overhaul the much-criticized way the nation detains immigration violators, trying to transform it from a patchwork of jail and prison cells to what its new chief called a ‘truly civil detention system.’”).

²¹² See generally HEARTLAND ALLIANCE NAT’L IMMIGRANT JUSTICE CTR. ET AL., *supra* note 209; Albor Ruiz, *Even as President Obama Promises U.S. Immigration Detention Reform, Human Rights Atrocities in Detention Jails Persist*, N.Y. DAILY NEWS, Nov. 30, 2012, (“Despite Obama’s promise in October 2009 to radically reform the system, little has changed: Immigration and Customs Enforcement (ICE) continues to subcontract the

private immigration detention facilities, possibly through enacting the Private Prison Information Act,²¹³ could help advocates work to make this promise a reality.

If nothing else, available evidence indicates that existing forms of private prison oversight have been ineffective in many instances to ensure fair treatment and contract compliance. Increasing public access to information would permit greater scrutiny of an industry that receives billions of dollars annually in government revenue, but is largely exempt from disclosure requirements by which government entities performing the same work must abide.

II. THE STATE OF PRIVATE PRISON LAW AND PUBLIC RECORD COMPLIANCE

Government prisons are required to comply with requests by the public for access to information under public records laws. Private prisons are typically not so bound, in part because most state courts have yet to even face the question of whether private prisons should be considered the functional equivalents of government entities. Applying public records laws to private prison companies will directly enhance industry transparency by allowing the public, particularly the media, to obtain vital operational information.²¹⁴ Transparency, in turn, should translate into greater accountability for the industry.²¹⁵

A. *Most States and the Federal Government: Not Expressly Applied*

[Public records laws] spring[] from one of our most essential principles: a democracy works best when the people have all the information that the security of the [n]ation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.²¹⁶

These laws are often utilized by members of the press and private organizations, who report on the documents produced or use them in

detention of individuals to county jails and private detention centers and to hold in them more than 400,000 immigrants a year across the country.”).

²¹³ H.R. 74, 112th Cong. (2011), *archived at* <http://perma.cc/E75K-R9T7>; *see also infra* Part III.B (explaining the proposed reform for private prisons contracting with the federal government).

²¹⁴ *See* Feiser, *supra* note 8, at 25-27 (“The public should provide the necessary oversight by classifying private operators as agencies and their records as agency records, for the purposes of the FOIA.”).

²¹⁵ *See id.* (“[P]rivate prison operators should at least be as accountable as government officials . . . [t]he FOIA, if applied to private contractors, would help accomplish this oversight.”).

²¹⁶ Feiser, *supra* note 8, at 22 (quoting Presidential Statement on Signing the Freedom of Information Act, 2 WEEKLY COMP. PRES. DOC. 887, 895 (July 11, 1966)).

advocacy.²¹⁷ Public access to information is crucial to effective government operations and democratic functioning.²¹⁸

Public records laws have been especially powerful tools for prison reform advocates, who struggle to bring change to large institutions housing some of society's least popular or sympathetic individuals.²¹⁹ As legislative and judicial actions weakened more traditional forms of prison oversight,²²⁰ states increasingly relied on private prisons to help manage burgeoning prison populations. In almost every jurisdiction in which they operate, private prisons have not been expressly required to comply with public records laws, depriving the public of a vital source of oversight for an increasingly relied upon segment of correctional systems.²²¹

In reviewing the transparency of the private prison industry generally, the National Council on Crime and Delinquency noted that "private prison contractors, unlike government agencies, are not typically required to report on the inmates housed in privately run prisons, do not make these data easily accessible to monitors, or are even aware of the documentation and reporting requirements intrinsic to the operation of public agencies."²²² Private prisons effectively elude two of the traditional oversight mechanisms: contract enforcement and public access to information.²²³

B. *Private Prisons as Functional Equivalents of Government Agencies*

Arguments could be made in favor of increasing public access to private prison information by focusing on the nature of either the function performed or the records held.²²⁴ While both approaches could prove valuable in this context, because the industry arguably performs such a core governmental function, requiring compliance through a functional equivalency or agency test may be the preferred route. Such a requirement would symbolically connect the industry to the government, and avoid potential loopholes that could be created in a regime focusing on specific types of records. Two states – Florida and Tennessee – have expressly held that private entities performing core

²¹⁷ *Id.* at 24-27.

²¹⁸ Stojkovic, *supra* note 21, at 1479, 1488-89 ("The essence of democracy is that sunlight can get into institutional settings, especially those that have a history of being hidden.").

²¹⁹ See Fathi, *supra* note 5, at 1461-62 ("In particular, the prospect of unannounced visits and comprehensive record reviews by an independent agency would be a powerful deterrent to prisoner abuse and mistreatment as well as other forms of misconduct.").

²²⁰ See *supra* Parts I.C-I.D.

²²¹ Raheer, *supra* note 11, at 240-47 (detailing the private prison industry's refusal to comply with open records requests, hostility to such requests as reflected in litigation, and the consequences of limiting access to operational and personnel information).

²²² HARTNEY & GLESMANN, *supra* note 63, at 15-16.

²²³ See *supra* Part I.A.

²²⁴ See Feiser, *supra* note 8, at 59-63.

governmental functions relating to incarceration must comply with public records requests. The “functional equivalency” tests utilized by litigants in these states offer valuable models for advocates to challenge the inapplicability of public records statutes to private prison companies.

1. Florida

Florida was the first state to expressly apply its public records law to private prisons, when more than two decades ago a newspaper company sued CCA for refusing to produce records under the state’s public records law. In *Times Publishing Company v. Corrections Corporation of America*,²²⁵ the court used a functional equivalency determination to find that CCA performed an inherently governmental function on behalf of Hernando County.²²⁶ In a decision that included detailed findings of fact, the court found that the state public records law’s applicability to “any . . . private agency, person, partnership, corporation, or business entity acting on behalf of any public agency” bound CCA to disclose records under the law.²²⁷

The court could not “conceive of a function more integrally related to the purpose and responsibility of a county government than that of holding in custody, caring for, and controlling persons arrested by county and other duly authorized law enforcement authorities and persons serving post-conviction sentences.”²²⁸ In its analysis, the court relied upon a “totality of the factors” test to find that CCA’s relationship with the county was so closely aligned that the company acted on behalf of the county for purposes of the public records law.²²⁹

The court specifically found that CCA performed a function inherent to government operations by incarcerating individuals, and that its contract with the county demonstrated a “significant level of involvement.”²³⁰ This involvement, which included allowing CCA to use county-owned land, sharing resources with CCA, and allocating tax dollars to CCA, created a situation in which CCA was “vested with stewardship and control over both a substantial amount of public assets and the County’s prisoners.”²³¹

Also significant to the analysis were the similarity of employees’ responsibilities to the operations government employees would perform, and the complex nature of the contract CCA signed – in which the county gave

²²⁵ No. 91-429 CA 01, 1991 WL 384136 (Fla. Cir. Ct. Dec. 6, 1991), *aff’d* 611 So. 2d 532 (Fla. Dist. Ct. App. 1993) (per curiam).

²²⁶ *Id.*

²²⁷ *Id.* at *1 (quoting Fla. Stat. § 119.011(2) (1989) (emphasis removed)).

²²⁸ *Id.* at *2.

²²⁹ *Id.* (quoting *Sarasota Herald-Tribune Co. v. Community Health Corp.*, 582 So. 2d 730 (Fla. Dist. Ct. App. 1991)).

²³⁰ *Id.*

²³¹ *Id.*

CCA powers that normally inhere in government bodies.²³² The level of involvement between CCA and the county was substantial enough that the court considered the remaining factors in the test insufficient “to outweigh the other factors” showing CCA performed an inherently governmental function.²³³ Although it would take a few years, subsequent decisions from Florida helped clarify the scope of that state’s public records law as it pertains to private prisons.

The second such decision, *Prison Health Services, Inc. v. Lakeland Ledger Publishing Company*,²³⁴ came in 1998 when Prison Health Services (“PHS”), which provided “total health care services” for inmates of Polk County through a contract with the sheriff, refused to comply with public records requests.²³⁵ After being sued for noncompliance, PHS was required to disclose information relating to prisoner health care.²³⁶ However, the scope of this decision’s application was limited because PHS had agreed to such compliance in its contract with the sheriff.²³⁷ While governments could include compliance provisions in their contracts with private prison companies, many arrangements seem to omit this requirement.²³⁸

More recently, *Panno v. Liberty Behavioral Health Corporation*²³⁹ went beyond the holding in *Prison Health Services* to require a private corporation that had not expressly agreed to comply with public records laws in its contract to respond to a prisoner’s public records requests.²⁴⁰ The court relied upon a nine-part test, developed shortly after *Times Publishing*, to determine whether the defendant, Liberty Behavioral Health Corp., acted as the functional equivalent of a government agency:

- 1) the level of public funding; 2) commingling of funds; 3) whether the activity was conducted on publicly owned property; 4) whether services contracted for are an integral part of the public agency’s chosen decision-making process; 5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; 6) the extent of the public agency’s involvement with, regulation of, or control over the private entity; 7) whether the private

²³² *Id.* at *3-4.

²³³ *Id.* at *4.

²³⁴ 718 So. 2d 204 (Fla. Dist. Ct. App. 1998).

²³⁵ *Id.* at 205.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See HARTNEY & GLESMANN, *supra* note 63, at 15 (“The experience of various jurisdictions has demonstrated that contracts executed with private prison companies are often poorly drafted and may minimize or omit key provisions, which can lead to numerous problems including inadequate contractor performance, absence of transparency, abuse of prisoner rights, and an overall lack of accountability.”).

²³⁹ No. 2005-CA-420; 2005-CA-1117 (Fla. Cir. Ct. Nov. 13, 2006).

²⁴⁰ *Id.* at *5, *11.

entity was created by the public agency; 8) whether the public agency has a substantial financial interest in the private entity; and 9) for who's benefit the private entity is functioning.²⁴¹

Many of the factors weighed in favor of finding that Liberty Behavioral Health Corp. essentially acted as a government agency.²⁴² Of particular relevance among these factors were the level of public funding and the extent to which the private entity performed "a governmental function or a function which the public agency would otherwise perform."²⁴³ Because the state's Department of Children and Families "delegated a responsibility that it otherwise would have assumed," the private company running the civil commitment center "perform[s] a governmental function."²⁴⁴ The court went on to require the private contractor to disclose a closed litigation file to the prisoner, along with information on staffing levels at the facility.²⁴⁵

Finally, Prison Legal News ("PLN"), a non-profit human rights news publication that focuses on the U.S. prison system and especially prisoners' legal rights, reached a settlement in 2010 with GEO regarding a public records request with which the company had repeatedly refused to comply.²⁴⁶ The court ordered the company to produce litigation-related documents pursuant to PLN's public records request four times before it finally complied, on the eve of a summary judgment hearing.²⁴⁷ After GEO dragged out the litigation for five years, the court ordered the company to pay \$40,000 in attorneys' fees.²⁴⁸

Even under these rulings, the types of records that the public can access using public records requests might be limited by statutory or privacy protections. The private prison industry has invoked trade secret exemptions to prevent the disclosure of certain types of information, even where the industry is ostensibly bound by public records laws.²⁴⁹ So while private prisons may be considered government agencies for purposes of public records laws, their status could offer more protection from disclosure than the government could take advantage of. Such an inherent limitation on the efficacy of oversight would have to be addressed through broader legislative reform targeting

²⁴¹ *Id.* at *3 (citing *News and Sun-Sentinel Co. v. Scwhab, Twitty, & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992)).

²⁴² *Id.* at *6 ("Based on the above analysis [involving the nine factors], the Court finds that Liberty acted on behalf of DCF and is, thus, subject to the Public Records Act.").

²⁴³ *Id.* at *3, *5.

²⁴⁴ *Id.* at *5.

²⁴⁵ *Id.* at *11.

²⁴⁶ Press Release, Prison Legal News, PLN Prevails in Public Records Suit Against GEO Group (June 15, 2010), *archived at* <http://perma.cc/RMX2-CN9A>.

²⁴⁷ *Id.*

²⁴⁸ *Prison Legal News v. The GEO Group, Inc.*, No. 50 2005 CA 011195 AA (Fl. Cir. Ct. Apr. 16, 2010), *archived at* <http://perma.cc/3DWT-SRDL>.

²⁴⁹ Raher, *supra* note 11, at 237-38 (discussing how private prisons attempt to use the trade secret logic to prevent records from being disclosed).

disclosure exceptions, which is beyond the scope of this Note. Regardless, Florida courts established the first real regime applying public records laws to private correctional services providers, delivering a comprehensive test that could be replicated in other jurisdictions.

2. Tennessee

Tennessee has also expressly applied public records statutes to private prison companies. *Friedmann v. CCA (Friedmann I)*²⁵⁰ arose in 2009 when an editor of PLN sought records of staffing levels and settlement agreements, among other information, from CCA concerning its operations in Tennessee under Tennessee's public records law.²⁵¹ CCA refused to release the documents, claiming it was not bound by the law as a private corporation; PLN then filed a petition to compel production.²⁵² PLN sought documents including information on litigation CCA was engaged in, settlements they had reached, and state investigations and audits of CCA facilities.²⁵³

Applying the public records law liberally, the trial court granted Plaintiffs' petition to force CCA to produce the requested documents.²⁵⁴ The Tennessee Supreme Court had previously framed the goal of the state's public records laws:

[T]he public's fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been delegated to an independent contractor. When a private entity's relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.²⁵⁵

Reviewing the trial court's decision *de novo*, the Tennessee Court of Appeals was "at a loss as to how operating a prison could be considered anything less than a governmental function . . . conclud[ing], without

²⁵⁰ *Friedmann v. Corr. Corp. of Am. (Friedmann I)*, No. M2008-01998-COA-R3-CV, 2009 Tenn. App. LEXIS 539 at *12 (Tenn. Ct. App. Aug. 5, 2009) ("The Supreme Court of the State of Tennessee has interpreted the Act such that the definition of public records also includes records made and received in connection with the transaction of official business in the hands of any private entity which is the functional equivalent of a governmental agency.").

²⁵¹ *See id.* at *2.

²⁵² *Id.* at *8 ("CCA claimed: (1) it was not subject to the Public Records Act; (2) CCA was not the functional equivalent of a state agency . . .").

²⁵³ *Id.* at *5-8 (summarizing a list of demands made by the plaintiffs to CCA).

²⁵⁴ *Id.* at *11-12 ("Following a hearing, the Trial Court entered a detailed final order concluding that CCA was subject to the Public Records Act.").

²⁵⁵ *Memphis Publ'g Co. v. Cherokee Children & Family Servs.*, 87 S.W.3d 67, 78-79 (Tenn. 2002).

difficulty, that . . . CCA is the functional equivalent of a state agency”²⁵⁶ In reaching its decision, the court relied upon a test devised by the Tennessee Supreme Court, declaring the following factors relevant in a totality-of-circumstances analysis after reviewing the functional equivalency law of multiple jurisdictions: “(1) the level of government funding of the entity; (2) the extent of government involvement with, regulation of, or control over the entity; and (3) whether the entity was created by an act of the legislature or previously determined by law to be open to public access.”²⁵⁷

The court in *Friedmann I* succinctly stated the most important reason public records statutes should apply with equal force to private prison companies: “[t]he providing of prisons is a responsibility that the state cannot delegate away to a private entity. . . . [T]he *ultimate responsibility* to provide for its prisoners belongs to the state of Tennessee.”²⁵⁸ The court also relied upon the state constitution, which expressly requires the state to provide “safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners”²⁵⁹ The court was particularly concerned about permitting the state to delegate such functions, which it considered among the core responsibilities of the state.²⁶⁰

The ruling is limited, however, in some important respects; the “functional equivalency determination” only applies to one correctional facility, which has a contract exclusively with the state of Tennessee, and CCA was only required to disclose certain inmate records delineated in the Tennessee Private Prison Contracting Act of 1986.²⁶¹ Thus, CCA is only required to disclose a very limited amount of information responsive to public records requests under the holding. Further, the holding “does not affect whether the State or local governments contracting with [private prison companies] must supply these documents in their possession, if so requested.”²⁶² Finally, the court noted that many of the documents requested were available from other sources,²⁶³ but this did not dissuade it from holding that private prisons are the functional equivalent of government agencies. Some commentators have criticized the holding’s narrow focus and potentially

²⁵⁶ *Friedmann I*, 2009 Tenn. App. LEXIS 539 at *21-22.

²⁵⁷ *Cherokee*, 87 S.W.3d at 79.

²⁵⁸ *Friedmann I*, 2009 Tenn. App. LEXIS 539 at *23-24 (emphasis added).

²⁵⁹ *Id.* at *14.

²⁶⁰ *Id.* at *23-25.

²⁶¹ TENN. CODE ANN. § 41-24-117 (2010); Raheer, *supra* note 11, at 242 (“[T]he functional equivalency determination . . . applies only to the South Central Correctional Center.”). In 1998, Tennessee amended the Private Prison Contracting Act of 1986 to include an express provision granting the public access to inmate records in private prisons “to the same extent such records are public if an inmate is being housed in a department of correction facility.” 1998 Tenn. Pub. Acts 686.

²⁶² *Friedmann I*, 2009 Tenn. App. LEXIS 539 at *30-31.

²⁶³ *Id.* at *31.

misguided statutory interpretation,²⁶⁴ but a subsequent decision in the same course of litigation seems to indicate that the court intended a somewhat broader interpretation.

This analysis is similar to a previous federal court decision regarding PHS, which provides another potentially useful test for other litigants to replicate. In *Buckner v. Toro*,²⁶⁵ the Eleventh Circuit drew an important, if somewhat vague distinction based on the nature of the activity performed.²⁶⁶ Private entities that perform a function “within the exclusive prerogative of the state,” rather than merely contracting to perform some service, “become[] the functional equivalent[s] of . . . municipalit[ies].”²⁶⁷ The court described providing medical treatment to prisoners as within that prerogative; although not at issue, surely this logic could be extended to apply to companies that operate entire prison facilities.²⁶⁸

Public oversight is a crucial component of government regulation, and is particularly important in the private prison context, where other forms of regulation, due to inherent limitations or industry (in)action, have proven insufficient to ensure that private prisons both treat prisoners humanely and deliver on the promise of cost savings.²⁶⁹ Recent developments in litigation in Vermont, Texas, and Kentucky, and favorable statutory schemes in other states could present opportunities for advocates to expand application of their state’s public records laws to private prison companies.

C. *Recent Developments in Litigation – Vermont, Texas, and Kentucky*

Using functional equivalency analyses similar to the test in *Cherokee*, PLN has continued to request information under public records laws from private prisons and medical providers in other states and to challenge denials of access to those records in court. So far, they have succeeded in convincing two trial level courts that public records laws should apply to these private operations.

²⁶⁴ See, e.g., Raheer, *supra* note 11, at 242-44 (“Because there is no ambiguity in either statute, nor are the two statutes inherently contradictory, the court’s use of PPCA to carve out an exception to *Cherokee* is misguided.” (footnote omitted)).

²⁶⁵ 116 F.3d 450 (11th Cir. 1997).

²⁶⁶ *Id.* at 452.

²⁶⁷ *Id.*

²⁶⁸ *Cf. id.* (“When a private entity like PHS contracts with a county to provide medical services to inmates, it performs a function traditionally within the exclusive prerogative of the state.”).

²⁶⁹ See *id.* (“Commentators worry that private prisons will allow operators to take liberties with prisoners that would not be allowed by the government.”); Fathi, *supra* note 5, at 1453-54, 1461-62 (“The combination of these factors—the closed nature of the prison environment and the fact that prisons house politically powerless, unpopular people—creates a significant risk of mistreatment and abuse.”); Raheer, *supra* note 11, at 237-38 (“[S]hielding 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.”).

Although the decisions seem likely to be appealed, they are important first steps toward increasing transparency. PLN has also requested legal documents from settlements reached by private prison companies in a third state, as government agencies must disclose.

A recent decision in Vermont made that state the third to recognize the identity between public and private corrections by applying a functional equivalency test to hold that private prison operators must comply with public records requests.²⁷⁰ PLN again brought suit against CCA seeking public records under state law, and has so far successfully convinced the trial court that CCA is the functional equivalent of a government agency.

Relying on both the *Cherokee* test and the *Friedmann I* analysis, the Vermont Superior Court similarly focused much of its opinion on the “governmental function factor” enumerated in those decisions.²⁷¹ The court limited its analysis to four fundamental criteria, creating a workable test of functional equivalency that considered (although not exclusively) the type of activity performed, the amount of government funding, the extent of regulation, and whether the government created the entity.²⁷²

After describing the liberal application of the state public records law in the interest of promoting transparency and accountability in government, the court properly characterized the potential consequences of an alternative finding. It recognized that accepting the argument that CCA is not subject to the public records law “would enable any public agency to outsource its governmental duties to a private entity and thereby entirely avoid, intentionally or unintentionally, the fundamental interests in transparency and accountability that the Act is designed to protect and that has become a normalized quality and function of government.”²⁷³

The court’s emphasis on the governmental function factor is crucial because it reflects the core of many advocates’ concerns. “CCA holds Vermonters in captivity; disciplines them; pervasively regulates their liberty, and carries out the punishment imposed by the sovereign. These are uniquely governmental acts. CCA could have no lawful basis for such an undertaking except on

²⁷⁰ *Prison Legal News v. Corr. Corp. of Am.*, No. 332-5-13 Wncv, 2014 WL 2565746, at *6 (Vt. Sup. Ct. Jan. 10, 2014) (“The court predicts that the Vermont Supreme Court [will] . . . give the Act the meaning it is intended to have, would construe it to reach private entities that are the functional equivalent of a public agency and the records that are within the scope of that equivalency.”).

²⁷¹ *Id.* at *6-7 (“The court . . . predicts that it would adopt a functional equivalency test along the lines of the analysis that has developed in Connecticut and Tennessee.”).

²⁷² *Id.* at *6 (“The non-exclusive factors are: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of the government involvement or regulation; and (4) whether the entity was created by the government.”).

²⁷³ *Id.* at *5.

authority of a government. It is no ordinary government contractor.”²⁷⁴ CCA is likely to appeal the decision.

PLN also recently succeeded in litigation against CCA in Texas, when it demanded access to operational information under the state’s public records law.²⁷⁵ The court issued a one-page opinion decreeing that CCA “is a ‘governmental body’ under Chapter 552 of the Texas Public Information Act . . . and subject to Act’s [sic] obligations to disclose information.”²⁷⁶ In its claim for declaratory relief, PLN had relied upon a determination by the Texas Attorney General that private entities performing inherently governmental functions are subject to public records laws.²⁷⁷ The Attorney General interpreted the statute to extend to entities that provide general support, rather than those that contract to perform specific services.²⁷⁸ The relevant factors for this determination – receiving public funds to cover a variety of services, incorporating the contract into long term budgets and planning, and annual renewals²⁷⁹ – all weigh in favor of extending public records laws to private prison companies.²⁸⁰

The Attorney General also considered relevant both the “overall nature of the contract,” including receiving public funding and creating an agency-type relationship, and whether a service is one “traditionally provided by

²⁷⁴ *Id.* at *11.

²⁷⁵ Prison Legal News v. Corr. Corp. of Am., No. D-1-GN-13-001445, Order Granting Plaintiff’s Motion for Summary Judgment (Mar. 19, 2014) (on file with author) (“It is therefore ordered adjudged and decreed that Defendant Corrections Corporation of America is a ‘governmental body’ under Chapter 552 of the Texas Public Information Act . . . and subject to Act’s obligations to disclose public information.”); Press Release, Human Rights Defense Center, Texas Court Holds Private Prison Company is Considered Governmental Body for Purposes of State’s Public Information Act (Mar. 20, 2014) (on file with author) (“[A] Travis County District Court held that Corrections Corporation of America (CCA) . . . is a ‘governmental body’ for purposes of the Texas Public Information Act and therefore subject to the ‘Act’s obligations to disclose public information.’”).

²⁷⁶ *Prison Legal News*, No. D-1-GN-13-001445 at 1.

²⁷⁷ Petition for Writ of Mandamus at 3, Prison Legal News v. Corr. Corp. of Am., No. D-1-GN-13-001445 (May 1, 2013), *archived at* <http://perma.cc/68FG-LB85> (“CCA is a ‘government body,’ as defined by the PIA. It is supported by public funds and performs a function ‘traditionally provided by governmental bodies’ – incarceration.”).

²⁷⁸ Tex. Attorney Gen. Op., JM-821 (Nov. 17, 1987), *archived at* <http://perma.cc/774H-RA6U> (“The receipt of public funds for the general support of the activities of a private organization brings that organization within the definition of a ‘governmental body.’”).

²⁷⁹ *Id.* (listing the relevant factors for determining if an entity is to be considered one that provides “general support”).

²⁸⁰ Petition for Writ of Mandamus, *supra* note 277, at 1 (“Privately-operated prisons and jails are notorious for their abhorrent conditions . . . Prison Legal News seeks to enforce its rights under the Public Information Act to investigate details about these facilities in Texas.”).

government bodies.”²⁸¹ Again, applied to the private prison context, the connections are rather obvious: private prisons are funded mostly by public funds, are responsive to state legislatures or other departmental oversight, and, as a growing body of case and statutory law appear to be recognizing, perform a service traditionally provided by the government. Further, because the public records law is to be liberally construed,²⁸² the Travis County District Court was not reluctant to apply the requirement to private prisons.

In Kentucky, PLN has asked a federal judge to unseal information from a settlement CCA reached with former employees over alleged labor law violations and withholding overtime pay.²⁸³ The state’s public records law applies to any entity receiving twenty-five percent or more of its funding from the government.²⁸⁴ This would seemingly encompass private prisons, which derive the vast majority of their funding from the government.

PLN’s challenges to the private prison industry’s position that public records laws do not apply to privately run prisons can provide important inroads and blueprints for advocates in other states. Statutory schemes across the country, particularly in some states that send a sizeable portion of their prisoners to private facilities, could allow litigants to use variations of the *Cherokee* test, at times supplemented by the more comprehensive analyses used in *Panno* and *Friedmann I*, to argue that the industry acts as the functional equivalent of the government. If successful, these litigants can help bring greater transparency to the industry and allow advocates to better evaluate it.

D. *Other States Whose Public Records Laws Could Be Applied to Private Prisons*

Existing statutory regimes in other states could permit litigants to argue that private prisons should be subject to public records laws under a functional equivalency test akin to those used in Tennessee and Vermont.²⁸⁵ Among

²⁸¹ Tex. Attorney Gen. Op., *supra* note 278 (“The primary issue in determining whether certain private entities are ‘governmental bodies’ under the act is whether they are supported in whole or in part by public funds or whether they expend public funds.”).

²⁸² TEX. GOV’T CODE ANN. § 552.001(a)-(b) (West 2012) (“This chapter shall be liberally construed in favor of granting a request for information.”).

²⁸³ Iulia Filip, *Details Sought on Private Prison Settlement*, COURTHOUSE NEWS SERV., Feb. 11, 2014, *archived at* <http://perma.cc/Y7YH-RYW9> (“Employees at two prison facilities CCA ran in Kentucky sued the company in May 2012, alleging it violated Kentucky and federal labor laws by misclassifying them and withholding overtime compensation.”).

²⁸⁴ KY. REV. STAT. ANN. § 61.870(1)(h) (West 2013) (“‘Public Agency’ means . . . [a]ny body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds . . .”).

²⁸⁵ See generally *Open Government Guide*, REPORTERS’ COMMITTEE FOR FREEDOM OF THE PRESS, *archived at* <http://perma.cc/VWJ3-L3YD> (last visited Dec. 20, 2013) (providing links to state open government and open meeting laws).

states that hold ten percent or more of their prison populations in private prisons,²⁸⁶ five (Idaho, Mississippi, New Jersey, New Mexico, and Wyoming) do not seemingly have statutory frameworks that could easily accommodate a successful functional equivalency challenge.²⁸⁷ Of the remaining states that have ten percent or more of their prison populations in private prisons, a few patterns emerge from the statutory frameworks that could be used to increase public access to settlement agreements and other information from private prisons. These laws are often based on either funding arrangements or proximity to government operations.

For purposes of the following analysis, the twenty states that did not house any prisoners in private prisons, and those with less than ten percent of their populations in private facilities as of 2010 are excluded.²⁸⁸ Additionally, this analysis only focuses on a functional equivalency determination for private prisons as a singular entity, rather than attempting to discern whether particular types of records potentially held by private prisons would be subject to public records laws, even absent a finding of functional equivalency. Finally, litigants have yet to bring before courts in each of these states the specific question of whether private prisons should be subject to the public records law.

Some statutory schemes provide that private entities supported at least in part by public funds can be required to report under public records laws. In these jurisdictions, the *Cherokee* test, relying principally on the funding or contracting arrangement, could be used by litigants to extend application of public records laws to private prisons. For example, in Arizona, private prisons could be considered public bodies under the state's public records laws, because they are "supported in whole or in part by monies from the state"²⁸⁹ Likewise, Kentucky's public records law expressly applies to private entities that receive at least twenty-five percent of their funding from the government.²⁹⁰ Hawaii's public records law extends to cover any company that performs a service on behalf of the government.²⁹¹ Oklahoma's law

²⁸⁶ *Id.*

²⁸⁷ See IDAHO CODE §9-337(13) (2010) ("Public record" includes, but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency"); MISS. CODE ANN. § 25-61-3(a) (West 2014) (applying only to bodies created by the state constitution, law, executive order, resolution, or ordinance); N.J. STAT. ANN. § 47:1A-1 (West 2014) (applying to government agencies, bodies, and officers); N.M. STAT. ANN. § 14-2-6(D) (LexisNexis 2014) (applying only to bodies created by the state constitution or any branch of government); WYO. STAT. ANN. §§ 16-4-201(a)(v), 9-2-405 (2011).

²⁸⁸ GUERINO ET AL., *supra* note 32, at 31.

²⁸⁹ ARIZ. REV. STAT. ANN. § 39-121.01(A)(2) (2011).

²⁹⁰ KY. REV. STAT. ANN. § 61.870(1)(h) (West 2013) ("Public Agency" means . . . [a]ny body which derives at least twenty-five percent (25%) of its funds expended by it in the Commonwealth of Kentucky from state or local authority funds").

²⁹¹ HAW. REV. STAT. § 92F-3 (West 2012) ("Agency means any . . . corporation or other establishment owned, operated, or managed by or on behalf of this State or any county.").

provides that entities “supported in whole or in part by public funds” must disclose public records pursuant to requests.²⁹² In South Carolina, bodies that receive or expend public funds are subject to the public records act.²⁹³

Other schemes focus more substantively on the types of services provided and the nexus between the private party and government bodies. In these states, the most substantive factor identified in the *Cherokee* test, the extent of government regulation or control, weighs in favor of finding functional equivalency. But litigants in these states should attempt to incorporate some of the factors from the *Panno* and *Friedmann I* cases to establish a more substantial connection. Specifically, factors concerning public funding, the centrality of the function to public agency prerogative, and on behalf of whom the services are provided, all could support findings of functional equivalency.

For example, private prison companies could be subject to Alaska’s public records law, which covers records held or created by a private contractor on behalf of a government agency.²⁹⁴ In Colorado, private entities performing core governmental functions are subject to the state’s public records law, at least where the state retains substantial control over the entity.²⁹⁵ Particularly where a private entity performs a public function and is subject to state oversight, those entities must respond to public records requests in Colorado.²⁹⁶ Whether the public records law in Indiana applies to private prisons depends on the terms of contracts; if private prisons are subject to regular audits, they might be considered a government agency.²⁹⁷

Wider application of these functional equivalency tests to bind private prison operators to public records requirements could prove crucial to members of the public seeking to improve prison conditions. Litigation has historically been the most effective and utilized means of prison oversight, but inherent limitations in scope and geography limit its capacity to remedy many significant problems. These limitations necessitate a more comprehensive and multifaceted form of oversight, including public access to information through public records laws.

²⁹² OKLA. STAT. tit. 51, § 24A.3.

²⁹³ S.C. CODE ANN. § 30-4-20(a) (“‘Public Body’ means . . . any organization, corporation, or agency supported in whole or in part by public funds or expending public funds . . .”); *see also* *Weston v. Carolina Research & Dev. Found.*, 401 S.E.2d 161, 163 (S.C. 1991) (“In order to be subject to the FOIA, a Foundation must fall within the FOIA’s definition of a ‘public body.’”).

²⁹⁴ ALASKA STAT. § 40.25.220(3) (2010).

²⁹⁵ COLO. REV. STAT. § 24-72-202(6) (2008); *see also* *Denver Post Corp. v. Stapleton Dev. Corp.*, 19 P.3d. 36, 37 (Colo. App. 2000).

²⁹⁶ *See Denver Post Corp.*, 19 P.3d. at 38-41 (“[W]e conclude that SDC is effectively an instrumentality of Denver with regard to the development of the Stapleton site.”).

²⁹⁷ IND. CODE § 5-14-3-2(3) (2014) (applying to government bodies and entities subject to budgetary review or regular audits).

III. RECOMMENDATIONS FOR REFORM

Advocates and journalists increasingly call for greater transparency in the operations of private entities that contract to perform inherently governmental services.²⁹⁸ Among these calls have come recommendations for specific ways to increase access to such information.²⁹⁹ Specifically, state legislators should first look to strengthen existing public records laws. This includes expanding the reach of current laws, decreasing existing exemptions in laws, and creating new disclosure requirements.³⁰⁰ Lawmakers are encouraged to work to repeal laws that hinder transparency.³⁰¹ Government agencies should also routinely incorporate transparency provisions into contracts they sign with private entities to improve data collection and make more information available to the public via the Internet.³⁰²

A. *Utilize Functional Equivalency Tests to Access Information on Operations and Conditions Through Settlements and Regular Reporting*

An effective method for enhancing private prison oversight might be developing confluence between two of the traditional prison oversight mechanisms: the courts and public access to information.³⁰³ Historically, settlements between private prison operators and individual litigants have been exempt from public scrutiny; as private entities, these companies routinely seal the terms of settlements.³⁰⁴ Government agencies, meanwhile, must disclose

²⁹⁸ See, e.g., IN THE PUBLIC INTEREST, *supra* note 9, at 7-10 (describing how increased government reliance on the private sector implicates financial, social, and political concerns, and calling for greater transparency from companies that contract with governments); DIANE DI IANNI, THE LEGAL FRAMEWORK OF TRANSPARENCY AND ACCOUNTABILITY IN THE PRIVATIZATION CONTEXT, LEAGUE OF WOMEN VOTERS 11 (2011), available at http://www.lwv.org/files/BP_PrivStudy_LegalFramework.pdf, archived at <http://perma.cc/L8S7-4SHM> (“The privatization of government function is of such weight and import that special attention must be given to ensuring full transparency both in advance of the consideration and approval of any such proposal, and with respect to the subsequent operations of the private entity performing such government services or functions in the event a privatization proposal is adopted.”).

²⁹⁹ IN THE PUBLIC INTEREST, *supra* note 9, at 18-19 (listing changes that should be made in order to effect reform).

³⁰⁰ *Id.*

³⁰¹ *Id.* at 19 (“Laws, like the Georgia statute that exempts all records and documents related to the supervision of probationers by private corporations from state’s open records act, should be repealed.” (footnote omitted)).

³⁰² *Id.* at 19-20 (“[G]overnment contracts should all include specific provisions explicitly describing what contractor information will be made public.”).

³⁰³ See *supra* Part I.D.

³⁰⁴ See, e.g., Rebecca Boone, *Inmate Settles ‘Gladiator School’ Lawsuit with Idaho Prison*, KBOI2, Sept. 19, 2011, archived at <http://perma.cc/Y4DM-PUSV> (“The settlement between Riggs and CCA was filed under seal . . . and both sides reached a confidentiality agreement”); Emma Perez-Trevino, *Beating Death Lawsuit Ends in Settlement*,

terms of settlements under most public records laws. Expanding public access to information from settlement agreements – by applying a functional equivalency test to establish the role of private prisons as government agencies – could help other litigants and advocates study and understand some of the more severe harms that occur inside private prisons, and industry valuations of liability.

In Tennessee, the battle between CCA and PLN over releasing business records pursuant to public records requests led to a second ruling by the state court of appeals that both settlement agreements and settlement reports (insofar as such reports were not produced in anticipation of litigation) are not exempt from disclosure under the state's public records laws.³⁰⁵ The court reiterated the liberal thrust of the public records statute and its applicability to CCA, as the functional equivalent of a government agency.³⁰⁶ Following extensive discovery on remand, the parties narrowed their dispute to “two categories of documents: 1) releases, settlement agreements, and other documents reflecting the settlement and/or payment of claims and/or litigation against CCA facilities in Tennessee (‘the settlement agreements’), and 2) spreadsheets or summaries of claims and/or litigation concluded against CCA in Tennessee (‘the settlement reports’).”³⁰⁷ CCA argued on appeal that settlement agreements and settlement reports were not public records under Tennessee's Public Records Act, and that the settlement reports in any event should be “protected from disclosure because they are attorney work product.”³⁰⁸

The court, disagreeing, recognized a “consistent[.]” line of precedent requiring government entities to produce settlement agreements under the Public Records Act.³⁰⁹ Rejecting CCA's argument that the court had “‘implicitly’ limited [its] finding regarding CCA as a government entity,” the court found no credence in CCA's attempt to distinguish documents produced in its litigation department from those produced in facilities operations.³¹⁰

The settlement reports, simplified internal documents used by CCA's litigation department to evaluate “areas . . . of concern and to be able to give advice on cases going forward,” were not protected under the work product

BROWNSVILLE HERALD, Jan. 7, 2010, *archived at* <http://perma.cc/V8LE-ERLM> (“The monetary settlement reached between the private prison group, former warden, insurers and de la Rosa's family is being kept confidential . . .”).

³⁰⁵ *Friedmann v. Corr. Corp. of Am. (Friedmann II)*, No. 08-1105-I, 2013 WL 784584 at *4 (Tenn. Ct. App. Feb. 28, 2013) (“We affirm the finding that the settlement agreements are public records and that CCA is required to produce the settlement agreements and reports . . .”).

³⁰⁶ *Id.* at *3 (“The court then, again recognizing the liberality of construing the Public Records Act, held ‘that this included records in the hands of any private entity which operates as the functional equivalent of a state agency.’”).

³⁰⁷ *Id.* at *2.

³⁰⁸ *Id.* at *3.

³⁰⁹ *Id.* at *5-7.

³¹⁰ *Id.* at *6-8.

doctrine.³¹¹ The court refused to protect the reports because CCA failed to establish a dispositive factor of the work product analysis: that the documents were “prepared in anticipation of litigation or trial.”³¹² Because the documents were produced for purposes of business that is the functional equivalent of a government operation in Tennessee, CCA is required to disclose settlement reports.³¹³

In addition to its lawsuit against CCA, PLN settled a public records suit with PHS in Vermont in 2012.³¹⁴ PLN had argued that PHS performed an inherently governmental function because it provided medical care to Vermont prisoners, which would be exclusively within the prerogative of the state had it not contracted with the company.³¹⁵ PHS agreed to turn over records relating to the resolution of six legal claims regarding medical care that totaled nearly \$2 million, as a state-run prison would have to do.³¹⁶ Once this information was disclosed, PLN was able to report details on the claims and how they were resolved, allowing advocates to get a better understanding of the incidents and the company’s legal responses. An accurate accounting of this information is crucial in this context, where Vermont uses taxpayer dollars to pay the company to perform a government function.

The lawsuit over conditions at ICC further showed just how important public access to staffing information can be. The settlement outlined terms that included specific staffing levels to be maintained at the facility and to address longstanding violence and security issues.³¹⁷ However, during the monitoring period, CCA misrepresented the number of staff by thousands of man-hours during a period of a few months.³¹⁸ This information only came to light because an investigator on another matter took action, alerting CCA to discrepancies in its reports.³¹⁹ To its credit, CCA conducted an internal investigation and collaborated with the state on a separate one; the

³¹¹ *Id.* at *10.

³¹² *Id.* at *9-10.

³¹³ *Id.* at *10 (“We, therefore, affirm the trial court’s ruling that the settlement reports requested pursuant to the Public Records Act at issue herein are public records and the reports do not qualify as attorney work product. Accordingly, CCA must disclose the settlement reports.”).

³¹⁴ *PLN Settles Public Records Suit Against PHS in Vermont, Obtains Settlement Payout Information*, PRISON LEGAL NEWS, Dec. 15, 2012, archived at <http://perma.cc/FT29-RY72>.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *See Kelly v. Wengler*, No. 1:11-cv-00185-EJL, 4 (Sept. 16, 2013) (Memorandum Decision) (“This case . . . had alleged constitutional violations at ICC because of high levels of inmate-on-inmate violence, inadequate staffing and training, inadequate investigation of assaults, and various other defects.”), archived at <http://perma.cc/LZ77-EKUV>.

³¹⁸ *See id.* at 3-5.

³¹⁹ *Id.* (“CCA began investigating falsified shift records in December 2012, after an investigator on an unrelated case, a harassment allegation, received information about mandatory posts going unfilled.”).

investigations revealed facility staff had over-reported staffing levels by thousands of man-hours.³²⁰ Had an informant not tipped off the independent investigator, the monitoring period would have concluded within a few months and the court would have had no authority to impose sanctions, regardless of compliance with the settlement. The court, while crediting CCA's "newfound transparency in record keeping," recognized that the revelation of deficient staffing levels was "long overdue."³²¹ The court then extended the monitoring period by two years and appointed an independent monitor to ensure future compliance with the settlement terms.³²²

Litigation has been a very effective tool for bringing accountability to prisons throughout the history of the United States.³²³ Arguably, if CCA had to release such information pursuant to public records requests, the staffing deficiencies could have come to light earlier, and prisoners in ICC would have benefitted from the level of external supervision the Idaho Supreme Court eventually granted. However, even when prisoners are able to successfully litigate and reach settlements in cases designed to improve conditions at a given facility, real world change may not be immediately forthcoming. When private actors can obfuscate judicial oversight to the point that only happenstance prevents injustice, it is clear that such enforcement suffers from weaknesses that render it incapable of wholly remedying severe structural problems.

B. *Enacting The Private Prison Information Act and State Replicas*

In addition to litigation, advocates have worked to make private prisons subject to public records laws in many state legislatures. While a comprehensive review of such activity is beyond the scope of this Note, an example from the federal system demonstrates why legislative advocacy is often a more difficult route to enact such a requirement.

The need for greater private prison oversight is particularly pressing at the federal level, where nearly eighteen percent of federal prisoners and half of immigration detainees are housed in private facilities.³²⁴ Further, immigration detention is still widely considered the largest potential growth market for the industry.³²⁵ Despite consistent attempts to apply FOIA to the industry when the industry contracts to hold federal prisoners, tens of thousands of individuals

³²⁰ *Id.* ("[T]here were nearly 4,800 hours over seven months where records indicated a correctional officer was staffing a security post but the post was actually vacant.").

³²¹ *Id.* at 17.

³²² *Id.* at 21, 23.

³²³ Fathi, *supra* note 5, at 1454.

³²⁴ CARSON & SABOL, *supra* note 30, at 13 ("On December 31, 2011, 6.7% of the state and 18% of the federal prison populations were incarcerated in private facilities.").

³²⁵ Raher, *supra* note 11, at 224-26 (discussing how federal authorities increasingly turn to private facilities to house the growing number of immigration detainees brought on by tougher immigration policy and enforcement).

incarcerated by the federal government are in facilities beyond the reach of this form of oversight.

Over the past decade, prison reform advocates have repeatedly attempted to enact a bill called the Private Prison Information Act (“PPIA”).³²⁶ The legislation would require “non-Federal prisons and correctional facilities holding Federal prisoners under a contract with the Federal Government to make the same information available to the public that Federal prisons and correctional facilities are required to make available.”³²⁷ Due largely to extensive lobbying efforts by the private prison industry,³²⁸ the bill has repeatedly failed, and despite holding nearly one of every five federal prisoners,³²⁹ the industry still need not comply with FOIA.³³⁰

A version of the PPIA was first introduced in the House in 2005 and in the Senate in 2006.³³¹ Since then, an iteration of the bill has been proposed once more in the Senate and three more times in the House.³³² In the House, the bill never made it beyond the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security; only two hearings were ever held on the bill.³³³ At the first hearing, the sponsor testified about oversight problems arising from the lack of industry transparency.³³⁴ The fact that “CCA did not submit any operational reports to federal agencies so there was no meaningful information accessible to FOIA requesters” compounded the issue of FOIA’s inapplicability to private prison companies.³³⁵ Neither legislators nor the media were able to obtain

³²⁶ H.R. 74, 112th Cong. (2011), *archived at* <http://perma.cc/EVJ3-PSMH>.

³²⁷ *Id.*

³²⁸ IN THE PUBLIC INTEREST, *supra* note 9, at 16-17 (“Between 2007 and 2009, CCA employed five sets of lobbyists assigned to several federal issues, including defeating PPIA.”).

³²⁹ CARSON & SABOL, *supra* note 30, at 13.

³³⁰ See Feiser, *supra* note 8, at 23 (“[T]he Act does not define the term ‘agency records,’ and private entities may not be holding records with a sufficient nexus to the government to qualify as agency records under judicial analysis.”).

³³¹ H.R. 1806, 109th Cong. (2005); S. 4031, 109th Cong. (2006).

³³² S. 2010, 110th Cong. (2007); H.R. 1889, 110th Cong. (2007); H.R. 2450, 111th Cong. (2009); H.R. 74, 112th Cong. (2011).

³³³ *Private Prison Information Act of 2007: Hearing on H.R. 1889 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2008); *Private Prison Information Act of 2007, and Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses? Hearing on H.R. 1889 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2007); Raheer, *supra* note 11, at 239.

³³⁴ Raheer, *supra* note 11, at 239 (“According to Representative Holden’s testimony, state legislators and the media had been unsuccessful in obtaining information on the problems occurring at the NOCC.”).

³³⁵ *Id.*

information on recurrent problems at private facilities; in other words, effective oversight was curtailed by restrictions on information.³³⁶

CCA campaigned aggressively against the legislation in 2008, arguing that government oversight of private prison contracts is sufficient to ensure good performance.³³⁷ Facing further opposition from both the Reason Foundation and the Department of Justice, the bill died in the subcommittee.³³⁸ A similar bill was brought in each of the next two sessions of Congress by Congresswoman Sheila Jackson-Lee, but neither she nor any other Congressperson has attempted to revive the legislation in the current session.³³⁹

The bill could have a substantial impact on transparency and public oversight of private prison facilities.³⁴⁰ Requiring compliance with FOIA would bring these prisons – as well as tens of thousands of prisoners, citizen and immigrant alike – into an existing oversight regime, allowing advocates and journalists already familiar with the FOIA process to begin requesting vital information immediately.³⁴¹ Private prison companies can seek guidance from their government counterparts, who are already familiar with the process of responding to FOIA requests. Further, such legislation could also set an example for state governments wary of the political fallout of requiring private prisons to comply with public records laws.³⁴² Legislation modeled on the

³³⁶ *Id.*

³³⁷ *Id.* (“In its statement, CCA claimed that government oversight is sufficient to allay any problems with access to information . . .”).

³³⁸ *Id.* at 240 (“[T]he Reason Foundation . . . testified against House Bill 1889 at the 2008 hearing, and the U.S. Department of Justice expressed concerns about the bill’s potential costs. The committee took no action on House Bill 1889.”).

³³⁹ Mel Motel, *Reintroducing the Private Prison Information Act: An Interview*, PRISON LEGAL NEWS, Feb. 15, 2013, *archived at* <http://perma.cc/H9US-RMEZ> (observing that there was a “coalition of organizations urging U.S. Representative Sheila Jackson Lee (D-TX) to reintroduce the Private Prison Information Act during the 113th Congress.”).

³⁴⁰ Feiser, *supra* note 8, at 25-27 (“[P]rivate prison operators that are not subject to public oversight could operate against the public’s interest . . .”).

³⁴¹ *See id.* at 26 (“The public should provide the necessary oversight by classifying private operators as agencies and their records as agency records, for purposes of the FOIA.”).

³⁴² *See id.* at 30 (“Some argue that the appropriate method for ensuring that private entities follow legal prescriptions is through a concept of state action, which effectively makes private operators responsible as if they were the government.”); *see also* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASH., PRIVATE PRISONS: A BASTION OF SECRECY 20-22 (2014) (“Members of Congress often use oversight as a means to develop the record to support legislation, as well as to release information to the public . . . [t]his could be an effective method of obtaining greater information on the operation of the private prisons . . .”), *available at* http://www.citizensforethics.org/page/-/PDFs/Reports/CREW_Private_Prisons_FOIA_secretcy_report_02_18_2014.pdf?nocdn=1, *archived at* <http://perma.cc/9P2F-J9DT>.

PPIA could also be used in states where public records laws seemingly would apply to private prisons to increase public access to vital information.³⁴³

C. *Improve Existing Forms of Contract Drafting and Oversight*

When private prisons enter into a contract to operate all or part of a correctional facility on behalf of a government entity, that contract becomes the blueprint for enforcing compliance with performance standards. Government agencies are thus the first, and best, potential lines of defense for prisoners suffering from individual or systemic harm in private facilities. These agencies also have obligations to ensure public resources are wisely invested, particularly given the substantial revenues the industry earns. Unfortunately, many of these agencies have failed to hold the private prison industry accountable for often significant contract violations.³⁴⁴ Improving contract drafting and oversight could provide a valuable means of ensuring humane and cost effective treatment.

Enhancing public access to information by incorporating and enforcing transparency provisions in contracts would create additional resources to ensure contract performance. Whether contracts come from a department of corrections, a legislature itself, or some other government agency, government officials should consistently include public records compliance requirements in contracts. Officials can then augment their own oversight with expertise from advocates who will be able to properly evaluate industry performance by analyzing regular information on staffing, medical care, security, violence, and other issues. Compliance with independent professional organizations has proven insufficient to ensure prisoners are protected from deprivations of their constitutional rights.

Ultimately, regardless of a state's ability to directly monitor private prison performance, applying public records statutes to private prison companies serves an important interest: independent public scrutiny of government operations.³⁴⁵ The history of private prisons indicates that states struggle to ensure that the industry complies with the terms of their contracts. However, even if it were the case that states experience few or no problems with private prison contract compliance, that alone would not ensure prisoners receive constitutionally adequate treatment while incarcerated. Public oversight therefore represents an important independent check on the industry.

D. *Why Access to Information Via Public Records Laws is Crucial*

There is no meaningful distinction between prisoners in public facilities and those in private facilities for the purpose of determining the types of rights

³⁴³ See *supra* Part II.D.

³⁴⁴ See *supra* Parts I.C-I.D.

³⁴⁵ Raher, *supra* note 11, at 247 (“Public records laws are designed to counteract agency hesitancy by allowing interested parties to independently analyze government operations.”).

granted by the federal Constitution.³⁴⁶ However, the different oversight regimes that govern public and private facilities make private prisons more difficult for the public to monitor and improve than public ones. Hopefully it has become apparent that increasing the public's access to operational information from private prisons would represent a vital step in improving industry oversight. As researchers and practitioners have attempted to evaluate and compare private prisons to government-operated ones, they have met consistent and formidable obstacles to accessing information.³⁴⁷ Without this access, analyses of private prison efficiency, prisoner treatment, and service delivery are hindered by poor information, more than thirty years after the genesis of the modern industry.³⁴⁸

Restrictions on litigation have weakened this traditional oversight mechanism, for prisons generally and private prisons specifically.³⁴⁹ Despite contractual obligations to comply with certain benchmarks, many states, particularly those with higher proportions of their prisoners in private facilities, have failed to consistently or firmly enforce these provisions.³⁵⁰ Therefore, the best available means of improving oversight comes from turning to a third traditional mechanism: scrutiny by an informed and motivated general public, ideally led by practitioners and other experts.³⁵¹ Extending the application of public records laws to private prisons would seemingly not invoke traditional criticisms of increased transparency, such as reduced security, less efficient government operations, or increased costs.³⁵² Issues of national/state security would not be implicated, and debate regarding government action and policymaking could be improved, by increasing transparency. Governments could hedge against efforts by the industry to pass on increased costs by managing contract terms, soliciting competition, or providing other incentives to companies to subsume the expenses.³⁵³

³⁴⁶ See *Minnecci v. Pollard*, 132 S. Ct. 617, 623 (2012) (explaining that while the Court was denying the plaintiff a federal remedy, there was adequate state law protection of the Eighth Amendment liberties at issue).

³⁴⁷ CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASH., *supra* note 342, at 10-14 (discussing the significant problems raised by the lack of publicly available data regarding private prisons).

³⁴⁸ *Id.* (“The lack of data on how private prisons are performing also makes it impossible to evaluate the studies issued by the private prison industry itself, which proclaim the superior efficiency and safety of private prisons compared to those publicly operated.”).

³⁴⁹ See *supra* Part I.C.1.

³⁵⁰ See *supra* Part I.C.2.

³⁵¹ CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASH., *supra* note 342, at 23-25 (“To date, public interest organizations and other groups have not done enough to use the tools they possess to shine a light on private prisons.”).

³⁵² See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 906-09 (2006).

³⁵³ See Douglas McDonald & Carl Patten, *Governments' Management of Private Prisons* vii-ix, 13-16 (Sept. 15, 2003) (unpublished research report submitted to the DOJ), *available*

Different methods can be used to increase public access to information: applying functional equivalency standards to private prisons in states with amenable statutory frameworks, and requiring the disclosure of information generated by companies for internal purposes related to operations and functions;³⁵⁴ applying that same test to access information from settlement agreements, as government agencies are required to disclose; and convincing legislators to both directly increase transparency by statute and to hold government bodies accountable for incorporating and enforcing transparency provisions in contracts with private prisons.³⁵⁵ Without more information on the industry, it is impossible to tell if the massive taxpayer investment in private prisons has paid off.

CONCLUSION

Private prisons should no longer be permitted to evade public scrutiny due to an essentially meaningless distinction concerning their legal status. The industry's opacity presents a fundamental obstacle to effective oversight by depriving the public of the ability to properly and empirically assess industry performance.

The need for greater public oversight appears especially pronounced in the context of private prisons. Available research suggests that private prisons struggle to provide adequate care and supervision of prisoners. In some instances, private prisons have escaped sanctions for contract violations. Some states have found that government operation of prisons is more or equally cost effective when compared to private operation. Without access to operational and personnel information, practitioners and advocates are unable to determine with any reasonable degree of confidence whether many private facilities are operated in humane, productive, and cost effective ways.

Effective, humane prison management is challenging for even the most creative and dedicated governments; it requires a multifaceted approach, at both governmentally and privately operated facilities. This approach must include direct supervision by governments and professional organizations, advocacy from informed and interested citizens, and, where necessary, litigation to address systemic deficiencies. The functional equivalency tests applied in *Friedmann I* and *Panno* can serve as models for legal reform leading to greater transparency and oversight of the private prison industry. In states where existing statutory schemes could provide the basis for claims that private prisons are functional equivalents of government agencies, litigants can use the

at <https://www.ncjrs.gov/pdffiles1/nij/grants/203968.pdf>, archived at <http://perma.cc/B75T-3GR4>.

³⁵⁴ CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASH., *supra* note 342, at 20-22 (“Hearings with witnesses from GAO and groups that attempt to monitor private prisons could establish a factual record for the value of the missing data . . . and help pave the way for legislation.”).

³⁵⁵ See *supra* Part III.B-C.

tests propounded in those cases. In states where such application is less explicit, advocates will have a more difficult, but not impossible task.

Creating access to private prison records through functional equivalency tests can only go so far. Legislative reforms in the spirit of the PPIA would permit advocates to avoid costly litigation and begin the more important task of evaluating the industry's performance and comparing it to that of various governments. Governments themselves must also shoulder significant responsibility for oversight by setting performance standards and increasing transparency in contracts they sign with private prison companies. Thus, litigation, legislative reform, and improvements to the contracting process could all generate greater transparency for the industry. This transparency will aid both advocates and opponents as they evaluate and debate the private prison industry.