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# CASHING IN ON CONVICTS: PRIVATIZATION, PUNISHMENT, AND THE PEOPLE

Laura I Appleman\*

## *Abstract*

*For-profit prisons, jails, and alternative corrections present a disturbing commodification of the criminal justice system. Though part of a modern trend, privatized corrections has well-established roots traceable to slavery, Jim Crow, and current racially-based inequities. This monetizing of the physical incarceration and regulation of human bodies has had deleterious effects on offenders, communities, and the proper functioning of punishment in our society. Criminal justice privatization severs an essential link between the people and criminal punishment. When we remove the imposition of punishment from the people and delegate it to private actors, we sacrifice the core criminal justice values of expressive, restorative retribution, the voice and interests of the community, and systemic transparency and accountability. This Article shows what is lost when private, for-profit entities are allowed to take on the traditional community function of imposing and regulating punishment. By banking on bondage, private prisons and jails remove the local community from criminal justice, and perpetuate the extreme inequities within the criminal system.*

## INTRODUCTION

In the pivotal opening scene in George R. R. Martin's *Game of Thrones*, Lord Eddard Stark, Warden of the North, explains to his young son Bran why he must put on the face of the "King's Justice," and punish (behead) a deserter with his own hands, instead of handing the job off to a hired executioner:

The question was not why the man had to die, but why *I* must do it." Bran had no answer for that. "King Robert has a headsman," he said, uncertainly. "He does," his father admitted . . . "Yet our way is the older way. The blood of the First Men still flows in the veins of the Starks, **and we hold to the belief that the man who passes the sentence should**

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**swing the sword.** If you would take a man's life, you owe it to him to look into his eyes and hear his final words.<sup>1</sup>

Eddard Stark professes and upholds a fundamental aspect of our criminal justice system: punishment must be adjudicated, imposed, and regulated by the people. Sometimes this justice is directly imposed by the people, through the auspices of a grand or petit jury; sometimes this justice is enacted more distantly, through the hands of the local or state-elected government. But all of it is done in the people's name, and only through their power.

The recent rise of privatizing punishment—spanning from for-profit incarceration to privatized probation to private post-release supervision, recovery homes, and parole—severs the essential link between the people and criminal punishment. To paraphrase George R.R. Martin, we pass the sentence but sell, far too cheaply, our right to swing the sword. In bartering away the right to enact and regulate offenders' punishment, by granting that right to private corrections companies instead of the state and local community, we lose the democratic legitimacy that undergirds our system of criminal justice. When we remove the imposition of punishment from the people and delegate it to private actors, we sacrifice the core criminal justice values of expressive, restorative retribution, the voice and interests of the community, and systemic transparency and accountability.

Though part of a modern trend, privatized corrections has well-established roots traceable to slavery, Jim Crow, and current racially-based inequities. The use of forced inmate labor in private prisons is distinctly troubling, given that a high percentage of minorities are imprisoned in private correctional institutions. Monetizing the physical incarceration and regulation of human bodies has had serious, deleterious effects on offenders, communities, and the proper functioning of punishment in our society.

Policy makers, legislators, and academics all have raised concerns about the rising tide of privatizing corrections. Although the ramifications of privatized criminal justice have begun to be explored, little attention has been paid to the negative impact upon the local community, particularly low-income communities and communities of color. When we look at privatizing corrections through this lens, however, we find additional reasons why the outsourcing of punishment to private entities, by stepping upon rights traditionally reserved to the lay citizenry, presents enormous problems for the proper administration of justice.

Privatized prisons, jails, and alternative corrections trample on our long-held tradition of having all punishment decided by the local community. The imposition of punishment onto incarcerated offenders by private, for-profit companies destroys the established patterns of community involvement and control. The principle behind our system of criminal justice—that the community should determine all punishment for an offender—has import for all aspects of punishment, including that meted out post-sentencing.

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<sup>1</sup> GEORGE R.R. MARTIN, *A GAME OF THRONES* 18 (1996) (emphasis added).

When offenders are punished by private entities, it lessens the expressive, restorative, retributive message normally sent by the community, since the offender is punished by a for-profit, private entity. The community loses both its voice and its means of participation. In addition, when we privatize punishment, the offender does not feel the condemnation of the local community, but instead concludes that her punishment is based on the profit motive of a private business. A critical social message is lost.

Furthermore, the majority of our private prisons and jails fail to meet minimum benchmarks on decreasing violence, reducing recidivism, and otherwise fulfilling the role of retributive punishment, even compared to the low standards established by public corrections. Shortcuts are frequently taken, ostensibly in the pursuit of profit, that reduce the quality of life for offenders. Regulation of private prisons, jails, and alternative corrections is usually minimal, sometimes with deadly results.

This Article explores what society loses when it allows private, for-profit entities to take on the traditional community function of imposing and regulating punishment. The physical imposition of punishment has traditionally and historically been performed by the community, or by local government chosen by the people. Only recently have we begun to outsource this right to private business, leading to deeply troubling results.

Part I of this Article explores the perils of privatization in criminal punishment, examining the growing reach of for-profit companies in not only private prisons, but also jails, halfway houses, probation, and post-release supervision. This Part additionally scrutinizes the outsourcing of vital services by both private and public facilities.

Part II shows how privatization of correctional facilities and their services has had strong negative effects on offender rehabilitation and reintegration into the community. This Part demonstrates some of the negative results of private corrections, including higher rates of recidivism, more damage to families and communities, and higher monetary costs than promised.

Part III contends that the community's role in imposing expressive, restorative retribution on offenders provides some important theoretical and policy reasons why the imposition and regulation of punishment cannot be outsourced to private entities. This Part also briefly reviews the sordid history of private prisons, showing how the privatization of criminal justice has always been rooted in slavery and Jim Crow.

Part IV examines the critical role played by local community-level social processes in enacting and regulating criminal punishment. This Part carefully explores the interconnection between delegation, democracy, and the community, and concludes that crucial public values such as transparency, public accountability, and legitimacy all suffer when private entities control local punishment.

Taking a different approach, Part V merges theory with practicality, exploring how communities can become better engaged in regulating the punishment delivered to wrongdoers in private correctional facilities. If society is to truly improve our criminal justice institutions, then we must reintegrate the local community into all aspects of criminal justice, including how and where we punish offenders.

Once unmasked, the quietly expanding realm of private, for-profit corrections reveals a crisis of humanitarian, criminal justice, and democratic legitimacy. Overlooked and undetected by the average citizen, these for-profit correctional facilities are the antithesis of our original system of criminal justice, papering over dangerous and inhumane treatment with the false promise of cost-savings. By banking on bondage, private prisons, jails, and alternative corrections remove the local community from criminal justice, and perpetuate the extreme inequities hidden within the criminal system.

#### I. THE PERILS OF PRIVATIZATION: DANGER, DEATH, AND DERELICTION OF DUTY

*“It’s sardine time. . . . We a for-profit prison now. We ain’t people no more. We bulk items.”*<sup>2</sup>

Running a correctional facility differs from running a municipal sewage authority. The moral, retributive, restorative psychological, and physical aspects of enacting community-determined punishment on *human* offenders makes managing corrections a complex, delicate, and extremely difficult task at the best of times. To do all of this while simultaneously prioritizing profit is seemingly impossible.

And yet, in troubled financial times, the lure of privatized punishment for local, state, and federal government seems irresistible. Private prisons, jails, probation, parole, and post-relief supervision have boomed in the past twenty years, even as incarceration rates nationwide have begun to decrease. From 1999–2010, the number of offenders held in private prisons increased by eighty percent, compared to eighteen percent for the overall prison population, a much smaller rate of growth.<sup>3</sup>

##### A. Squeezing Profits Out of Prisons

Approximately 193,000 offenders are currently incarcerated in private prisons,<sup>4</sup> both state and federal. This number, however, does not take into account the many more offenders who come into the orbit of privatized punishment, which includes

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<sup>2</sup> *Orange Is the New Black: Work that Body for Me* (Netflix web series June 17, 2016); see also Meredith Blake, *How ‘Orange Is the New Black’ and Other Shows Raise Awareness of Criminal Justice and Prison Issues*, L.A. TIMES (June 20, 2016), <http://www.latimes.com/entertainment/tv/la-et-st-orange-is-the-new-black-and-prison-awareness-20160616-snap-story.html> [https://perma.cc/ZU7J-FMHM].

<sup>3</sup> CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 1 (2012), <http://sentencingproject.org/wp-content/uploads/2016/01/Too-Good-to-be-True-Private-Prisons-in-America.pdf> [https://perma.cc/6AEM-HM5T].

<sup>4</sup> The most recent numbers are from FY 2015. E. ANN CARSON & ELIZABETH ANDERSON, U.S. DEP’T OF JUSTICE, PRISONERS IN 2015 28 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf> [https://perma.cc/8CUG-D843]; Maurice Chammah, *What You Need to Know About the Private Prison Phase-Out*, MARSHALL PROJECT (Aug. 18, 2016), <https://www.themarshallproject.org/2016/08/18/what-you-need-to-know-about-the-private-prison-phase-out#.xe2xWry5a> [https://perma.cc/7ANQ-VYWN].

private jails, private probation, private post-release supervision, and private rehabilitation/halfway houses, as well as the outsourcing of critical prisoner services such as transport, healthcare, telephony, and food. Roughly eight percent of all inmates are held in private correctional facilities,<sup>5</sup> and the number is likely to grow,<sup>6</sup> as are company profits. Total revenues for private corrections are over \$3.3 billion per year,<sup>7</sup> and private prison executives at the leading companies rake in enormous compensation packages, in some cases totaling millions of dollars.<sup>8</sup> Profits are ripe for the taking when it comes to privatizing punishment.

### 1. *Big Money for Big Companies*

Who benefits from the continued growth of privatized punishment? Primarily, it is private, for-profit corrections companies. The two largest publicly traded players, private prison operators Corrections Corporation of America (“CCA”)<sup>9</sup> and the GEO Group,<sup>10</sup> have a combined market capitalization of almost \$5.8 billion,<sup>11</sup>

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<sup>5</sup> Shane Bauer, *My Four Months as a Private Prison Guard—Ch. 2: Prison Experiments*, MOTHER JONES (July 2016), <https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/#chapter-2> [<https://perma.cc/EXY3-QJXA>].

<sup>6</sup> Indeed, following Donald J. Trump’s election, private prison stocks soared; CCA’s stock rose 43%, and the GEO Group’s stock rose 21%. See Jeff Sommer, *Trump’s Win Gives Stocks in Private Prison Companies a Reprieve*, N.Y. TIMES (Dec. 3, 2016), <http://www.nytimes.com/2016/12/03/your-money/trumps-win-gives-stocks-in-private-prison-companies-a-reprieve.html> [<https://perma.cc/9FQD-TQ6Y>].

<sup>7</sup> Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015), [https://www.washingtonpost.com/posteverlything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/?utm\\_term=.0b923c4c3076](https://www.washingtonpost.com/posteverlything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/?utm_term=.0b923c4c3076) [<https://perma.cc/W2ZH-Q6Q9>].

<sup>8</sup> DAVID SHAPIRO, AM. CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 5 (2011), [https://www.aclu.org/sites/default/files/field\\_document/bankingonbondage\\_20111102.pdf](https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf) [<https://perma.cc/9LD6-LLMB>].

<sup>9</sup> CORECIVIC, <http://www.corecivic.com/> [<https://perma.cc/66P9-9GYH>] (last visited Sept. 1, 2017). In October 2016, CCA changed its name to CoreCivic, to better reflect its diversification into areas like inmate transportation and residential re-entry programs for former inmates. See Bethany Davis, *Correction Corporation of American Rebrands as CoreCivic*, CCA (Oct. 28, 2016), <http://www.cca.com/insidecca/corrections-corporation-of-america-rebrands-as-corecivic> [<https://perma.cc/PZT7-2BFU>]; Sommer, *supra* note 6.

<sup>10</sup> *Geo Group*, GEO GROUP, INC., <http://www.GEOgroup.com/> [<https://perma.cc/RW29-EH8S>] (last visited Sept. 1, 2017).

<sup>11</sup> David Segal, *Prison Vendors See Continuing Signs of a Captive Market*, N.Y. TIMES (Aug. 29, 2015), <http://www.nytimes.com/2015/08/30/business/prison-vendors-see-continued-signs-of-a-captive-market.html> [<https://perma.cc/6DDW-J7YA>].

controlling over seventy-five percent of the private prison business.<sup>12</sup> These two prison privatizers made over \$360 million profit in 2015 alone.<sup>13</sup>

Who else profits from these private prison companies? Among other individuals, many unknowing mutual fund holders. CCA's largest investor is The Vanguard Group, which owns fourteen percent of the company's stock, worth approximately \$447 million in 2015.<sup>14</sup> The Vanguard Group also holds eighteen percent of the GEO Group's stock, worth around \$665 million in 2017.<sup>15</sup> Blackrock Inc., an investment firm, holds approximately eleven percent of GEO Group's stock, valued at \$332 million dollars.<sup>16</sup> Thus the private corrections conundrum is one that affects many Americans, whether directly or, more remotely, in their stock or investment portfolios.

CCA is the largest private corrections company in the United States, running private correctional facilities all over the country, and owning a total of 61.<sup>17</sup> Its track record in running these prisons, however, is insalubrious, most recently exposed by a journalist working undercover as a private prison guard in one of CCA's Louisiana prisons.<sup>18</sup> CCA's main competitor, GEO Group, has been equally dogged with problems in properly running and supervising its facilities.

Private corrections companies come in sizes large and small. Apart from CCA and the GEO Group, there are numerous smaller players to help split up the remaining pieces of the private prison pie. Smaller companies, including Management & Training Corporation, LCS Correctional Services, and Emerald Corrections, hold multiple prison contracts throughout the country.<sup>19</sup> Their prison practices have proven equally troubling.

The Louisiana-based LaSalle Corrections, for example, owns local prisons that incarcerate nearly 1 out of 7 prisoners in the state, providing minimum services for bottom dollar:

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<sup>12</sup> JAMES AUSTIN & GARRY COVENTRY, U.S. DEP'T OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS 4 (2001), <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf> [<https://perma.cc/5Q9R-RF4Q>].

<sup>13</sup> Donald Cohen, *It's Been a Rough Few Weeks for the Private Prison Industry*, HUFFINGTON POST (July 21, 2016), [http://www.huffingtonpost.com/donald-cohen/its-been-a-rough-few-week\\_b\\_11121034.html](http://www.huffingtonpost.com/donald-cohen/its-been-a-rough-few-week_b_11121034.html) [<https://perma.cc/J8U9-WBE8>].

<sup>14</sup> *The Corrections Corporation of America, by the Numbers*, MOTHER JONES (July 2016), <http://www.motherjones.com/politics/2016/06/cca-corrections-corporation-america-private-prisons-company-profile> [<https://perma.cc/V2NM-Y853>].

<sup>15</sup> *The GEO Group, Inc. (GEO)*, YAHOO! FINANCE, <https://finance.yahoo.com/quote/GEO/holders?ltr=1> [<https://perma.cc/749Q-B5HV>] (last visited March 2, 2018).

<sup>16</sup> *Id.*

<sup>17</sup> Clara Jeffrey, *Why We Sent a Reporter to Work as a Private Prison Guard*, MOTHER JONES (July 2016), <http://www.motherjones.com/politics/2016/06/cca-private-prisons-investigative-journalism-editors-note> [<https://perma.cc/93T3-SM3H>].

<sup>18</sup> *Id.*

<sup>19</sup> MASON, *supra* note 3, at 2.

If you are sentenced to state time in Louisiana, odds are you will be placed in a local prison—a low-budget, for-profit enterprise where you are likely to languish in your bunk, day after day, year after year, bored out of your skull with little chance to learn a trade or otherwise improve yourself.<sup>20</sup>

More than half of all Louisiana prisoners are housed in these bare-bones local prisons and jails.<sup>21</sup>

Large or small, one interest held in common by all these private correction companies is a desire to freeze U.S. incarceration policies. For-profit prison companies have lobbied heavily to try to ensure that meaningful sentencing reform fails, since this would shrink their business.<sup>22</sup> Because private prison companies exist for money-making purposes, “policies that maintain or increase incarceration boost their revenues; from a business perspective, the economic and social costs of mass incarceration are ‘externalities’ that aren’t figured into their corporate bottom line.”<sup>23</sup> Profit margins, not prisoner welfare, are their primary focus.

In part, this emphasis on the bottom line has motivated these companies to expand into halfway houses, jails, rehabilitation centers, and other correctional alternatives. As the country begins to wrestle meaningfully with shorter, alternative sentencing, private corrections companies want to ensure they continue to capture their slice of the market.

## 2. *Violence, Sexual Assault, and Homicide*

Even by the minimal requirements of correctional habitability, private correctional facilities routinely provide prisoners an extremely low quality of living. The ratio of corrections officers to inmates tends to be dangerously disproportional, and reports of squalor, rape, and inmate uprisings have been a continued hallmark, falling below the standards of government-run prisons.<sup>24</sup> In twenty-one states, local and federal investigations, official reviews, security reports, and lawsuits against private prisons and their corporate overseers have recently unveiled a “startling pattern” of riots, sexual assault, and homicide.<sup>25</sup>

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<sup>20</sup> Cindy Chang, *North Louisiana Family Is a Major Force in the State’s Vast Prison Industry*, TIMES-PICAYUNE (May 14, 2012), [http://www.nola.com/crime/index.ssf/2012/05/jonesboro\\_family\\_is\\_a\\_major\\_fo.html](http://www.nola.com/crime/index.ssf/2012/05/jonesboro_family_is_a_major_fo.html) [https://perma.cc/TFP8-SEU9].

<sup>21</sup> *Id.*

<sup>22</sup> JUSTICE POLICY INSTITUTE, GAMING THE SYSTEM: HOW THE POLITICAL STRATEGIES OF PRIVATE PRISON COMPANIES PROMOTE INEFFECTIVE INCARCERATION POLICIES 3 (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming\\_the\\_system.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf) [https://perma.cc/P2AV-W558]; Cohen, *supra* note 7.

<sup>23</sup> JUSTICE POLICY INSTITUTE, *supra* note 22, at 12.

<sup>24</sup> See Pat Beall, *Prison Enterprise a Powerful Force in Backrooms, Behind Bars*, PALM BEACH POST (Oct. 28, 2013), <http://www.mypalmbeachpost.com/news/news/prison-enterprise-a-powerful-forcein-backrooms-beh/nbWyF/> [https://perma.cc/Y4F9-7FEU].

<sup>25</sup> *Id.*



A large percentage of these problems relate to the minimal staffing of these private facilities. Many private correctional institutions routinely fail to provide enough officers to prevent violence.<sup>26</sup> In addition, the correction officers are frequently inexperienced, unable to maintain the tight control and discipline needed to run a correctional facility safely.<sup>27</sup> Equally dangerous, private prison guards often receive minimal job training. As a result, private prison guards have high rates of exploiting and assaulting inmates under their supervision.<sup>28</sup> The business model of these for-profit prisons requires that they spend as little as possible on officer pay and training,<sup>29</sup> even if the result is inmate violence, injury or death.

Even within the world of privatized corrections, CCA is notorious for poorly staffing its prisons. In 1997, CCA staffed a federal prison in Ohio with officers who had minimal corrections experience and then relocated 1,700 high-level security prisoners from Washington, D.C. to reside there.<sup>30</sup> Within the first fourteen months, the facility experienced thirteen stabbings, two murders, and six escapes.<sup>31</sup> In desperation, local officials sued CCA in federal court for failing to abide by its own standards, and CCA was ultimately ordered to remove 113 of the maximum-security prisoners from the facility.<sup>32</sup>

CCA is currently under criminal investigation by the FBI for falsifying 4,800 hours of guard posts required under an Idaho contract.<sup>33</sup> CCA collected state funds for guards who were never assigned to work. The Idaho facility amassed four times the number of prisoner-on-prisoner assaults than the state's seven other prisons combined, a result of the badly inadequate staffing.<sup>34</sup> In addition, the facility, nicknamed "the Gladiator School" due to its multiple intra-inmate fights, suffered

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<sup>26</sup> See Pat Beall, "Parade of Horribles" in *Private Prisons*, PALM BEACH POST (Nov. 3, 2013), <http://www.mypalmbeachpost.com/news/news/parade-of-horribles-in-private-prisonscost-cutting/nbdpx/> [<https://perma.cc/3C9V-SWMG>]. Indeed, recently CCA admitted that it had lied about understaffing a particularly violent Idaho prison. *Id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> Mike Brickner, *Correction Corporation of America's Loss Is Ohio's Gain*, ACLU (Jan. 9, 2015), <https://www.aclu.org/blog/speakeasy/corrections-corporation-americas-loss-ohios-gain> [<https://perma.cc/A3VP-PZ6V>].

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Who Is CCA?*, ACLU TENN., <http://www.aclu-tn.org/who-is-cca/> [<https://perma.cc/94FF-JHLA>] (last visited Sept. 1, 2017). An independent auditor found that CCA failed to fill at least 26,000 hours of required posts in 2012 alone, for an average of 500 hours per week of missing security staff. *Id.*

<sup>34</sup> *Id.*

epidemic—and continuing—violence.<sup>35</sup> CCA was ultimately removed from management, but not until after many inmates were seriously injured.<sup>36</sup>

The few officers provided by these private prison companies are trained to step back and not get involved. CCA advises its prison guard trainees to not break up an inmate fight, or even call for backup. Instead, guards are instructed to ask the prisoners to stop fighting, and if they refuse, to just walk away.<sup>37</sup> At some CCA prisons, sometimes there are only two officers per 800 inmates at mealtimes, a seriously inadequate ratio.<sup>38</sup> Inside the general population ward, where the prisoners spend most of their time, there is likewise often only one CCA guard per 176 inmates.<sup>39</sup> On the segregated solitary confinement wards, CCA guards routinely fail to check on the prisoners every thirty minutes, as they are required to do,<sup>40</sup> creating an unsafe environment for at-risk inmates. Guard towers surrounding the CCA correctional facilities are frequently unmanned, permitting inmate escapes.<sup>41</sup>

The GEO Group has been equally negligent in its running of private prisons. In 2012, the U.S. Department of Justice found that a Mississippi juvenile facility run by the GEO Group violated the constitutional rights of the youth detained there.<sup>42</sup> The young men incarcerated in the prison were “sexually preyed upon by the staff and all too frequently suffered grievous harm, including death.”<sup>43</sup> Moreover, the GEO Group provided virtually no care or oversight for their young charges, including deliberate indifference to sexual misconduct with youth by correction officers; excessive use of force by prison guards on youth; failure to protect the inmates from youth-on-youth violence; deliberate indifference to the youth at risk of self-injurious and suicidal behaviors; and ignoring inmates’ medical needs.<sup>44</sup>

This mismanagement is sadly typical for GEO Group-run facilities. In 2013, inmates at East Mississippi Correctional Facility filed suit alleging “barbaric and

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<sup>35</sup> Pat Beall, *Judge: Prison Firm Lied About Staffing*, PALM BEACH POST (NOV. 3, 2013), <http://www.mypalmbeachpost.com/news/news/judge-prison-firm-lied-about-staffing/nbfRx/> [<https://perma.cc/5QHM-5W9F>].

<sup>36</sup> *Kelly v. Wengler*, ACLU, <https://www.aclu.org/cases/kelly-v-wengler> [<https://perma.cc/5FWU-ZR68>] (last updated May 23, 2016).

<sup>37</sup> See Bauer, *supra* note 5, at Chapter 1.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* at Chapter 2.

<sup>42</sup> Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Department of Justice Releases Investigative Findings on the Walnut Grove Youth Correctional Facility in Mississippi (Mar. 21, 2012), <https://www.justice.gov/opa/pr/department-justice-releases-investigative-findings-walnut-grove-youth-correctional-facility> [<https://perma.cc/LU2Q-62Q9>].

<sup>43</sup> *Id.*

<sup>44</sup> Memorandum from the U.S. Dep’t of Justice, Civil Rights Div. to Phil Bryant, Governor of the State of Miss. 5, 15, 21 (Mar. 20, 2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/04/09/walnutgrovefl.pdf> [<https://perma.cc/R7WJ-XYC9>].

horrific conditions” at the GEO Group-run prison.<sup>45</sup> An ACLU investigation found that these prisoners were underfed, housed in filthy conditions, and held in rat-infested cells lacking working toilets or lights.<sup>46</sup> Although government-run prisons are hardly plush, the conditions in many privately-run facilities frequently go below even the minimum standards.

Privatized federal prisons suffer similarly endemic problems. A recent Office of the Inspector General report revealed that private federal prisons—managed by CCA, the GEO Group, and Management & Training Corporation<sup>47</sup>—incurred more safety and security incidents per capita than comparable public federal prisons, including higher rates of assaults, extensive property damage, bodily injury, death of a correctional officer, and improperly segregating new inmates in twenty-four-hour lockdown.<sup>48</sup> These results are meaningful, given that federal prisons have considerably more resources and much lower levels of overcrowding than state and local prisons. Thus, even in the best possible incarceration scenario, private prison operators incurred a variety of negative and dangerous incidents.

In light of these findings, on August 18, 2016, the Obama Justice Department decided to stop using private prison companies to run federal prisons.<sup>49</sup> As the Deputy Attorney General noted: “[Private prisons] simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of Inspector General, they do not maintain the same level of safety and security.”<sup>50</sup>

Given the Trump Justice Department’s recent rescission of the order, however,<sup>51</sup> privately-run federal prisons appear likely to remain. The Bureau of Prisons currently has twelve private prison contracts, which house approximately 21,000 inmates.<sup>52</sup> Combined with the number of offenders held by private state prisons, a significant amount of those people incarcerated in this country are under the supervision of the private sector.

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<sup>45</sup> Complaint at 1, *Dockery v. Epps*, No. 3:13-cv-326 (S.D. Miss. May 30, 2013), 2013 WL 2361045.

<sup>46</sup> *Id.* at 2–4.

<sup>47</sup> U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS i (2016), <https://oig.justice.gov/reports/2016/e1606.pdf> [<https://perma.cc/T2Y2-XFLN>].

<sup>48</sup> *Id.* at ii.

<sup>49</sup> See Memorandum from Sally Q. Yates, Deputy Att’y Gen. to Acting Dir., Federal Bureau of Prisons 1–2 (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/download> [<https://perma.cc/7WJJ-RJ7R>].

<sup>50</sup> *Id.* at 1.

<sup>51</sup> On January 23, 2017, Attorney General Jeff Sessions sent a memo to the Bureau of Prisons rescinding the Obama administration’s August 16 order advising the bureau not to renew any contracts with private prisons. Lydia Wheeler, *Trump Admin Rescinds Plan to Reduce Private Prison Use*, HILL (Feb. 23, 2017), <http://thehill.com/homenews/administration/320915-trump-admin-rescinds-plan-to-reduce-private-prisons> [<https://perma.cc/8GRG-LWXL>].

<sup>52</sup> *Id.*

### *B. Private Alternative Corrections Instead of Traditional Incarceration*

For-profit prison companies are moving aggressively into the world of alternate corrections, which includes private jails, halfway houses, probation services, and rehabilitation centers. The number of offenders subject to private punishment multiplies when the count is expanded outside of prison walls. The private companies running alternative corrections—often the very same for-profit companies that run the private prisons—have precisely the same profit-based motivation, and tend to use the same business models.<sup>53</sup>

Largely due to concern over sentencing reform, investors and private prison companies have started investing in alternative correction services, such as private halfway houses, electronic monitoring, private probation, “civil commitment” centers for sex offenders, and for-profit residential treatment facilities.<sup>54</sup> These “alternatives” to incarceration can be very profitable, especially if they are run similarly to privately-owned prisons.

#### *1. Private Probation and Post-Release Supervision*

Private probation companies have greatly expanded in recent years. As of 2016, over 1,000 courts, most in the South but including Michigan and Washington State, have transferred the supervising and fee-collection from misdemeanor offenders to private probation companies.<sup>55</sup> These private companies often advertise themselves to impoverished state and local governments as an inexpensive way to punish low-level offenders while keeping them out of costly jails.<sup>56</sup>

These probation companies, however, frequently end up indebting probationers, not rehabilitating them.<sup>57</sup> Probation privatizers make money from imposing numerous fees on probationers, fees that multiply with penalties and interest if the offender cannot pay.<sup>58</sup> And when offenders cannot pay, arrest and

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<sup>53</sup> See Joshua Holland, *Private Prison Companies Are Embracing Alternatives to Incarceration*, NATION (Aug. 23, 2016), <https://www.thenation.com/article/private-prison-companies-are-embracing-alternatives-to-incarceration/> [<https://perma.cc/S52R-8X6G>].

<sup>54</sup> Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc> [<https://perma.cc/2KPF-DJFH>].

<sup>55</sup> Sharon Cohen, *Poor Offenders Pay High Price When Probation Turns on Profit*, SPOKESMAN-REV. (Mar. 12, 2016), <http://www.spokesman.com/stories/2016/mar/12/poor-offenders-pay-high-price-when-probation-turns/> [<https://perma.cc/D7AQ-T62U>].

<sup>56</sup> Stillman, *supra* note 54.

<sup>57</sup> Ryan Cooper, *How Your Local Jail Became Hell: An Investigation*, WEEK (Mar. 31, 2015), <http://theweek.com/articles/540725/how-local-jail-became-hell-investigation> [<https://perma.cc/8VMP-774J>].

<sup>58</sup> See Laura I. Appleman, *Nickel and Dimed into Incarceration: Cash-Register Justice in the Criminal System*, 57 B.C. L. REV. 1483, 1507–08 (2016) (discussing the rise in fees over recent decades, and the discretion of local officials in imposing them).

imprisonment often follows, sometimes based on warrants drafted by probation companies and issued by the courts.<sup>59</sup>

In addition to debt collection, many private probation companies also offer electronic monitoring, drug testing, and even behavioral-therapy courses,<sup>60</sup> all at little to no cost to local governments and courts.<sup>61</sup> In truth, private probation services transfer the financial burden of probation directly onto offenders, all while taking their monetary cut. The result is that most offenders, who tend to be impoverished, spend the rest of their lives trying to pay off their criminal justice debt.<sup>62</sup> Local governments that use private probation services essentially turn courts into debt-collection machines, with the profits going to the private companies. The objective no longer focuses on best interest of either the defendant or society.<sup>63</sup>

All courts struggle to collect criminal justice debt from offenders, whether they utilize the services of private probation companies or not. Private probation fees, however, are often substantially greater than what states charge for equivalent services, as many states charge nothing at all.<sup>64</sup> These private supervision fees can increase criminal justice debt significantly, and lead to more incarceration in the long run.<sup>65</sup>

Furthermore, the competition among private probation companies for profitable, exclusive contracts with local courts can engender corruption among both court and company officials.<sup>66</sup> For example, ten years of private probation in Idaho was shut down after allegations of profiteering and illegal fees.<sup>67</sup> Likewise, in Tennessee, private probation companies have been so rapacious in their eagerness to extract fees from offenders that some of them are afraid to leave the house.<sup>68</sup> One major private probation company, Judicial Correction Services, has been repeatedly sued in Alabama and Mississippi for racketeering and extortion, among other charges.<sup>69</sup> In the world of private probation, both transparency and oversight are extremely rare.<sup>70</sup>

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<sup>59</sup> Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1100 (2015).

<sup>60</sup> For example, one private probation company in Alabama required offenders to attend a course in “Moral Reconciliation Therapy,” which cost offenders \$240. Hannah Rappleye & Lisa Riordan Seville, *The Town that Turned Poverty into a Prison Sentence*, NATION (Apr. 14, 2014), <https://www.thenation.com/article/town-turned-poverty-prison-sentence/> [<https://perma.cc/N5WC-Y226>].

<sup>61</sup> Stillman, *supra* note 54.

<sup>62</sup> See generally Appleman, *supra* note 58 (arguing that criminal justice debt has aggressively metastasized throughout the criminal system, primarily burdening the indigent).

<sup>63</sup> See Stillman, *supra* note 54.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Cohen, *supra* note 55.

<sup>69</sup> *Id.*

<sup>70</sup> See Stillman, *supra* note 54.

Another problem with privatized probation companies is the trend of “net-widening”: placing more people into the criminal justice system, and keeping them there longer,<sup>71</sup> even if they’re not behind bars, for purposes of profit. Thus, “[i]nstead of moving [rehabilitated offenders] into the community, with some form of accountability,”<sup>72</sup> these companies simply continue to have them wear the electronic monitoring hardware, thereby stretching out the payment plans and the profits. Allowing probation to be run for profit often means that probationary decision-making shifts from ostensibly neutral courts to for-profit companies, ones that use probation not only as a tool to extract fees from offenders,<sup>73</sup> but also to extend offenders’ time under supervision, ultimately increasing profits.

## 2. *Private Halfway Houses and Re-Entry Programs*

The private corrections industry has also begun investing in extra-carceral services. In 2013, for example, CCA purchased Correctional Alternatives, which specializes in prisoner re-entry programs, like work furloughs and home confinement.<sup>74</sup> Likewise, the GEO Group now owns a variety of “community re-entry services” and treatment programs, having purchased the country’s largest electronic-monitoring firm, BI Incorporated, in 2011.<sup>75</sup> This expansion may well be a concern if these programs are run similarly to the private prisons, jails, and probation services, as it is unlikely the focus will be on rehabilitation.

A cautionary tale is provided by New Jersey’s experience with Community Education Centers (“CEC”), a privately run, for-profit rehabilitation company. In the 1990s, New Jersey began outsourcing its prisoner re-entry and halfway houses to CEC, resulting in client neglect, abuse, and outright chaos.<sup>76</sup> Roughly forty percent of all New Jersey state prisoners enter a halfway house after prison, and Community Education Centers controlled most of those.<sup>77</sup> Conditions at these private halfway houses were shocking, far worse than those run by the state. In one year alone, 185 offenders escaped from the houses,<sup>78</sup> many of them violent offenders, and life within the centers was dangerous and unregulated. Problems with CEC’s halfway houses have not been limited to New Jersey; in 2011, an Indiana inmate died due to untreated pregnancy complications, and Colorado inmates

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<sup>71</sup> Holland, *supra* note 53.

<sup>72</sup> *Id.*

<sup>73</sup> Hadar Aviram, *The Inmate Export Business and Other Financial Adventures: Correctional Policies for Times of Austerity*, 11 HASTINGS RACE & POVERTY L.J. 111, 132 (2014).

<sup>74</sup> Segal, *supra* note 11.

<sup>75</sup> Stillman, *supra* note 54.

<sup>76</sup> Sam Dolnick, *As Escapees Stream Out, A Penal Business Thrives*, N.Y. TIMES (June 16, 2012), [http://www.nytimes.com/2012/06/17/nyregion/in-new-jersey-halfway-houses-escapees-stream-out-as-a-penal-business-thrives.html?\\_r=2](http://www.nytimes.com/2012/06/17/nyregion/in-new-jersey-halfway-houses-escapees-stream-out-as-a-penal-business-thrives.html?_r=2) [https://perma.cc/ZML4-43PH].

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

described assaults, gang violence and rampant drug use.<sup>79</sup> Despite these problems, CEC was acquired by the GEO Group, which now provides both residential and non-residential re-entry programs.<sup>80</sup>

Transitional and halfway houses have proved a profitable undertaking for private prison companies. The GEO Group, for example, took over the Southeast Texas Transitional Center in October 2010, and during its first two years, six people escaped from a halfway house for high-risk sex offenders.<sup>81</sup>

On the whole, private halfway houses run by large for-profit companies have a poor track record, far worse than non-profit halfway houses and rehabilitation centers. Avalon Correctional Services, one of the country's largest for-profit halfway house companies, is notorious for drug use, sales, and overdoses in its residences, as well as guards staging fights where inmates were forced to beat each other bloody.<sup>82</sup> Allegations were made that the beatings had an economic motive; in lieu of punishing residents by sending them back to prison (which would cost Avalon money from lost clients), facility administrators relied on "informal discipline" to ensure that offenders remained at the halfway house.<sup>83</sup> In addition, Avalon has been sued by several female inmates alleging that they suffered sexual abuse during their work-release program, where administrators routinely ignored their complaints.<sup>84</sup>

It seems that any profit motive in the recovery industry leads to trouble. For example, in Ft. Lauderdale, Florida, privately-run "sober houses" were discovered to have provided drugs to the residents, paid bribes to get a steady stream of well-insured patients, committed insurance fraud, condoned sexual abuse, and even taken residents' phones and car keys, thus making it impossible for them to leave.<sup>85</sup> The almost complete lack of regulation and vulnerable natures of the addicts trying to rehabilitate in these houses made the residents particularly easy to exploit,<sup>86</sup> a common theme in corrections privatization.

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<sup>79</sup> *Id.*

<sup>80</sup> *Geo Reentry Services*, GEO GROUP, INC., <https://www.geogroup.com/Reentry-Services> [<https://perma.cc/ZQ6P-W2ZZ>] (last visited Mar. 5, 2018).

<sup>81</sup> Craig Malisow, *Thomas Lee Elkins: GEO Group Lets Sixth Rapist Stroll Away from Halfway House in 24 Months*, HOUS. PRESS (Oct. 8, 2012), <http://www.houstonpress.com/news/thomas-lee-elkins-geo-group-lets-sixth-rapist-stroll-away-from-halfway-house-in-24-months-6747156> [<https://perma.cc/4AWX-6UZ4>].

<sup>82</sup> See Stillman, *supra* note 54.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Holly Baltz, *Post's Sober Home, Heroin Coverage Kickstarts Official Action*, PALM BEACH POST (Jan. 1, 2017), <http://www.mypalmbeachpost.com/news/post-sober-home-heroin-coverage-kickstarts-official-action/Qg10hEY60Or2ukZAEebgoK/> [<https://perma.cc/77BT-XXZ2>].

<sup>86</sup> Lawrence Mower, *Police Reports Link Sober Home Operator to Prostitution, 'Flop' Houses*, PALM BEACH POST, <http://www.palmbeachpost.com/news/police-reports-link-sober-home-operator-prostitution-flop-houses/ffmKXZKgR174JtTvdU20PL/> [<https://perma.cc/LY9Y-PV3M>] (last updated Dec. 21, 2016).

### 3. Private Jails

Jails have also not been immune to the privatization spree. Although there are bad conditions in many local jails, the worst conditions have arisen from privately-run facilities. One such example is the Jack Harwell Detention Center in Waco, Texas, run by LaSalle. Lawsuits filed against the facility have claimed that employees there routinely refused mental-health treatment, essential medications and medical care to detainees, and falsified documents to cover up their failure to perform visual checks on at-risk people.<sup>87</sup> There is a separate suit claiming the jail ignored multiple sexual assaults on a female detainee by a corrections officer.<sup>88</sup> Multiple sources have described the Harwell Detention Center as an out-of-control institution rife with smuggling, extortion and drug abuse.<sup>89</sup>

Likewise, the GEO Group-owned CEC has had continual problems with its privatized short-term facilities. In the past two years, CEC has been under scrutiny for a number of health and safety issues, and is currently facing a wrongful death suit from a Dallas family that alleges their family member was given improper medical care while in CEC custody, leading to his death.<sup>90</sup>

CEC is also under investigation for the 2015 deaths of two prisoners in a single week at a Houston, Texas jail.<sup>91</sup> The Texas Commission on Jail Standards found multiple problems at the facility, including infrequent inmate observations, incomplete suicide prevention screening, and improper distribution of medication.<sup>92</sup> This privately-run jail has repeatedly failed Texas correctional standards, including failing to complete mental disability/suicide screening forms, not properly distributing medicine, no access to drinking water, cells with broken locking mechanisms, and facilities with broken toilets and showers.<sup>93</sup> These types of violations, ranging from minor to severe, are a constant feature for privately run jails, marking a definite worsening of conditions from government-run jails.

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<sup>87</sup> Diana Claitor & Rebecca Larsen, *McLennan County Jail Increasingly Mired in Abuse*, WACO TRIB.-HERALD (Dec. 27, 2015), [http://www.wacotrib.com/opinion/columns/guest\\_columns/diana-claitor-rebecca-larsen-guest-columnists-mclennan-county-jail-increasingly/article\\_9adeac4f-ccae-558f-8fae-1b355d9b53cb.html](http://www.wacotrib.com/opinion/columns/guest_columns/diana-claitor-rebecca-larsen-guest-columnists-mclennan-county-jail-increasingly/article_9adeac4f-ccae-558f-8fae-1b355d9b53cb.html) [<https://perma.cc/PBD4-N7H3>].

<sup>88</sup> Tommy Witherspoon, *Former Inmate Alleges Sexual Assault at Waco Jail*, WACO TRIB.-HERALD (Dec. 11, 2015), [http://www.wacotrib.com/news/courts\\_and\\_trials/former-inmate-alleges-sexual-assault-at-waco-jail/article\\_b8fb29e7-a269-53f2-8fe3-b517f4037f4d.html](http://www.wacotrib.com/news/courts_and_trials/former-inmate-alleges-sexual-assault-at-waco-jail/article_b8fb29e7-a269-53f2-8fe3-b517f4037f4d.html) [<https://perma.cc/4RRV-WSBG>].

<sup>89</sup> Claitor & Larsen, *supra* note 87.

<sup>90</sup> Jason Allen, *Federal Lawsuit: North Texas Jailers Showed Deliberate Indifference to Dying Prisoner*, CBS DFW (June 3, 2016), <http://dfw.cbslocal.com/2016/06/03/federal-lawsuit-north-texas-jailers-showed-deliberate-indifference-to-dying-prisoner/> [<https://perma.cc/H6VM-VMZ7>].

<sup>91</sup> St. John Barned-Smith, *State Inspectors Find Deficiencies at Liberty County Jail After Recent Deaths*, HOUS. CHRON. (May 2, 2015), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-news-6238310.php> [<https://perma.cc/4H5T-6FF4>].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*



#### 4. Privatized Juvenile Corrections

Similar concerns have arisen with the privatization of juvenile correctional facilities. Over 40,000 children are currently incarcerated in privately operated juvenile facilities.<sup>94</sup> This is approximately forty percent of the nation's juvenile offenders incarcerated in private facilities, a figure that has grown roughly thirty-three percent in the past fifteen years.<sup>95</sup> Although some of these private juvenile correction centers are not-for-profit operations, a large number of them are for-profit.<sup>96</sup> The end result makes money off the backs of young offenders.

Privatized youth correction facilities routinely cut costs by shrinking staffing, often with dangerous results. For example, at the Walnut Grove Youth Correctional Facility, a GEO Group-run Mississippi private prison, there was only one correctional officer employed for every 120 juvenile prisoners.<sup>97</sup> High rates of violence resulted, as there were too few staff to properly supervise the children, with twenty-seven assaults per one hundred offenders in 2013.<sup>98</sup> As was detailed in a Department of Justice report, minimal staffing, bad management, and lax oversight turned the youth detention center into an armed camp, where “female employees had sex with [juvenile] inmates, pitted them against each other, gave them weapons and joined their gangs.”<sup>99</sup>

Despite these serious problems, states like Florida have outsourced all their juvenile corrections to private, for-profit companies.<sup>100</sup> The children and young adults incarcerated in Youth Services International (“YSI”) prisons, jails, and halfway houses across the country have undergone beatings, neglect, sexual abuse, and unsanitary food over the past two decades.<sup>101</sup> YSI would routinely hold the children past their release dates in order to make more money.<sup>102</sup> Since there was no true scrutiny of privatized juvenile facilities, the company simply fabricated the necessary paperwork for its annual state quality assurance evaluations, time and time

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<sup>94</sup> AUSTIN & COVENTRY, *supra* note 12, at 12.

<sup>95</sup> Chris Kirkham, *Prisoners of Profit: Private Prison Empire Rises Despite Startling Record of Juvenile Abuse*, HUFFINGTON POST (Oct. 22, 2013), <http://projects.huffingtonpost.com/prisoners-of-profit> [<https://perma.cc/H7QS-DUCV>].

<sup>96</sup> AUSTIN & COVENTRY, *supra* note 12, at 12.

<sup>97</sup> Margaret Newkirk & William Selway, *Gangs Ruled Prison as For-Profit Model Put Blood on Floor*, BLOOMBERG (July 11, 2013), <http://www.bloomberg.com/news/articles/2013-07-12/gangs-ruled-prison-as-for-profit-model-put-blood-on-floor> [<https://perma.cc/49CG-SJ8L>]. The prison was initially owned by Cornell Cos, which was ultimately purchased by GEO Group.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Chris Kirkham, *Prisoners of Profit: Florida's Lax Oversight Enables Systemic Abuse at Private Youth Prisons*, HUFFINGTON POST (Oct. 23, 2013), <http://projects.huffingtonpost.com/projects/prisoners-of-profit-2> [<https://perma.cc/86MW-HUR8>].

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

again.<sup>103</sup> This glossing over of problems for the state audit was routinely ignored, since many Florida state employees wound up going to work for the same private contractors they regulated.<sup>104</sup>

Like many private corrections companies, YSI has managed to keep operating over the years by careful grooming of state political connections at the highest levels, and cleverly gaming the private contracting system by pulling out of state contracts whenever an investigation looked likely.<sup>105</sup> These practices have been going on for over twenty years—whenever one of YSI’s facilities was about to be shut down, the company would withdraw from the state contract before any damaging reports were filed, and then another facility, with a new name, would simply take its place.<sup>106</sup>

As in all aspects of criminal justice, when the profit motive enters the realm of juvenile corrections, it is hard to eradicate. In the 2009 “Kids for Cash” scandal, for example, two Pennsylvania judges and two privatized juvenile corrections owners were charged with accepting and giving bribes in exchange for sending children to various forms of privatized punishment, including private boot camp, boarding school, wilderness camp, and juvenile detention facilities.<sup>107</sup> These children were often accused of nothing more than a misdemeanor, and appeared in court without lawyers.<sup>108</sup> Over a million dollars in bribes were paid.<sup>109</sup> Critically, “Kids for Cash” began when one of the judges shut down the state juvenile detention centers in favor of a private, for-profit company facility.<sup>110</sup> Once the sneaking tendrils of profit-making have taken root, they are very hard to eradicate, even when the profits come at the expense of children’s health, safety, and rights.

### C. Outsourcing Essential Prison Services

Although some outsourcing may be necessary in today’s complex corrections environment, the use of external, for-profit providers for needs as varied as health care, food, phone services, and visitation has significantly decreased the quality of life for inmates, while increasing the money that goes to these private companies. The increased costs to inmate well-being, health, and safety, as well as the numerous lawsuits that have arisen from the substandard health care provided, illustrate how costly these private providers can be.

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Stephanie Chen, *Pennsylvania Rocked by ‘Jailing Kids for Cash’ Scandal*, CNN (Feb. 24, 2009), <http://www.cnn.com/2009/CRIME/02/23/pennsylvania.corrupt.judges/> [<https://perma.cc/5VKZ-RC82>].

<sup>108</sup> *Id.*

<sup>109</sup> Jon Schuppe, *Pennsylvania Seeks to Close Books on “Kids for Cash” Scandal*, NBC NEWS (Aug. 12, 2015), <http://www.nbcnews.com/news/us-news/pennsylvania-seeks-close-books-kids-cash-scandal-n408666> [<https://perma.cc/489Q-EAMV>].

<sup>110</sup> Chen, *supra* note 107.

### *I. Privatized Prison Health Care*

One major expansion of privatized correction services has been in inmate health care.<sup>111</sup> Many states have outsourced their prison healthcare, attempting to cut costs in tight times.<sup>112</sup> The federal system has increased its healthcare outsourcing as well; federal spending on privatized inmate healthcare increased by twenty-four percent—to \$327 million—between 2010 and 2014.<sup>113</sup> In 2014, sixty-nine prisons were surveyed and all of them paid much more for medical services than the Medicare rates, with some prisons spending as much as 385% more for private healthcare.<sup>114</sup>

Despite its expense, outsourcing prison healthcare has not been beneficial for medically fragile inmates, who have routinely been denied medical care and accused of faking their health problems.<sup>115</sup> Some of this neglect has led directly to prisoner deaths. In 2005, for example, the lackadaisical and neglectful health care provision from Prison Health Services led to two deaths in New York state prisons.<sup>116</sup> One death was caused by a jail medical director cutting off all but a few of an inmate's thirty-two daily pills, needed to control Parkinson tremors, with the nurses ignoring the inmate's subsequent pleas.<sup>117</sup> Ten days later, when the man died, the prison officers doctored the records to cover up the abuse and neglect.<sup>118</sup> Two months later, another inmate's chest pains were ignored and treated only with Ben-Gay and arthritis medicine.<sup>119</sup> Ten days later, she died of a heart attack at age thirty-five.<sup>120</sup>

Prison Health Services, the for-profit corporation overseeing these New York prison health services, obtained numerous corrections contracts by claiming that it could provide medical care, recruit doctors, and battle lawsuits, all at a cost lower than what the state was currently paying.<sup>121</sup> In the end, however, the costs were far higher than predicted. Prison Health Services provided substandard care for inmates by following a deadly blueprint: “medical staffs trimmed to the bone, doctors underqualified or out of reach, nurses doing tasks beyond their training, prescription

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<sup>111</sup> See Liliana Segura, *With 2.3 Million People Incarcerated in the US, Prisons Are Big Business*, NATION (Oct. 1, 2013), <https://www.thenation.com/article/prison-profiters/> [<https://perma.cc/GGT8-3K3E>].

<sup>112</sup> *Id.*

<sup>113</sup> U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' REIMBURSEMENT RATES FOR OUTSIDE MEDICAL CARE 1 (2016), <https://oig.justice.gov/reports/2016/e1604.pdf#page=1> [<https://perma.cc/6ZGP-D437>].

<sup>114</sup> *Id.* at 8.

<sup>115</sup> Segura, *supra* note 111.

<sup>116</sup> Paul von Zielbauer, *As Health Care in Prison Goes Private, 10 Days Can Be a Death Sentence*, N.Y. TIMES (Feb. 27, 2005), <http://www.nytimes.com/2005/02/27/nyregion/as-health-care-in-jails-goes-private-10-days-can-be-a-death.html> [<https://perma.cc/2WJ5-4SA6>].

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

drugs withheld, patient records unread and employee misconduct unpunished.”<sup>122</sup> Despite numerous deaths, minimal service, and outright neglect, however, along with millions of dollars in lawsuits, Prison Health Services continues to provide medical care to jails and prisons throughout the United States.<sup>123</sup>

Likewise, Correctional Medical Services (“CMS”) has provided similarly neglectful care for inmates over the years, due in large part to its role as “the nation’s cheapest provider, a perfect convergence of big business and low budgets.”<sup>124</sup> CMS has routinely rejected hepatitis screening and treatment for inmates, despite the contagious and deadly nature of the disease.<sup>125</sup> This casual attitude towards contagious disease<sup>126</sup> is not only dangerous for inmates, but also threatens the general health of the public in the long run.

California prisons have also suffered from low-quality private health care. Between 2004 and 2014, approximately 200 inmates died under the “care” of California Forensic Medical Group (“CFMG”), a private prison healthcare company.<sup>127</sup> Excluding homicide, this works out at a death rate of roughly 1.7 per 1,000 inmates at CFMG facilities, compared with 1.5 in other facilities.<sup>128</sup>

Overall, approximately forty percent of all prison health care is farmed out to for-profit providers.<sup>129</sup> The problem with such medical provision is two-fold. First, as detailed above, the quality of care provided is dangerously bad. In addition, however, there is simply no transparency or accountability provided by these private correctional medical providers.<sup>130</sup> As journalist Wil Hylton observed:

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Wil S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, WRONGFUL DEATH INST., <http://www.wrongfuldeathinstitute.com/links/sickontheinside.htm> [https://perma.cc/6LJJ-QVZE] (last visited Sept. 1, 2017).

<sup>125</sup> *Id.*

<sup>126</sup> As Paul von Zielbauer detailed in a New York Times expose, Prison Health Services treatment of inmates with HIV/AIDS in Alabama bordered on intentional negligence, with failure to give prescribed medications, refusal to screen for tuberculosis or hepatitis, and rat infestation in the H.I.V. unit. Paul von Zielbauer, *A Company’s Troubled Answer for Prisoners with HIV*, N.Y. TIMES (Aug. 1, 2005), <http://www.nytimes.com/2005/08/01/us/a-companys-troubled-answer-for-prisoners-with-hiv.html> [https://perma.cc/9PBQ-ENBZ].

<sup>127</sup> Rupert Neate, *Welcome to Jail Inc: How Private Companies Make Money Off US Prisons*, GUARDIAN (June 16, 2016), <https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit> [https://perma.cc/U4XC-R9GD].

<sup>128</sup> *Id.*

<sup>129</sup> von Zielbauer, *supra* note 116.

<sup>130</sup> There is so little transparency with private prison providers that a federal judge recently ruled that the government must make its contracts with private prison companies publicly available in the immigration context. Detention Watch and the Center for Constitutional Rights had sued the U.S. Immigration and Customs Enforcement (“ICE”) due to a severe lack of transparency in the agency’s detention of immigrants, which is 62% privatized. See *Details of Private Prison Corporation Immigration Contracts Not Exempt from Freedom of Information Act, Judge Rules*, CTR. CONST. RIGHTS (July 15, 2016),

[P]rivate companies . . . feel no responsibility, and have no legal obligation, to account to the public for what goes on inside their facilities. . . . [They] choose[] not to provide any accounting of how that money is spent or even how much of it is spent—and how much unspent, to be pocketed as profit.<sup>131</sup>

The combination of ruthless cost cutting, negligent medical care, and lack of transparency has created a space where profit overtakes minimal prisoner health requirements, resulting in malpractice, mistreatment, and death. As one district court monitor in Georgia described, the “care” provided by these companies created a “medical gulag.”<sup>132</sup>

Despite all of these problems with Correctional Medical Services and Prison Health Services, however, in 2011, Valitas Health Services (the parent company of Correctional Medical Services) acquired Prison Health Services, creating a correctional health care goliath.<sup>133</sup> Renamed Corizon, the company now serves more than 400 facilities.<sup>134</sup> Currently the largest correctional health care provider, Corizon earned \$1.4 billion in 2014, providing services for around 345,000 inmates in twenty-seven states.<sup>135</sup>

Like its predecessors, Corizon has repeatedly provided extremely substandard health care for inmates. Across the country, most recently in Indiana, Florida, and New York, advocates and officials have accused Corizon of cutting corners to save money, resulting in inadequate care.<sup>136</sup> Allegations have been repeatedly raised, with specific complaints that in order to control its costs, Corizon is reluctant to prescribe

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<https://ccrjustice.org/home/press-center/press-releases/details-private-prison-corporation-immigration-contracts-not-exempt> [<https://perma.cc/C7V8-8X4V>].

<sup>131</sup> Hylton, *supra* note 124.

<sup>132</sup> *Id.*

<sup>133</sup> Beth Kutscher, *Rumble over Jailhouse Healthcare: As States Broaden Outsourcing to Private Vendors, Critics Question Quality of Care and Cost Savings*, MODERN HEALTHCARE (Aug. 31, 2013), <http://www.modernhealthcare.com/article/20130831/MAGAZINE/308319891> [<https://perma.cc/4WSW-SLYE>].

<sup>134</sup> *Id.*

<sup>135</sup> David Royse, *Medical Battle Behind Bars: Big Prison Healthcare Firm Corizon Struggles to Win Contracts*, MODERN HEALTHCARE (Apr. 11, 2015), <http://www.modernhealthcare.com/article/20150411/MAGAZINE/304119981> [<https://perma.cc/E9GV-83WM>].

<sup>136</sup> See Virginia Black, *Profits Over Prisoners? Indiana's Health Care for Inmates Draws Anger, Anguish*, SOUTH BEND TRIB. (June 13, 2016), [http://www.southbendtribune.com/news/publicsafety/profits-over-prisoners-indiana-s-health-care-for-inmates-draws/article\\_0586c362-2f19-11e6-8a57-db81e46465f5.html](http://www.southbendtribune.com/news/publicsafety/profits-over-prisoners-indiana-s-health-care-for-inmates-draws/article_0586c362-2f19-11e6-8a57-db81e46465f5.html) [<https://perma.cc/6CRV-ZS2B>].

certain medications or send offenders for specialized testing, diagnoses, or treatment.<sup>137</sup> Corizon recently expanded its range of prison services, now including medical, mental health, rehab, dental, and vision,<sup>138</sup> despite its often borderline-negligent health services.<sup>139</sup>

Overall, private prison healthcare providers, whether large or small, do a poor job of providing medical services to inmates. As two economists from the University of California, Santa Barbara found in a 2007 study, even though states obtained lower costs with outsourced prison healthcare, using these companies led to higher inmate mortality rates.<sup>140</sup> Granted, state-provided prison health care is no panacea.<sup>141</sup> The evidence seems to show, however, that outsourcing health services to for-profit companies results in even worse care, with only questionable savings.<sup>142</sup> Even within the world of prison privatization, the private prison health care industry's metastatic growth and ferocious hunger for profit raises a note of extreme caution.<sup>143</sup>

The health care provided in private correctional facilities is minimal. Any time an inmate is taken to a hospital, the private prison company must pay for her stay, which cuts into profit.<sup>144</sup> In addition, the prison must send two guards to watch over the inmate while she is in the hospital, which also adds up.<sup>145</sup> As repeated lawsuits have shown, CCA and other prison privatizers shirk providing necessary medical attention in even the most critical of times.<sup>146</sup> Numerous experiences of outright

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> In early 2016, Corizon was forced out of its \$1.2 billion contract with Florida correctional facilities due to allegations of life-threatening lapses in care and a high number of inmate deaths, with prison inmate mortality rates hitting a ten-year high within 100 days of privatization. Corizon was replaced by another for-profit prison health care group, Centurion of Florida. Michael Sandler, *Centurion to Take over Prison Health Services in Florida*, MODERN HEALTHCARE (Feb. 3, 2016), <http://www.modernhealthcare.com/article/20160203/NEWS/160209935/centurion-to-take-over-prison-health-services-in-florida> [<https://perma.cc/H782-7JQQ>]. This is typical for Corizon; the company has lost five contracts with state prison systems since 2012, primarily due to its dangerous and neglectful health care services. Pat Beall, *Privatizing Prison Health Care Leaves Inmates in Pain, Sometimes Dying*, PALM BEACH POST (Sept. 26, 2014), <http://www.mypalmbeachpost.com/news/news/privatized-prison-health-care-in-florida-deadly-pa/nhWkX/> [<https://perma.cc/Uk6M-3Y5V>].

<sup>140</sup> Kelly Bedard & H.E. Frech III, *Prison Health Care: Is Contracting Out Healthy?*, 18 HEALTH ECON. 1248, 1248 (2009).

<sup>141</sup> For example, in California, the state provided such inadequate inmate healthcare that the entire prison system has operated under federal court supervision since 2010. *See Brown v. Plata*, 563 U.S. 493, 499 (2011).

<sup>142</sup> *See* Kutscher, *supra* note 133.

<sup>143</sup> *See* William Allen & Kim Bell, *Death, Neglect and the Bottom Line: Push to Cut Costs Poses Risks*, CORPWATCH (Sept. 27, 1998), <http://www.corpwatch.org/article.php?id=858> [<https://perma.cc/APZ9-DG9G>].

<sup>144</sup> Bauer, *supra* note 5, at Chapter 4.

<sup>145</sup> *Id.*

<sup>146</sup> HOLLY KIRBY ET AL., *THE DIRTY THIRTY: NOTHING TO CELEBRATE ABOUT 30 YEARS OF CORRECTIONS CORPORATION OF AMERICA* 10 (2013),

denial of care to ailing inmates, criminal neglect, and insufficient medical protocols when care is provided have led to repeated cases of injury and death.<sup>147</sup>

Mental health care in private prisons fares no better. One CCA prison in Louisiana, incarcerating more than 1,500 inmates, had no full-time psychiatrists and only one full-time social worker.<sup>148</sup> This was in contrast to the publicly run prisons in Louisiana—one of the most poorly funded public prison systems in the country—which have at least three full-time mental health counselors.<sup>149</sup>

In sum, the indifference to suffering and the rampant cost-cutting found in privatized prison health care makes it unsustainable and unsupportable. Even compared to the low standard of medical care provided in America's government-run prisons, private prison healthcare has been a failure.

## 2. *Private Prison Transport*

The privatization of interstate prisoner transport has resulted in the abuse and death of both indicted and convicted offenders. Over the past sixteen years, as private, for-profit companies have taken over prisoner transportation, four offenders have died, fourteen have alleged abuse, both physical and sexual, and over fifty have escaped.<sup>150</sup> In addition, the conditions in these private transport vans are routinely inhumane, causing unnecessary suffering and punishment. Prisoners routinely pass out from heat-stroke, vomit, panic, get dehydrated, urinate and defecate on themselves, and have withdrawals from their medications during the long journeys from one correctional facility to another.<sup>151</sup>

Prisoner Transportation Services of America ("PTS"), the country's largest for-profit extradition company, routinely transports suspects and offenders in lamentable conditions.<sup>152</sup> A typical PTS transport van crams roughly fifteen people, male and female, into seats inside a backseat cage, each handcuffed and shackled at the waist and ankles.<sup>153</sup> There is usually little to no air-conditioning, and no way to lie down to sleep during the long, rough trips around the country as the vans pick up

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[http://grassrootsleadership.org/sites/default/files/uploads/GRL\\_Dirty\\_Thirty\\_formatted\\_for\\_web.pdf](http://grassrootsleadership.org/sites/default/files/uploads/GRL_Dirty_Thirty_formatted_for_web.pdf) [<https://perma.cc/6LXN-M4DG>].

<sup>147</sup> *Id.*

<sup>148</sup> Bauer, *supra* note 5, at Chapter 3.

<sup>149</sup> *Id.*

<sup>150</sup> See Eli Hager & Alysia Santo, *Private Prisoner Vans' Long Road of Neglect*, N.Y. TIMES (July 6, 2016), <http://www.nytimes.com/2016/07/07/us/prisoner-transport-vans.html> [<https://perma.cc/P26J-THCN>].

<sup>151</sup> Fernando Colon & Eli Hager, *The Horrible Things I Saw in a Van Packed with Prisoners*, MARSHALL PROJECT (July 7, 2016), <https://www.themarshallproject.org/2016/07/07/the-horrible-things-i-saw-driving-a-van-packed-with-prisoners> [<https://perma.cc/SHV9-G8VB>].

<sup>152</sup> Hager & Santo, *supra* note 150.

<sup>153</sup> *Id.*

detainees for transport.<sup>154</sup> Although the driving is erratic and often dangerous, there are no seatbelts for the detainees.<sup>155</sup> Sometimes there is abuse from the guards, both physical and sexual.<sup>156</sup>

Female prisoners face a particular risk of sexual assault by guards during transport.<sup>157</sup> Since 2000, at least fourteen women have filed civil or criminal lawsuits against private transportation companies alleging they were sexually assaulted while being transported from one correction facility to another.<sup>158</sup>

The privatization of prisoner transport tells a familiar story of private, for-profit punishment, one of “a pattern of prisoner abuse and neglect in an industry that operates with almost no oversight.”<sup>159</sup> Guards have little to no training, and often fail to recognize, or simply ignore, signs of serious illness.<sup>160</sup> The cross-country trips to pick up various prisoners can take weeks to complete. In addition, the pressure to drive quickly and cut corners to make a profit has resulted in detainees being locked inside the vans for days with minimal food and water, infrequent bathroom stops, and no facilities in the van.<sup>161</sup> Furthermore, there is a wide range of different detainees transported in the vans, and often suspects are mixed with violent offenders.<sup>162</sup> “Unruly” prisoners are locked in a segregation cage.<sup>163</sup> In part, these conditions have been allowed to continue because crossing so many state lines can make jurisdiction murky. Federal regulators have shown little interest in stemming such abuses, and the correction facilities that hire such private transport often try to reject any accountability for prisoners not under their direct custody.<sup>164</sup>

Despite all these problems, the significant price differential between government transport and private transport makes the lure of using private transportation quite substantial.<sup>165</sup> In 2016, twenty-six out of fifty states used private, for-profit prisoner transport companies to extradite offenders from one correctional facility to another.<sup>166</sup> The private transport companies are also used by variety of cities and municipalities as well.<sup>167</sup> All of this takes place with virtually no governmental oversight.<sup>168</sup> In the case of private prisoner transport, any savings made are at the expense of the comfort, safety, human dignity, and sometimes, the

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Eli Hager & Alysia Santo, *How to Investigate Private Prisoner Transport in Your State*, MARSHALL PROJECT (July 6, 2016), <https://www.themarshallproject.org/2016/07/06/how-to-investigate-prisoner-transport-in-your-state> [<https://perma.cc/EB4S-Q3R7>].

<sup>167</sup> *Id.*

<sup>168</sup> *See id.*



lives of those transported. Efficiency, cost-effectiveness, and ease of arrangement should not be traded off for basic human rights.

### 3. *Privatized Prisoner Banking*

Current prisoner banking practices primarily benefit private corrections banking companies. For example, JPay Inc. (“JPay”),<sup>169</sup> a private, for-profit company that oversees inmates’ bank accounts, has charged fees as high as forty-five percent to place money in an account. These inmate accounts are vital when facing long periods of incarceration;<sup>170</sup> the vast majority of funds paying for basic needs like toothpaste, visits to the doctor, winter clothes, toilet paper, electricity, and even room and board.<sup>171</sup> For approximately 400,000 inmates, there is no other deposit option but this one. The choice is to pay the fees or go without.<sup>172</sup> Although companies like JPay claim to streamline the provision of money from families to inmates, they have actually replaced the simplicity of sending money orders with a system which charges high user fees per transaction to deposit money via a debit card.<sup>173</sup>

But the disturbing aspect of JPay, its competitor Touchpay,<sup>174</sup> and its prison banking confederates is not just limited to their usurious user fees. As the Center for Public Interest has noted, “[b]y erecting a virtual tollbooth at the prison gate, JPay has become a critical financial conduit for an opaque constellation of vendors that profit from millions of poor families with incarcerated loved ones.”<sup>175</sup> In other words, private prison banking controls the provision of family funds to incarcerated offenders, making it far easier for all sorts of private prison services to take their cut.<sup>176</sup>

Correction facilities benefit from privatized banking as well. Besides simplifying the transfer of funds, for every payment sent to a prisoner (usually at least one transfer per prisoner per month) the company remits between \$.50 and

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<sup>169</sup> JPAY, <https://www.jpai.com/> [<https://perma.cc/E5FK-9D95>] (last visited Sept. 1, 2017).

<sup>170</sup> Daniel Wagner, *Profiting from Prisoners: Prison Bankers Cash in on Captive Customers*, CTR. PUB. INTEGRITY (Sept. 30, 2014), <https://www.publicintegrity.org/2014/09/30/15761/prison-bankers-cash-captive-customers> [<https://perma.cc/H62Q-XBMK>].

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* After the Center’s report, JPay stopped charging extra fees to accept money orders in three states. Daniel Wagner, *Profiting from Prisoners: Prison Banker Cuts Fees After Center Report*, CTR. PUB. INTEGRITY (Nov. 12, 2014), <https://www.publicintegrity.org/2014/11/12/16255/prison-banker-cuts-fees-after-center-report> [<https://perma.cc/296L-HXA7>].

<sup>173</sup> Wagner, *supra* note 170. JPay does accept money orders, but they take an inordinately long time to process. *Id.*

<sup>174</sup> *Welcome to TouchPay!*, TOUCHPAY, <http://www.touchpayonline.com/> [<https://perma.cc/8B83-XY4B>] (last visited Sept. 1, 2017).

<sup>175</sup> Wagner, *supra* note 170.

<sup>176</sup> *Id.*

\$2.50 back to the facility.<sup>177</sup> Little of this remission, however, goes to prisoner services.<sup>178</sup> The remainder of the profit goes back to the prison banking company—for JPay, to the tune of \$50 million in yearly revenue.<sup>179</sup>

Federal prisoners are equally captive to private banking fees. The Treasury Department granted private companies such as Bank of America and JPMorgan extremely lucrative no-bid contracts to service federal prison banking.<sup>180</sup> Since 2000, Bank of America has had a monopoly on federal prisoner banking, making over \$76.3 million for its oversight of the program.<sup>181</sup> Similar to the state prisoner banking system, Bank of America's system allows it to subcontract with other for-profit, subcontracted prison vendors, placing it as the node of prison services conveniently procured outside any government bidding process.<sup>182</sup>

When federal prisoners are released, JPMorgan then issues high-fee debit cards to return to them the remaining monies from their own prison accounts, which include prison wages and money sent from family members.<sup>183</sup> For example, JPMorgan debit cards impose a \$2 fee for an ATM withdrawal, and \$1.50 for leaving an account inactive for three months—fees that can easily eat up a released offender's remaining funds.<sup>184</sup>

#### 4. Privatized Phone and Visitation Services

The high calling rates and numerous fees charged by private correctional phone companies not only make money off the backs of a captive population, but also reduce the contact and social bonds between prisoners and their home communities. Prison administrators, both public and private, routinely select prison phone companies based on the amount of commission offered to them. This commission is derived from the very expensive phone rates paid by prisoners and their families.<sup>185</sup> Currently, prison phone companies can charge eleven cents a minute to prison

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<sup>177</sup> *Id.*

<sup>178</sup> See Dina Gusovsky, *The Big Business of Selling Apps to Prison Inmates*, CNBC (Oct. 1, 2014), <http://www.cnbc.com/2014/10/01/the-big-business-of-selling-apps-to-prison-inmates.html#> [https://perma.cc/X3DP-J92U].

<sup>179</sup> *Id.*

<sup>180</sup> Daniel Wagner, *Profiting from Prisoners: Megabanks Have Prison Financial Services Locked Up*, CTR. PUB. INTEGRITY (Oct. 2, 2014), <https://www.publicintegrity.org/2014/10/02/15812/megabanks-have-prison-financial-services-market-locked> [https://perma.cc/XX2U-4M9F].

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Diana Liebelson & Ben Walsh, *Someone Wrote a Sketchy Guide on Evading New Rules on Prison Phone Costs*, HUFFINGTON POST (Feb. 10, 2016), [http://www.huffingtonpost.com/entry/evading-rules-prison-phone-costs\\_us\\_56bb5203e4b08ffac1235a00](http://www.huffingtonpost.com/entry/evading-rules-prison-phone-costs_us_56bb5203e4b08ffac1235a00) [https://perma.cc/S532-A23C].

inmates, and fourteen to twenty-two cents a minute to jail inmates.<sup>186</sup> This is an improvement on the almost \$1 per minute rate that was charged until 2015, when the FCC capped the vast majority of prison phone and limited the amount of add-on fees. These fees were a major source of revenue for prison phone companies.<sup>187</sup>

Such deals are money-makers for correctional administrators. In Los Angeles County, for example, these commissions have a contractual guarantee of \$15 million a year.<sup>188</sup> The high rates end up limiting most inmate phone calls to the bare minimum, given the poverty level of most families of incarcerated offenders. Expensive phone calls can cause prisoners to communicate less frequently with their families and friends in the outside world, which ultimately increases the recidivism rate.<sup>189</sup>

In addition, prison telephone providers have helped pass legislation to ban prisoners from possessing cell phones, despite the fact that most inmates only use their cell phones to contact their families.<sup>190</sup> Securus, Global Tel\*Link, and CenturyLink, which control over eighty percent of prison phone business nationwide, have spent millions of dollars on lobbying and political contributions.<sup>191</sup> In 2010, Congress passed the Cell Phone Contraband Act,<sup>192</sup> which made the possession of a cell phone or wireless device in a federal prison a felony punishable by a fine and up to one additional year of incarceration. Several states have also passed laws strictly punishing an inmate's possession of a cell phone, including Maryland, Arizona, and Alabama.<sup>193</sup> These laws received strong support from the three leading prison phone companies.<sup>194</sup> Prisoners are thus left reliant on private telephony and absurdly expensive long-distance phone rates to keep in touch with their outside support systems.

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<sup>186</sup> Dana Liebelson, *Obama Administration Approves Plan to Make Prison Phone Calls More Affordable*, HUFFINGTON POST (Oct. 22, 2015), [http://www.huffingtonpost.com/entry/prison-phone-costs-fcc-obama\\_us\\_5628f5f0e4b0443bb562d907](http://www.huffingtonpost.com/entry/prison-phone-costs-fcc-obama_us_5628f5f0e4b0443bb562d907) [<https://perma.cc/M2FF-8VVV>].

<sup>187</sup> Ben Walsh, *Prison Phone Company Fights to Keep Profiting Off Inmates and Their Families*, HUFFINGTON POST (Oct. 21, 2015), [http://www.huffingtonpost.com/entry/securus-technologies-prison-phone-industry\\_us\\_5627c31ee4b02f6a900f0837](http://www.huffingtonpost.com/entry/securus-technologies-prison-phone-industry_us_5627c31ee4b02f6a900f0837) [<https://perma.cc/49S7-DF69>].

<sup>188</sup> Jack Smith IV, *The End of Prison Visitation*, MIC, <https://mic.com/articles/142779/the-end-of-prison-visitation#.67rjplgzz> [<https://perma.cc/3MJY-DMU6>] (last updated Sept. 6, 2016).

<sup>189</sup> See ITPI, *HOW PRIVATE PRISON COMPANIES INCREASE RECIDIVISM 7* (2016), <https://www.inthepublicinterest.org/wp-content/uploads/ITPI-Recidivism-ResearchBrief-June2016.pdf> [<https://perma.cc/CM5A-3RF5>].

<sup>190</sup> *Private Prison Phone Companies Lobbied for Criminalization of Cell Phones in Prisons*, EJI (Feb. 8, 2016), <https://eji.org/news/private-companies-lobbied-to-criminalize-cell-phones-in-prisons> [<https://perma.cc/QTG7-UPRM>].

<sup>191</sup> *Id.*

<sup>192</sup> 18 U.S.C. § 1749 (2010).

<sup>193</sup> *Private Prison Phone Companies*, *supra* note 190.

<sup>194</sup> *Id.*

Finally, the growth of video visitation threatens to eliminate some in-person prison visitation, once again increasing social and monetary costs for prisoners and their families.<sup>195</sup> Some video call companies require a ban on in-person visitation before they will sign a contract with a correction facility.<sup>196</sup> For example, until May 2015, Securus Technology's standard contract required the jail or prison to eliminate in-person visits.<sup>197</sup>

A startling seventy-four percent of county jails with video visitation have ended in-person visits, which, for impoverished families who do not have access to this kind of technology, can eliminate contact entirely.<sup>198</sup> At last count, approximately 600 prisons in forty-six states have some version of a video visitation system, and every year, more and more of those correctional facilities eliminate in-person visitation entirely.<sup>199</sup> Given the current demographics of inmates—overwhelmingly poor, largely minority, many non-English speakers—having video visitation entirely replace regular visitation threatens to cut off communication between prisoners and their families, because the costs are so exorbitant.<sup>200</sup>

These video visitation systems are popular with correctional facilities because the facility saves money in outsourcing visitation.<sup>201</sup> Video visitation requires fewer full-time prison staff members to escort the prisoner to a video terminal.<sup>202</sup> Often there are large sums to be paid directly to the Sheriff's Department, local government, or correctional facility.<sup>203</sup>

Further, these often expensive, bug-ridden video calls can actually increase violence and discipline issues in correction facilities.<sup>204</sup> Early studies of the implementation of video visiting have shown that incidences of inmate-on-inmate

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<sup>195</sup> Matt Stroud & Joshua Brustein, *Expensive 'Prison Skype' Is Squeezing Out In-Person Visitation*, BLOOMBERG (Apr. 27, 2015), <http://www.bloomberg.com/news/articles/2015-04-27/expensive-prison-skype-is-squeezing-out-in-person-visitation> [https://perma.cc/S399-3EEZ].

<sup>196</sup> ITPI, *supra* note 189, at 8.

<sup>197</sup> Matt Stroud & Joshua Brustein, *'Prison Skype' Squeezes Out In-Person Visits, Soaking Inmate Families*, ST. LOUIS POST DISPATCH (Apr. 29, 2015), [http://www.stltoday.com/business/local/prison-skype-squeezes-out-in-person-visits-soaking-inmate-families/article\\_34e133d4-b0a7-5aa6-b7e8-d75707f154d4.html](http://www.stltoday.com/business/local/prison-skype-squeezes-out-in-person-visits-soaking-inmate-families/article_34e133d4-b0a7-5aa6-b7e8-d75707f154d4.html) [https://perma.cc/XH47-7Q7X].

<sup>198</sup> Bernadette Rabuy & Peter Wagner, *Screening Out Family Time: The For-Profit Video Visitation Industry in Prisons and Jails*, PRISON POL'Y INITIATIVE (Jan. 2015), <http://www.prisonpolicy.org/visitation/report.html> [https://perma.cc/RR6J-9UPD].

<sup>199</sup> Smith, *supra* note 188.

<sup>200</sup> JORGE ANTONIO RENAUD, GRASSROOTS LEADERSHIP & TEX. CRIM. JUST. COALITION, VIDEO VISITATION: HOW PRIVATE COMPANIES PUSH FOR VISITS BY VIDEO AND FAMILIES PAY THE PRICE 2 (2014), <http://grassrootsleadership.org/sites/default/files/uploads/Video%20Visitation%20%28web%29.pdf> [https://perma.cc/RR6J-9UPD].

<sup>201</sup> Smith, *supra* note 188.

<sup>202</sup> *Id.*

<sup>203</sup> In Los Angeles, for example, GlobalTel, the prison phone company that provides telephony to all LA jails, recently expanded into video visitation, paying out 15 million dollars per annum, plus 67.5% of any revenue surpassing that amount. *Id.*

<sup>204</sup> *Id.*

violence, disciplinary infractions and possession of contraband tend to rise after correctional facilities eliminate in-person visitation in favor of video visitation.<sup>205</sup> For example, disciplinary cases for contraband possession in Travis County, Texas increased fifty-four percent after the county switched to video-only visitation.<sup>206</sup>

Thus, far from providing a better experience for the prisoner, privatization of correctional facilities, whether in ways large or small, does them no favors. As always, the companies themselves are the primary group benefiting from the work of for-profit prisons and the outsourcing of prison services.

### 5. Privatized Prison Food Services

Another area of rampant correctional privatization is prisoner meal provision.<sup>207</sup> Privatized prison food services have managed costs by carefully measuring meal portions and, in some cases, reducing meals to only twice daily.<sup>208</sup> The savings promised by these prison food providers have been hard to resist for many counties across the nation, despite the inmate hunger that these services often create.<sup>209</sup>

Other problems with outsourcing prison meals include rotten or spoiled foods. In 2014, Aramark Food Services was terminated from servicing Michigan prisons due to, among other issues: failing to appropriately feed inmates; the use of unauthorized substitutions or not preparing enough meals; and maggots and rodents in and near inmate food sources.<sup>210</sup> Aramark was also alleged to have failed to handle food safely, failed to hire and train enough people to keep food from spoiling, and failed to use food equipment properly.<sup>211</sup> Similar issues occurred with Aramark Food in prisons in Ohio<sup>212</sup> and Mississippi,<sup>213</sup> as well as in jails in New Jersey.<sup>214</sup> This kind of negligence, extreme parsimony, and potentially deliberate indifference to

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<sup>205</sup> *Id.*

<sup>206</sup> RENAUD, *supra* note 200, at 9.

<sup>207</sup> Alan Judd, *Jail Food Complaints Highlight Debate Over Outsourcing Public Services*, ATLANTA J.-CONST. (Jan. 1, 2015), <http://www.myajc.com/news/news/public-affairs/jail-food-complaints-highlight-debate-over-outsour/PpVFFB46kOLExOmv6UX7SJ/> [<https://perma.cc/3SD4-VM6T>].

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Donald Cohen, *Aramark Unfit for Duty in Michigan Prisons*, DETROIT NEWS (Sept. 30, 2014), <http://www.detroitnews.com/story/opinion/2014/09/30/aramark-fails-michigan-prisons/16497349/> [<https://perma.cc/TZQ5-SH6B>].

<sup>211</sup> Christopher Zoukis & Rod L. Bower, *Aramark's Correctional Food Services: Meals, Maggots and Misconduct*, PRISON LEGAL NEWS (Dec. 2, 2015), <https://www.prisonlegalnews.org/news/2015/dec/2/aramarks-correctional-food-services-meals-maggots-and-misconduct/> [<https://perma.cc/7XDE-YB8J>].

<sup>212</sup> Cohen, *supra* note 210.

<sup>213</sup> Jerry Mitchell, *Health Woes Shut Parchman Kitchen*, CLARION-LEDGER (Aug. 27, 2016), <http://www.clarionledger.com/story/news/2016/08/27/health-woes-shut-parchman-kitchen/89257192/> [<https://perma.cc/PEL4-FYSP>].

<sup>214</sup> Zoukis & Bower, *supra* note 211.

proper food preparation and staffing is a consistent hallmark of outsourcing jail and prison functions to the for-profit world.

One common theme of this explosion of privatization is that moving from public to private provision of corrections and services has been primarily beneficial to the private corrections companies themselves. Part II discusses some of the secondary effects of modern privatization on offenders, their families, and their communities.

## II. THE TRUTH OF PRIVATIZED CORRECTIONS: DAMAGED FAMILIES, HIGHER COSTS

The privatization of correctional facilities and their services has had strong negative effects on offender rehabilitation and reintegration into the community. Although government correctional facilities often do a poor job in rehabilitating and reintegrating inmates, private correctional services perform notably worse. The failures of the private correctional system include higher rates of recidivism, more damage to families and communities, and higher monetary costs in general.

### *A. Higher Rates of Recidivism*

Academic research has shown that offenders incarcerated in prisons and jails operated by for-profit companies have higher rates of recidivism than similarly situated offenders who are incarcerated in publicly managed prisons and jails.<sup>215</sup> This is largely due to their business models, which are dependent on continued incarceration. Such higher levels of recidivism can be attributed to two primary causes: higher rates of violence in private facilities, and greater difficulty for visiting families due to out-of-state incarceration.

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<sup>215</sup> ITPI, HOW PRIVATE PRISON COMPANIES INCREASE RECIDIVISM 2 (2016), <https://www.inthepublicinterest.org/wp-content/uploads/ITPI-Recidivism-ResearchBrief-June2016.pdf> [<https://perma.cc/CM5A-3RF5>].

### 1. *Greater Violence*

Private prisons are, statistically, more violent than public prisons.<sup>216</sup> This is due in part to the minimalist staffing policies in private prisons, which reduces operating costs and increases profits.<sup>217</sup> In Texas and Florida, where approximately a third of all inmates reside in privately held prisons, employee turnover rates were fifty to more than one hundred percent higher in private prisons than in public ones.<sup>218</sup> Likewise, in Mississippi, Tennessee, and Idaho, company-run prisons have had higher assault rates than public ones.<sup>219</sup> In general, prisoners who experience violence while incarcerated are more likely to recidivate than prisoners who do not.<sup>220</sup>

Moreover, guard pay is lower in private prisons than in public ones. According to the U.S. Labor Department, median annual pay in company-run facilities was \$30,460 in 2010, twenty-one percent less than for correctional officers employed by states.<sup>221</sup> Lower pay means lower morale for correctional officers, which often leads to greater apathy, burnout, and worse conditions overall.

### 2. *Out of State Incarceration*

To fill beds in the prisons they own, private prison companies routinely incarcerate prisoners in locations far away from their homes, often in other states.<sup>222</sup> As a result, prisoners often lose contact with their families and communities, making them more likely to recidivate than those who keep in closer connection.<sup>223</sup> As a rule, the more visits an offender receives during her incarceration, the less likely she is to reoffend when she is released.<sup>224</sup>

These visits from family and friends provide a critical way to establish, maintain, and enhance an inmate's social support networks. Strengthening an inmate's social bonds is important not only because it can help prevent the assumption of a criminal identity, but also because, as discussed below, most released prisoners rely on family and friends for necessities such as employment, financial support, and housing.<sup>225</sup>

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<sup>216</sup> *Id.* at 4–5.

<sup>217</sup> *Id.* at 5.

<sup>218</sup> Newkirk & Selway, *supra* note 97.

<sup>219</sup> *Id.*

<sup>220</sup> ITPI, *supra* note 189, at 5.

<sup>221</sup> Newkirk & Selway, *supra* note 97.

<sup>222</sup> ITPI, *supra* note 189, at 6.

<sup>223</sup> *Id.*

<sup>224</sup> See, e.g., MINN. DEP'T OF CORR., THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM 27 (2011), [https://mn.gov/doc/assets/11-11MNPrisonVisitationStudy\\_tcm1089-272781.pdf](https://mn.gov/doc/assets/11-11MNPrisonVisitationStudy_tcm1089-272781.pdf) [<https://perma.cc/VX87-D8A2>].

<sup>225</sup> *Id.*

*B. Costs to Prisoners' Families*

Whether large or small, private corrections companies incarcerate thousands of prisoners, often extremely far away from their friends and family. Although states often house convicted offenders in correctional facilities far away from major population centers, several states have begun incarcerating offenders in private prisons located in different states entirely. Alaska,<sup>226</sup> Arkansas, California, Hawaii, Vermont, and Wyoming,<sup>227</sup> along with Puerto Rico and the U.S. Virgin Islands, all ship substantial prisoners to private prisons located out of state, primarily due to prison overcrowding.<sup>228</sup> Hawaii ships a full quarter of its convicted offenders out of state—so many that CCA has dedicated a special prison just for Hawaiians in Arizona.<sup>229</sup> Washington State and North Dakota look like they will soon follow these states' lead.<sup>230</sup>

This out-of-state incarceration often severely curtails family visits, as traveling over such great distances to see convicted family members costs both time and money.<sup>231</sup> Since most prisoners and their families are disproportionately low-income, both the logistical and financial challenges are often insurmountable.<sup>232</sup> The distance also takes its toll on children, who rarely get to see their incarcerated parents, sufficing with infrequent phone calls or letters.<sup>233</sup> This makes reintegration more difficult for returning offenders, who often have lost touch with family members and children during the long absence.

Moreover, housing prisoners so far out of state makes it very difficult for the state to oversee operations. Private prison companies are notorious for contract violations and safety and security problems, but there is much less a state agency can do from thousands of miles away.<sup>234</sup> It can be difficult to get accurate health and safety information from out-of-state doctors and coroners.<sup>235</sup>

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<sup>226</sup> U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., INTERSTATE TRANSFER OF PRISON INMATES IN THE UNITED STATES 13 (2006), <http://static.nicic.gov/Library/021242.pdf> [<https://perma.cc/63AK-PNJB>].

<sup>227</sup> *Id.*

<sup>228</sup> Eli Hager & Rui Kaneya, *The Prison Visit that Cost My Family \$2,370*, MARSHALL PROJECT (Apr. 12, 2016), <https://www.themarshallproject.org/2016/04/12/the-hawaii-prison-visit-that-cost-my-family-2-370> [<https://perma.cc/3B78-74SY>].

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*



In addition, long distances complicate a prisoner's ability to keep up with court dates, appeals, and filing deadlines, which can be short in duration and extremely complex. California's Prison Law Office has specifically warned that it can be "difficult for out-of-state prisoners to get access to forms and information needed to file legal cases in the California courts."<sup>236</sup>

Likewise, it is more difficult for a prisoner's home state parole agency to track a prisoner's progress, thus potentially incarcerating inmates for longer than necessary due to incomplete information concerning rehabilitation.<sup>237</sup> In a similar vein, out-of-state inmates may have different or additional rights than in-state inmates, and those rights can be hard to keep track of and preserve when incarcerated in a distant, for-profit prison.<sup>238</sup>

Finally, re-entering society can be particularly difficult for out of state prisoners, since all the contacts that make reintegration possible—potential employers, landlords and social service providers—are far away.<sup>239</sup> Equally important, studies have repeatedly found that visitation significantly decreased the risk of recidivism, particularly with those inmates with little other social support.<sup>240</sup> Since "returning prisoners face a number of obstacles to successful reintegration, including unemployment, debt, homelessness, substance abuse, and family conflict,"<sup>241</sup> housing them in far-away prisons makes the transition all the more difficult and risky.

### C. Questionable Cost Savings

Private prison companies thrive due to their alleged cost savings, promising millions saved in taxpayer funds. Yet repeated investigations have found that these prison privatizers base their contracts on imaginary costs and a set formula, saving state and local governments little if any money in the long run.<sup>242</sup> In part, this is because private prisons can often cherry-pick the least expensive, least dangerous prisoners for their facilities, leaving a state's public prisons with the sickest and most violent inmates, the most expensive and most difficult to house.<sup>243</sup> Even when a prison facility is outsourced, the state must continue to be involved. Generally, the state is tasked with overseeing and administering private prisons in the correctional

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<sup>236</sup> PRISON LAW OFFICE, INFORMATION REGARDING TRANSFER TO OUT-OF-STATE PRISONS 6 (2013), <http://prisonlaw.com/wp-content/uploads/2015/09/OutofStateTransferJuly2013.pdf> [<https://perma.cc/U5AT-NXAE>].

<sup>237</sup> U.S. DEP'T OF JUSTICE, *supra* note 226, at 17.

<sup>238</sup> *Id.* at 17.

<sup>239</sup> Hager & Kaneya, *supra* note 228.

<sup>240</sup> *See, e.g.*, MINN. DEP'T OF CORR., *supra* note 224, at iii (arguing that more frequent visits for prisoners reduces their risk of recidivism after release).

<sup>241</sup> *Id.* at 1.

<sup>242</sup> Beall, *supra* note 24.

<sup>243</sup> *Id.*

system, creating additional governmental cost, even if state employees aren't staffing or running the prisons.<sup>244</sup>

Minimal staffing of prisons and jails, as described above, is also another way that for-profit prison companies save money, claiming to pass those lower costs on to the state. But this bare-bones provision of correctional officers and security guards imposes high costs on both inmates and guards. The pressure to keep costs down is illustrated through not only minimalist staffing,<sup>245</sup> correctional officer pay,<sup>246</sup> and training,<sup>247</sup> but also in decisions that keeps programming for inmates, usually staff intensive, at the barest of levels.<sup>248</sup>

Occupancy requirements are another way that privatizing corrections can cost a state as much as running public facilities. A large majority of private prison contracts—over sixty-five percent require the state or local government to guarantee a minimum number of bodies in prison or jail beds, or else required payment to make up for empty prison cells.<sup>249</sup> Most quotas require ninety percent occupancy.<sup>250</sup> These quotas make state taxpayers responsible for guaranteeing profits for private prison companies, instead of saving them money, as was promised.<sup>251</sup>

In addition, cost comparisons often fail to account for differences in health care costs for sick inmates, who normally remain in state supervision.<sup>252</sup> Contracts with private prison companies usually restrict their inmate intake to those prisoners who are healthy, young, and have fewer psychiatric needs.<sup>253</sup> In Florida, for example, a study done by an internal government accountability office found a variety of problems with the contracts enacted between six private prisons and the state. This

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<sup>244</sup> Chris Kirkham, *Private Prison Corporation Offers Cash in Exchange for State Prisons*, HUFFINGTON POST (Feb. 14, 2012), [https://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons\\_n\\_1272143.html](https://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons_n_1272143.html) [<https://perma.cc/86MW-HUR8>].

<sup>245</sup> MASON, *supra* note 3, at 10.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*; Bauer, *supra* note 5.

<sup>249</sup> ITPI, CRIMINAL: HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS FOR PRIVATE PRISON CORPORATIONS 2 (2013), <https://www.inthepublicinterest.org/wp-content/uploads/Criminal-Lockup-Quota-Report.pdf> [<https://perma.cc/DAY2-WUZN>].

<sup>250</sup> *Id.* at 2. While occupancy quotas range from 80% to 100%, most private prison contracts require a 90% bed fill rate, usually over a number of years. Arizona's three private prison have a 100% occupancy rate. *Id.* at 6, 8.

<sup>251</sup> *Id.*

<sup>252</sup> Kirkham, *supra* note 244.

<sup>253</sup> See, e.g., OFFICE FOR PROGRAM POL'Y ANALYSIS & GOV'T ACCOUNTABILITY, REPORT NO. 08-71: WHILE DMS HAS IMPROVED MONITORING, IT NEEDS TO STRENGTHEN PRIVATE PRISON OVERSIGHT AND CONTRACTS 1 (2008), <http://www.oppaga.state.fl.us/reports/pdf/0871rpt.pdf> [<https://perma.cc/E4VT-728Q>].

included failing to ensure that private prisons housed inmates with all different levels of health needs, both mental and physical, as do the rest of the state prisons.<sup>254</sup> As special needs inmates are more expensive, accepting only healthy inmates in privately-run prisons results in the state bearing a larger proportion of the cost of housing them.<sup>255</sup>

A number of recent studies have shown that using private, for-profit companies to run prisons and jails does not save state and local governments any money. In 2010, the Arizona Auditor General found that “it may be more costly to house inmates in private prisons” than public institutions.<sup>256</sup> Similarly, a 2010 New Jersey study found that “most objective cost studies [of privatized prisons] show[] little or no cost savings to taxpayers coupled with an increased safety risk.”<sup>257</sup> And a 2007 meta-analysis of previous privatization studies by University of Utah researchers found that “[c]ost savings from privatization are not guaranteed and quality of services is not improved.”<sup>258</sup> Although other studies have found privatized corrections provide some cost savings, the evidence is mixed, at best.<sup>259</sup>

Ultimately, the lack of oversight, extreme profits, lackadaisical attitude towards prisoner welfare, and constant nickel-and-diming of impoverished inmates are all hallmarks of what happens when privatizing corrections occurs in the criminal justice system. Whatever benefits are gained accrue almost entirely to the private entity.

### III. PUNISHMENT AS A COMMUNITY RIGHT

When punishment of offenders passes from public to private, there are a wide variety of consequences, and none of them are good. As the history of private incarceration illustrates, private corrections in this country were built over a quicksand of racism, slavery, and profit. The resurrection of private prison labor gangs, “lent” out to local counties by corrections companies in an effort to buy favor, draws from the same shaky ground.

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<sup>254</sup> *Id.* at 1.

<sup>255</sup> *Id.* at 5.

<sup>256</sup> STATE OF ARIZ., OFFICE OF THE AUDITOR GEN., REPORT NO. 10-08: DEPARTMENT OF CORRECTIONS: PRISON POPULATION GROWTH 19 (2010), <http://static.prisonpolicy.org/scans/10-08.pdf> [<https://perma.cc/N9CE-JNZY>].

<sup>257</sup> CORR. FACILITY EVALUATION TASK FORCE, FINAL REPORT FACILITY CORRECTIONAL FACILITY TASK FORCE 7 (2010), <https://co.monmouth.nj.us/documents/109/JailReport.pdf> [<https://perma.cc/3YCK-2DZV>].

<sup>258</sup> BRAD LUNDAHL ET AL., PRISON PRIVATIZATION: A META-ANALYSIS OF COST EFFECTIVENESS AND QUALITY OF CONFINEMENT INDICATORS 20 (2007), <https://socialwork.utah.edu/wp-content/uploads/sites/4/2016/12/861.pdf> [<https://perma.cc/U83M-MZJU>].

<sup>259</sup> See, e.g., Dina Perrone & Travis C. Pratt, *Comparing the Quality of Confinement and Cost-Effectiveness of Public Versus Private Prisons: What We Know, Why We Do Not Know More, and Where to Go from Here*, 83 PRISON J. 301, 315–16 (2003) (reviewing cost studies and concluding that “neither side of the correctional privatization debate should, at this time, be able to legitimately claim that the weight of the empirical evidence is on their side”).

In large part, private corrections have been so trouble-prone because granting the power to determine and impose punishment has always been a role for the local community, not profit-driven outsiders looking to commercialize incarceration. The more that private, for-profit companies are allowed to dictate the terms of punishment and corrections, the less benefit either the offender or the community receives.

#### *A. The Troubled History of Private Incarceration*

The practice of private payment for incarcerating offenders dates back to the beginning days of our republic. In early American history, local governments would reimburse private jailers for a form of pretrial detention, to hold the accused facing trial.<sup>260</sup> Early jails, which were primarily holding cells for debtors or for pre-trial detainees, were overcrowded, poorly kept, and unsanitary.<sup>261</sup>

This first incarnation of privately-run corrections soon ended after the creation of the first publicly run prison in 1790.<sup>262</sup> Soon almost all offenders were confined in local or state-run correctional facilities. There was one major exception, however, to the eradication of private incarceration: the use of inmate labor.

American prisons have a long and disturbing history when it comes to profiting from prisoner labor. In early prisons, prisoners were routinely put to work as part of the larger purpose of prisoner reform.<sup>263</sup> This purpose shifted during the Civil War with the passage of the 13th Amendment, which outlawed slavery and involuntary servitude “except as a punishment for crime whereof the party shall have been duly convicted.”<sup>264</sup>

Convict leasing, which was designed to get around the existence of the 13th Amendment, was widely utilized in the postbellum South. It both offered a means to help defray incarceration costs as well as helped rebuild the ruins of the South.<sup>265</sup> The convict laws of the post-Reconstruction South were regulations that were intended to help control and utilize black male labor.<sup>266</sup> Following the Civil War, eight Southern states enacted convict laws, which permitted the hiring of county prisoners to plantation owners and private companies.<sup>267</sup> In addition, nine southern states adopted vagrancy laws, making it a criminal offense not to work, and

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<sup>260</sup> MASON, *supra* note 3, at 1.

<sup>261</sup> Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450 (2005).

<sup>262</sup> *Id.* at 450–51.

<sup>263</sup> Anita Sinha, *Orange Is the New Black and the Practice of Prison Labor*, HUFFINGTON POST (Aug. 13, 2013), [http://www.huffingtonpost.com/anita-sinha/orange-is-the-new-black-prison-labor\\_b\\_3743927.html](http://www.huffingtonpost.com/anita-sinha/orange-is-the-new-black-prison-labor_b_3743927.html) [<https://perma.cc/APX9-XJXT>].

<sup>264</sup> U.S. CONST. amend. XIII.

<sup>265</sup> Dolovich, *supra* note 261, at 451.

<sup>266</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 28, 30–31 (2010).

<sup>267</sup> *Id.* at 31.

applied them selectively to black men.<sup>268</sup> This provided a constant stream of black prison laborers. The system of convict leasing invariably resulted in severe abuse of the prisoners, who were treated as less than human.<sup>269</sup> Few if any of the monies made were paid to prisoners.<sup>270</sup>

The purpose of both the convict and vagrancy laws was to help establish a new system of free, forced labor.<sup>271</sup> The South's aggressive enforcement and punishment of even minor criminal offenses against blacks created a market for convict leasing, where prisoners were rented as day laborers to the highest private bidder.<sup>272</sup> Soon, however, Southern prisons and jails simply went into the convict-leasing business themselves, reaping even greater profits.<sup>273</sup> This economic bonanza created a strong incentive to convict and lock up as many freedmen as possible to keep a steady supply of labor.<sup>274</sup>

Prisons and jails continued to lease convicts into the twentieth century. By the late 1920s, most states stopped leasing out their convict laborers, instead keeping them to work on public projects in chain gangs.<sup>275</sup> Legislation was eventually passed requiring that convicts labor only on public works.<sup>276</sup> The chain gangs of the 1930s, however, differed little from the convict leasing system, relying on the same tactics of humiliation and dehumanization.<sup>277</sup> Eventually, the chain gang's widespread abuses lead to its eradication around the middle of the twentieth century.<sup>278</sup>

The North had its private prison systems as well, distinct from the South's use of inmate labor and chain gangs. For example, New York utilized private prisons in the nineteenth century, using a "fee system" where independent prison operators

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<sup>268</sup> *Id.*

<sup>269</sup> Dolovich, *supra* note 261, at 452.

<sup>270</sup> ALEXANDER, *supra* note 266, at 28.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 31.

<sup>273</sup> *Id.* at 32.

<sup>274</sup> See generally MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866–1928 (1996) (describing how Southern states sought to alleviate the need for cheap labor, a perceived rise in criminal behavior, and the bankruptcy of their state treasuries by using convict leasing).

<sup>275</sup> *Id.* at 39–59.

<sup>276</sup> Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 451 (1997).

<sup>277</sup> *Id.* at 452.

<sup>278</sup> *Id.* In 1995, however, Alabama, reinstated a version of the chain gang. *Id.* at 452–53. Arizona, Florida, Massachusetts, Ohio, and Washington have also recently instituted a type of chain gang. Andrew Ford, *Florida Sheriff Reintroduces Chain Gang*, USA TODAY (May 2, 2013), <http://www.usatoday.com/story/news/nation/2013/05/02/brevard-county-sheriff-chain-gang/2130335/> [<https://perma.cc/W6C2-FH6U>]; Jessica Jerreat, 'It Looks Like 21st Century Slavery': Photographer's Images of Arizona's Chain Gangs Evoke a Dark Period in the Country's History, DAILY MAIL (Jan. 28, 2014), <http://www.dailymail.co.uk/news/article-2547778/Images-Arizona-chain-gang-evokedark-history-slavery.html#ixzz4NTII90a7> [<https://perma.cc/XP3G-2GGJ>].

charged per-inmate.<sup>279</sup> By the end of the nineteenth century, however, for-profit prisons and jails had been mostly eradicated, as concerns about safety, health, sanitation, and conditions of incarceration led to widespread closure.<sup>280</sup> Generally, private businesses were only involved in providing contracted services to correctional facilities, such as food preparation, medical care, and transportation.<sup>281</sup>

Concern about rising incarceration costs, however, resurrected privatized corrections in the 1980s. CCA incorporated in 1983,<sup>282</sup> and went public a year later, contending that its use of surveillance and corrections facilities design made it possible to run institutions with fewer guards.<sup>283</sup> Under the name “The Wackenhut Corporation,” GEO Group was created the same year, going public in 1997.<sup>284</sup> By 1997, CCA had transformed into a real estate investment trust (“REIT”) for tax purposes,<sup>285</sup> claiming that it was primarily in the property-owning business.<sup>286</sup> The GEO Group eventually followed suit in 2013.<sup>287</sup> Also in 1997, CCA’s newest affiliate, Prison Realty Trust, raised \$447 million to buy more correctional facilities to add to their growing empire.<sup>288</sup>

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<sup>279</sup> Llewellyn Hinkes-Jones, *Privatized Prisons: A Human Marketplace*, L.A. REV. BOOKS (Jan. 10, 2013), <https://lareviewofbooks.org/article/privatized-prisons-a-human-marketplace/#!> [<https://perma.cc/C9LN-KXUJ>].

<sup>280</sup> Anne Larason Schneider, *Public-Private Partnerships in the U.S. Prison System*, 43 AM. BEHAV.

SCI. 192, 194–95 (1999).

<sup>281</sup> MASON, *supra* note 3, at 1.

<sup>282</sup> Madison Pauly, *A Brief History of America’s Private Prison Industry*, MOTHER JONES (Aug. 2016), <http://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline> [<https://perma.cc/Y6P5-5BN4>].

<sup>283</sup> *Id.*

<sup>284</sup> *GEO Group History Timeline*, GEO GROUP, INC., [https://www.geogroup.com/history\\_timeline](https://www.geogroup.com/history_timeline) [<https://perma.cc/4A6A-898M>] (last visited Feb. 14, 2018).

<sup>285</sup> In reaction to private prison companies reorganizing themselves as REITs, Senator Ron Wyden (OR) has attempted to cut the substantial tax breaks available to REITs. In 2015, for example, CCA and GEO Group avoided a combined \$113 million in corporate taxes through their REIT status. Mike Ludwig, *Senate Bill Would End Tax Breaks for Private Prison Companies*, TRUTHOUT (July 19, 2016), <http://www.truth-out.org/news/item/36879-senate-bill-would-end-tax-breaks-for-private-prison-companies> [<https://perma.cc/KDF3-WU4M>].

<sup>286</sup> Pauly, *supra* note 282.

<sup>287</sup> *GEO Group History Timeline*, *supra* note 284.

<sup>288</sup> Pauly, *supra* note 282. As Pauly notes, the Prison Realty Trust went bankrupt in 2000 as prison rates began to drop and was subsequently dropped by CCA. *Id.*

What distinguishes these new versions of for-profit prisons from the previous types private prisons is, in part, their marketing. To the founder of CCA, selling private prison services is no different than selling anything else: “you just sell it like you were selling cars or real estate or hamburgers.”<sup>289</sup> Although CCA is marketing the incarceration and regulation of human beings, not merchandise, the sales pitch follows the same format.

One painfully familiar aspect of private prison practices is the resurgence of inmate work gangs. Indeed, CCA has used its provision of free inmate labor as a selling point to states, pointing out that in one of its first years of operating, Bay County, Florida received \$600,000 in “free” labor.<sup>290</sup> Today’s use of inmate work crews by private prison companies to provide free labor is all too familiar. Private prison leasing of inmate labor commodifies poor minority bodies for state, local, and commercial profit.

Allowing private companies to sell their services to state and local governments not only resurrects the specter of slavery and Jim Crow, but also steps on the need for the community to determine and impose punishments, as developed further below.

### *B. Expressive Restorative Retribution and the Community*

Why is it so critical that the local community, not private, for-profit companies, help determine and impose punishment on offenders? For one, when a distant agent, instead of the local or state government, is primarily or solely responsible for doling out the moral blame of punishment, offenders may not feel responsible for their actions, because the actual, physical fact of their punishment is so far attenuated from the community who imposed it. When a private, for-profit company imposes and enforces incarceration and its related punishments, the offender may instead attribute her punishment to the private company, shrugging off the desired feelings of responsibility or awareness of her wrongdoing. In contrast, when the local government is in charge of determining and imposing corrections, the wrongdoer has more difficulty avoiding the burden of criminal responsibility, because her fellow citizens, community, and society itself has pronounced her blameworthiness.

The power of expressive values in criminal law and punishment play an important role in corrections. Law and legal process has a strong effect on individual behavior through their power to affect the social, normative meaning of that behavior.<sup>291</sup> More specifically, community participation in the determination and imposition of criminal punishment helps express the people’s beliefs and values about the wrongdoer, the crime, and the injury to society. The expressive aspect of the community’s decision is particularly apparent in the punishment phase of the

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<sup>289</sup> Erik Larson, *Captive Company*, INC. MAG. (June 1, 1988), <http://www.inc.com/magazine/19880601/803.html> [<https://perma.cc/AAD9-G6Y9>].

<sup>290</sup> *Id.*

<sup>291</sup> Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 585–86 (1998).

adjudication and sentencing, since the actual imposition of punishment has always had public, communal value.

By eliminating the community and local government from the imposition of punishment through private corrections, much of the expressive value of community punishment is lost. This sort of loss threatens the democratic legitimacy and political salience of the state.<sup>292</sup> To work properly, legal expressions such as the imposition of criminal punishment must enlist and utilize the natural sense of justice among the citizenry.<sup>293</sup> Delegating such punishment to a private, for-profit corrections company makes this goal impossible.

Moreover, as a distributive principle, retributive justice supports the use of only state or locally-run corrections. Every time the offender commits a crime, she undermines the sovereign will of the people by challenging their decision-making structure.<sup>294</sup> Because criminal laws in liberal democracies reflect a democratic pedigree of criminal laws, crimes are expressions of superiority to the state and the community. When we punish an offender who knows or should have known her actions were illegal, she learns that her actions matter to the community—especially a community created by shared laws.

By involving the will of the people through the imposition of punishment within local and state-run corrections, it helps send the clear message that the offender is being punished for the unfairness she created in the community. Punishment imposed by private corrections, on the other hand, fails to send this message, because the penance is imposed by an outside source, completely unconnected to the state, government, or community. A framework of retributive justice cannot function without some involvement from the lay public, since its legitimacy is threatened without the actual imposition of punishment from the community. Thus, whatever retributive meaning a punishment may have is almost entirely lost in the realms of private corrections.

Restorative justice also has an important role to play when the community is involved with crime and punishment. Most supporters of restorative justice understand it to include a set of moral and substantive principles, including responsibility, remorse, atonement, making amends, moral learning, forgiveness, and reconciliation.<sup>295</sup> Restoring fairness and equalizing the community are important components of restorative justice, which envisions crime as “a violation of people and relationships that creates obligations to make things right.”<sup>296</sup>

A restorative theory of punishment conceptualizes justice as a process that incorporates both the community and the offender in an attempt to repair and

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<sup>292</sup> See William DeFord, *The Dilemma of Expressive Punishment*, 76 U. COLO. L. REV. 843, 845 (2005).

<sup>293</sup> Cooter, *supra* note 291, at 596.

<sup>294</sup> JEFFREY G. MURPHY & JULES L. COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 124 (1989).

<sup>295</sup> Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 376 (2005).

<sup>296</sup> David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 319 (2003) (citation omitted).



reconcile the harm done.<sup>297</sup> Private correction companies, on the other hand, envision crime and justice only as routes to profit. Neither retributive nor restorative justice can result from privatizing our state punishment, as our current system of private punishment, run by large for-profit companies, has money-making as its primary goal.

Restorative justice also contains aspects of expressive philosophy, because expressive theories help publicize the negative aspects of the crime and convey punishment's condemning message.<sup>298</sup> Restorative justice processes promote social disapproval of crime by the very expression of condemnation handed down by the community. This is far more meaningful than punishment imposed by private companies. In the restorative justice paradigm, community disapproval is the predominant deterrence to misconduct; thus the stronger the community involvement, the safer the community. Restorative justice is not private justice,<sup>299</sup> and privatized corrections, focused as they are on profit, have only one goal: the bottom line.

Another aspect of restorative justice where the participation of the community has been critical is the reintegration and rehabilitation of prisoners when they are released.<sup>300</sup> Community involvement has been absolutely vital in helping reconstitute societal bonds with the offender after she has served her punishment. Private corrections companies, however, are unconcerned with what happens with offenders once they are no longer in their control. This is particularly ironic given these companies' level of involvement in alternative corrections, which theoretically exist to help reintegrate the offender back into the community.

### *C. Psychological Effects of Racial Disparity in Privatized Corrections*

The psychological effect upon offenders imprisoned in private corrections cannot be ignored, especially given the substantial racial disparity among such prisoners. Offenders incarcerated by private companies quickly learn that the primary function of their imprisonment is to increase profits for the parent companies. This is signaled in numerous ways, as detailed above, including substandard facilities, care, programs, and supervision, along with dangerous conditions and abuse.<sup>301</sup> Far from absorbing the message that is meant to be sent by the community—that they are being punished for their wrongdoing in injuring society—these offenders learn only that they are at the bottom of the imprisoned heap, not even valued enough to be punished by the government or local community.

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<sup>297</sup> *Id.* at 319–20.

<sup>298</sup> Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 *CARDOZO L. REV.* 2313, 2330 (2013).

<sup>299</sup> *Id.* at 2335.

<sup>300</sup> Matt Ferner, *These Programs Are Helping Prisoners Live Again on the Outside*, *HUFFINGTON POST* (July 28, 2015), [http://www.huffingtonpost.com/entry/if-we-want-fewer-prisoners-we-need-more-compassion-when-they-re-enter-society\\_us\\_55ad61a5e4b0caf721b39cd1](http://www.huffingtonpost.com/entry/if-we-want-fewer-prisoners-we-need-more-compassion-when-they-re-enter-society_us_55ad61a5e4b0caf721b39cd1) [<https://perma.cc/D97F-GSKQ>].

<sup>301</sup> See discussion *supra* Parts I.B., I.C.

Furthermore, the message sent to the local community through the use of private prisons is equally destructive. The use of private prisons and jails sends a message to the offender's community that it is acceptable to impose substandard conditions upon offenders who are impoverished, non-white, or a combination of the two.

For-profit prisons hold more people of color than government-run facilities, a reality that has strong and troubling implications.<sup>302</sup> First, the containment of people of color, relative to "non-Hispanic, white[s]," functions primarily as a source of profit extraction.<sup>303</sup> Second, the incarceration in private prisons strongly suggests that communities of color are seen as unworthy of taxpayer supported public investment.<sup>304</sup> The high level of minority offenders incarcerated in private prisons also illustrates how they disproportionately suffer from facilities providing the least access to educational and rehabilitative services.<sup>305</sup> Indeed, the substantial overrepresentation of people of color in facilities controlled by for-profit firms suggests that people of color are excluded from traditional national conceptions of "the commons."<sup>306</sup> People of color continue to be seen in the national imagination as sources of profit extraction and not necessarily as citizens deserving of public services, thus continuing to be unable to participate fully in this nation's democratic experiment.<sup>307</sup>

Thus, the use of private corrections fails both the offender and the community in the areas of expressive, retributive, and restorative justice. This is closely tied to the community's critical role to play in determining punishment for local offenders. My other articles detail the community's proper role in deciding punishment in the

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<sup>302</sup> Brett Burkhardt, *Racial Makeup of Private Prisons Shows Disparities*, *New OSU Study Finds*, OR. STATE U. NEWS & RES. COMM. (Aug. 6, 2014), <http://oregonstate.edu/ua/ncs/archives/2014/aug/racial-makeup-private-prisons-shows-disparities-new-osu-study-finds> [<https://perma.cc/9MXB-GHDD>].

<sup>303</sup> Christopher Petrella, *The Color of Corporate Corrections, Part II: Contractual Exemptions and the Overrepresentation of People of Color in Private Prisons*, 3 *RADICAL CRIMINOLOGY* (2014), <http://journal.radicalcriminology.org/index.php/rc/article/view/44/html> [<https://perma.cc/QKK9-MXTA>].

<sup>304</sup> *See id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* More specifically, the overrepresentation of bodies of color in private prison facilities suggests that communities of color are seen as unworthy of taxpayer-supported public investment, such as state-supported prisons and their programs. *See* Christopher Petrella & Josh Begley, *The Color of Corporate Corrections: The Overrepresentation of People of Color in the For-Profit Corrections Industry*, 2 *RADICAL CRIMINOLOGY* (2013), <http://journal.radicalcriminology.org/index.php/rc/article/view/27> [<https://perma.cc/59RR-T9KT>].

<sup>307</sup> Petrella, *supra* note 303, at n.12.

areas of bail,<sup>308</sup> sentencing,<sup>309</sup> probation,<sup>310</sup> parole,<sup>311</sup> post-release supervision,<sup>312</sup> and criminal justice debt,<sup>313</sup> among others. Usually the role of the local community ends post-sentencing hearing. The realities of prison privatizers and the many different aspects of private punishment, however, should make us reconsider this end. The need for more local participation in enacting punishment on offenders unquestionably arises with the current grim realities of privatized punishment.

At its best, community-based criminal punishment provides for strong local, popular participation within existing criminal justice institutions. As shown above, when the actual imposition of sentence and punishment is taken away from local governments and given to faceless, privatized companies, everything and everyone suffers. As explored in Part IV, granting this power to for-profit privatizers exacts a heavy cost on community rights, legitimate punishment, and local, democratic control.

#### IV. RETURNING TO LOCAL CONTROL

Since the beginning of the American criminal justice system, we have relied on the community to adjudicate crime and punishment. As William Stuntz contended, “[m]ake criminal justice more locally democratic, and justice will be both more moderate and more egalitarian.”<sup>314</sup> This is because criminal justice creates value by generating societal opinions of how best to apply legal rules and adjudicate offenses.<sup>315</sup> More specifically, it is the community’s shared principles of justice that make the rule of law both workable and legitimate.<sup>316</sup>

The power of moral credibility and pressure of social norms also lend a hand in obtaining compliance with society’s rules of conduct, by using the influence of the forces of social and individual moral control. Local community-level social processes have much more effect on the prevention and promotion of crime and delinquency than do the characteristics of individual offenders.

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<sup>308</sup> See generally Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297 (2012) (arguing that imprisoning accused offenders pre-trial imposes punishment before trial, violating the Sixth Amendment right to trial by jury).

<sup>309</sup> See Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307, 1337–41 (2007).

<sup>310</sup> LAURA I. APPLEMAN, *DEFENDING THE JURY: CRIME, COMMUNITY, AND THE CONSTITUTION* 187–90 (2015).

<sup>311</sup> *Id.* at 193–99.

<sup>312</sup> *Id.* at 199–205.

<sup>313</sup> See Appleman, *supra* note 58, at 1494–1516.

<sup>314</sup> William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008).

<sup>315</sup> Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 211 (2012).

<sup>316</sup> APPLEMAN, *supra* note 310, at 71.

American normative theories of democracy and democratic deliberation have always included community involvement in all aspects of criminal justice. The right to a jury—the local community—to determine your guilt or innocence has always been a seminal concept in American democratic theory.<sup>317</sup> If you accept that conceptions of egalitarian moral worth are part of our culture’s normative values and have therefore set the standards for acceptable treatment of people in our society, then the lay citizenry must be part of the determination and imposition of punishment, from the beginning of the criminal justice process to its endpoint.

### A. Local Control

Despite our continual focus on federal crime and punishment, criminal justice is a largely local process, with primarily local effects. As a result, the lay community must be involved much more substantially in its application. Citizens need to participate in criminal justice decisions to both legitimize criminal punishment and make the process more democratic. Indeed, true democracy requires that we commit both process and value to governance by the people.<sup>318</sup>

Traditionally, this participation has occurred through the auspices of the petit or grand jury. However, as jury trials have dwindled to a mere 1–5% of criminal justice adjudications, it is important to find other ways for the local community to get involved. “[T]he most important benefit of localism in criminal justice [is] . . . its tendency to make the enforcement of criminal law more responsive to the values, priorities, and felt needs of local communities.”<sup>319</sup> This localism benefit has always been a particular hallmark of our criminal justice system, as crime has always been specifically envisioned as an offense against the local community. In other words, localism is inherent in the American conception of criminal punishment—indeed, it is hardwired into our historical and constitutional understanding of criminal justice.<sup>320</sup>

When criminal punishment parallels the community’s local understanding of justice, the punishment gains legitimacy and promotes compliance by urging the populace to view it as a moral authority in uncertain situations.<sup>321</sup> Allowing private, for-profit corrections companies to impose such punishment cuts this important link. As Martha Minow has queried, what happens to these kind of public values when public commitments proceed through private agents?<sup>322</sup>

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<sup>317</sup> Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1414–15 (2017).

<sup>318</sup> Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1268 (2003).

<sup>319</sup> Stephen F. Smith, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 110 (2011).

<sup>320</sup> *Id.* at 110–12 (expressing skepticism that statewide enforcement of the death penalty is preferable to continued local enforcement and stressing the positives of localism).

<sup>321</sup> APPLEMAN, *supra* note 310, at 71.

<sup>322</sup> Minow, *supra* note 318, at 1229.

Minow herself partially answers her question, pointing out how many “new versions of privatization potentially jeopardize public purposes by pressing for market-style competition, by sidestepping norms that apply to public programs, and by eradicating the public identity of social efforts to meet human needs.”<sup>323</sup> These concerns are particularly salient with privatized corrections, which combine profit-based motives with reduced services and hidden internal machinations, eradicating any of the concerns and norms of the local community.

As Minow explains, there is a strong argument for viewing the regulation and administration of correctional facilities as a public task, because the political system currently assigns a monopoly over the legitimate use of force to the government.<sup>324</sup> Minow argues that using private actors in the correctional context may undermine the legitimacy of government action, since the public may suspect that their focus is private profit-making, rather than the traditional purposes of criminal justice.<sup>325</sup> Indeed, allowing for-profit companies to provide services that previously were public raises worrying questions about public participation in the criminal justice system, as well as the effects this has upon the character of the polity.<sup>326</sup>

Privatizing corrections tends to fundamentally alter the relationship between state and society in the criminal context.<sup>327</sup> This is because such privatization removes punishment and corrections from the local and state governmental control—control specifically delegated from the local community—and places it in the hands of for-profit companies that have minimal interest in reinforcing the public norms underlying our basic assumptions of criminal justice.<sup>328</sup> By entrusting the decision-making and implementation of punishment to entirely private entities, we not only cut off any last aspect of community involvement, but also cede to private actors the sovereignty over a fundamental societal and community function: the act of punishment.

Moreover, using private corrections companies creates the public perception that the connection between the community and the imposition and regulation of punishment has been cut. In our criminal justice system, it is the community’s role to determine an offender’s punishment, while the actual administration of punishment is normally delegated to the democratically elected local government. But when the government then outsources this critical function to private, for-profit companies, the community gets the message that their essential role—as determiners of social norms—has been excised. No longer is the lay community’s voice or message imposed. As the Israeli Supreme Court argued in a decision banning the use of private prisons: “The administration of prisons and jails involves the legally

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<sup>323</sup> *Id.* at 1230.

<sup>324</sup> *Id.* at 1234.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 1234–35.

<sup>327</sup> See Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 112 (2001).

<sup>328</sup> As White delineates, “the rule of law . . . vitiates private justice simply because private persons neither can construct nor implement between themselves general, formally equal, predictable, and non-retroactive legal norms.” *Id.* at 119.

sanctioned coercion of some citizens by others. This coercion is exercised in the name of the offended public.”<sup>329</sup> Indeed, granting the power to inflict criminal sanctions to private, for-profit companies neatly severs the link between the local community’s adjudication of the offense/determination of punishment and the infliction of the sanction.<sup>330</sup>

The role of the local becomes ever more important when we make a careful study of privatized punishment. The worst excesses and greatest oversights all seem to occur when private corrections entities eliminate any local investment or interaction with incarceration and punishment, running all operations from one nationwide center. Although this might promote efficiency and increase profits, the effects of this one-size-fits-all approach can be disastrous for both offenders and communities.

### *B. Delegation, Democracy, and the People*

In addition to trampling on local, democratic participation in criminal justice, allowing private prisons to impose sanctions and punishments on incarcerated offenders is an inappropriate delegation of power. Despite some troubling historical practices, punishment and the use of physical coercion have always been understood as government prerogatives.<sup>331</sup> When state or local governments delegate the authority to execute these duties to entities with dubious accountability to the public interest,<sup>332</sup> we run into serious problems. Although private entities often administer state programs, usually those entities are not as directly involved in corporal punishment as are the current crop of private corrections companies.

Another undemocratic aspect of privatized corrections is the imposition of punishment for profit. Granted, in all corrections discipline, any alleged transgression is adjudicated by an internal prison administrator—often minimally trained—ranging from guards to the parole board to the probation officer.<sup>333</sup> In private corrections, however, particularly privatized alternate corrections such as probation, this imposition is more troubling. For every punishment imposed that

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<sup>329</sup> Acad. Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin., HCJ 2605/05 27, 65, 67–68 (2009) (Isr.), [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.htm](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm) [<https://perma.cc/Y6U8-LNAZ>] (observing that the “power of imprisonment and the other invasive powers that derive from it are therefore some of the state’s most distinctive powers as the embodiment of government” and concluding that privatization violates “the constitutional right to personal liberty”).

<sup>330</sup> Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113, 114 (2008).

<sup>331</sup> Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1499 (2003).

<sup>332</sup> Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 VAND. L. REV. 1509, 1512 (2015).

<sup>333</sup> KEY SUN, CORRECTIONAL COUNSELING: A COGNITIVE GROWTH PERSPECTIVE 13 (2d ed. 2013).

extends an inmate's term, the private corrections company makes more money. It is a classic conflict of interest that has, until recently, gone largely unnoticed.<sup>334</sup>

As discussed in Part I, corrections officers generally make multiple disciplinary decisions daily, with little oversight or review.<sup>335</sup> These disciplinary decisions can result in a loss of "good time credit," which applies toward early release, or placement in administrative segregation.<sup>336</sup> In private jails and prisons, each loss of good time credit means one more day incarcerated, which means one more day of profit.<sup>337</sup> Perhaps unsurprisingly, one study found that CCA inmates lost good time credit at nearly eight times as much as did inmates in a state-run prison.<sup>338</sup>

The profit motive engendered by these private corrections companies creates perverse incentives to extend inmate sentences and punishment. In addition, the profit-based motives of private corrections companies reflexively promote criminal justice policies that produce enhanced sanctions for the most minor of infractions, without any consideration of whether the policies are in the public interest.<sup>339</sup>

Imposing punishment on incarcerated offenders also implicates an improper delegation of the local community's traditional role in adjudicating and imposing all forms of punishment. The delegation of essential community and governmental functions to private corrections companies poses a very real threat to democratic accountability, the rule of law, and punishment.<sup>340</sup>

In addition, delegating the imposition of punishment to private companies raises issues with transparency and public accountability, legitimacy, and nonpublic motives.<sup>341</sup> Each are discussed briefly below.

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<sup>334</sup> Bauer, *supra* note 5, at Chapter 2. Bauer describes an incident where an inmate removed a broom from a closet at the wrong time and was punished by having to stay in the prison an extra 30 days. For these extra 30 days, CCA was paid more than \$1,000. *Id.*

<sup>335</sup> Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 111 (2016).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* As Eisenberg details, each placement in administrative segregation equals nearly \$1,000 in profit for a private corrections company like CCA. *Id.*

<sup>338</sup> *Id.* at 112.

<sup>339</sup> Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151 (2010).

<sup>340</sup> *Id.* at 151.

<sup>341</sup> *Id.* at 155.

### *1. Transparency and Public Accountability*

It is extremely difficult to obtain any public accountability from private corrections. Allowing for-profit companies to take over jails, prisons, probation, and post-release supervision means increasing the veil of secrecy that already pervades American corrections. Privatized correctional facilities operate with an almost complete lack of transparency, as they are not subject to the kind of oversight required for state and federal prisons.<sup>342</sup> Indeed, “the private prison industry operates in secrecy while being funded almost entirely with public taxpayer money.”<sup>343</sup>

This lack of transparency touches on a major requirement for imposition of punishment on offenders: the need for accountability to the local community. Because prisons, jails, and other sorts of correctional controls play a very public role in our criminal justice system, it is necessary that the local community carefully scrutinize the inner workings, in order to ensure that local punishment norms are followed.

This opaqueness in private corrections goes against the tenets of restorative and retributive justice, which focus on letting the local populace make transparent decisions about punishment in full view of, and with oversight by, the greater community. Although H.R. 2470, the “Private Prison Information Act,”<sup>344</sup> which requires greater transparency and Freedom of Information Act rights for the dealings of private prison companies, was introduced in the House on May 20, 2015, the bill was referred to committee and has lingered there ever since.<sup>345</sup> This means that private, for-profit companies can continue to run correctional facilities however they like, with little to hold them accountable. Even if the Federal Bureau of Prisons ultimately decides to end its association with private corrections, this still leaves the many state, local, and county offenders subject to the private corrections industry’s arbitrary and undemocratic power to punish on the government’s behalf.

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<sup>342</sup> Segura, *supra* note 111.

<sup>343</sup> *Id.*

<sup>344</sup> The PPIA argues that since private prison companies rely almost entirely on taxpayer funds, and perform the inherently governmental function of incarceration, the public has a right to obtain information pertaining to private prison operations. See Press Release, Human Rights Def. Ctr., Private Prison Information Act Reintroduced in 114th Congress (May 21, 2015), <https://www.prisonlegalnews.org/in-the-news/2015/private-prison-information-act-reintroduced-114th-congress/> [<https://perma.cc/YSP7-JXFT>].

<sup>345</sup> Private Prison Information Act of 2015, H.R. 2470, 114th Cong. (2015).



Transparency is integral to the democratic project,<sup>346</sup> and penal transparency even more so. Generally, however, prisons and jails are not particularly transparent,<sup>347</sup> and private correction facilities even less so. There is very little public information for prisons or jails, and virtually none for halfway houses, recovery centers, and other correctional alternatives. As such, scholars have argued for increased penal transparency in five areas: 1) physical safety; 2) health; 3) institutional employment/education; 4) internal discipline; and 5) recidivism.<sup>348</sup>

This kind of transparency is even more necessary in the world of privatized corrections. The vast majority of private facilities need not disclose information arising from public records requests, as opposed to government-run prisons.<sup>349</sup> As noted by the National Council on Crime and Delinquency, “private prison contractors . . . 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.”<sup>350</sup> Therefore, increasing public access to the workings of private facilities would allow the much-needed scrutiny of correctional conditions and operations by the local community.<sup>351</sup>

The need for transparency and public accountability in criminal punishment applies to all kinds of corrections. Stephanos Bibas has written persuasively about the great divide between insiders and outsiders in the criminal justice system, and how this continuous secrecy impairs public confidence in the law.<sup>352</sup> The private corrections industry, however, has been the most resistant to providing any insight, overview, or accountability in their practices, even within a secretive, closed-door industry. We need a combination of transparency and accountability to not only uphold the rights of people under criminal justice control,<sup>353</sup> but also to vindicate the rights of the local community to determine and administer punishment. Private corrections’ refusal to open up their processes bypasses local control of punishment, something that is inseparable from our democratic decision-making.

Likewise, the rush to privatize probation has given tremendous law enforcement authority and oversight to for-profit companies, who have transformed

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<sup>346</sup> Andrea C. Armstrong, *No Prisoner Left Behind?: Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL’Y REV. 435, 458 (2014).

<sup>347</sup> *Id.* at 462.

<sup>348</sup> *Id.* at 471.

<sup>349</sup> Mike Tartaglia, *Note, Private Prisons, Private Records*, 94 B.U. L. REV. 1689, 1691 (2014).

<sup>350</sup> CHRISTOPHER HARTNEY & CAROLINE GLESMANN, PRISON BED PROFITEERS: HOW CORPORATIONS ARE RESHAPING CRIMINAL JUSTICE IN THE U.S. 15 (2012), [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/prison-bed-profiteers.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profiteers.pdf) [<https://perma.cc/X5Z5-3JWN>].

<sup>351</sup> See Tartaglia, *supra* note 349, at 1694.

<sup>352</sup> STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 112–113 (2012).

<sup>353</sup> See Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL’Y REV. 455, 455–56 (2011).

punishment into a relentless machine for collection of criminal justice debt.<sup>354</sup> Here, as well, there is an almost complete lack of transparency. In many states, these private probation companies do not fall under the state's open records law, due to private probation-sponsored statutes making all private probation records confidential.<sup>355</sup> Whatever the size of these private corrections companies, the public must be able to obtain complete accountability and transparency without difficulty. This is particularly important because the companies serve a public function in criminal justice, thus acting as a proxy for the government itself.<sup>356</sup>

The cost of imprisonment is another compelling reason to require transparency and accountability from private corrections companies, particularly given the false promise of cost savings. Often the lay public accepts the takeover of local prisons, jails, probation, halfway houses, and rehabilitation services because it believes this will save money while providing the same services.<sup>357</sup> Full knowledge of a private corrections company's transactions, however, might change the public acceptance of private corrections companies. This includes such routine practices as understaffing, poor or non-existent medical care, high interest on criminal justice debts, elimination of in-person visitation, ruinous phone rates, and toxic food, all of which can ultimately lead to higher costs for taxpayers. At minimum, requiring data collection, record keeping, and publication of private correction records to force transparency can help foster a public debate on the wisdom of corrections privatization, hopefully promoting more rational decision-making in the realm of criminal justice.<sup>358</sup>

The public requires sufficient information about the operation of these privatized criminal justice institutions to properly judge the utility of such operations. As the criminal justice system continues to privatize, there is ever more of a need for transparency and accountability.<sup>359</sup> It is likely that more transparency will lead to less privatization, since the practices associated with the rampant cost-cutting of private corrections are not likely to survive serious scrutiny.

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<sup>354</sup> See generally Appleman, *supra* note 58 (describing how unchecked criminal justice debt can lead to punishment outside the strictures of the 6th Amendment jury trial right).

<sup>355</sup> See, e.g., Geraghty & Velez, *supra* note 353, at 476 (discussing GA. CODE ANN. § 42-8-106 (2010)).

<sup>356</sup> *Id.*

<sup>357</sup> See Julia Bowling, *Are Private Prisons Good Investments for States?*, BRENNAN CTR. JUST. (Apr. 15, 2014), <https://www.brennancenter.org/blog/are-private-prisons-good-investments-states> [<https://perma.cc/ZZN2-Z9WA>].

<sup>358</sup> *Id.*; Geraghty & Velez, *supra* note 353, at 476. Geraghty and Velez make this point more generally about the need for transparency and accountability in criminal justice overall, but their point is particularly applicable to private correction companies.

<sup>359</sup> See Geraghty & Velez, *supra* note 353, at 487.

## 2. *Legitimacy*

Americans do not have much confidence in the fairness or effectiveness of the criminal justice system.<sup>360</sup> As Jeffrey Fagan notes, “[t]he disquiet threatens to erode the public perception that the criminal law and legal institutions are legitimate and raises the prospect of disengagement of citizens from the important collaborations that are essential to the co-production of security.”<sup>361</sup> These observations ring even more true when it comes to the perception and role of private corrections within our criminal justice system.

Fagan articulates three major issues with criminal justice legitimacy, all of which resonate strongly when considering using private corrections companies to run criminal institutions. First, there are significant concerns about the criminal system’s lack of procedural fairness and respectful, dignified treatment of citizens, all of which erode legitimacy in the eyes of the public.<sup>362</sup> As Part I details, the random, chaotic nature of institutions run by private correction companies, from the casual, ingrained violence to the arbitrary imposition of excess punishment to the callous disregard of medical needs, violate the basic tenets of procedural fairness and dispense with dignity for the incarcerated or probationary citizen.

Second, Fagan argues that the legitimacy of the criminal justice system is undermined by the public’s continually negative perception of the distribution of justice, along with its growing apprehension over the proportionality and consistency of legal responses to criminal behavior.<sup>363</sup> This concern is particularly applicable to the growing role of private probation, parole, and post-release supervision, where private industry has squeezed an endless stream of money out of the poorest of offenders. As discussed above, these probation companies frequently function to indebt offenders, not to rehabilitate them. Such disproportionate punishment of minor offenders, on top of the already existing punishment handed down by the courts, is perceived as illegitimate and highly undemocratic. In the end, endless criminal justice debt ends up imposing as much punishment for minor offenses as for much greater offenses.

Fagan’s third point contends that criminal justice legitimacy is weakened by concern over the criminal law’s waning capacity to detect wrongdoing and protect citizens.<sup>364</sup> Within the world of private corrections, privatized criminal institutions routinely fail to detect wrongdoing and protect citizens within their walls, thus undermining the belief in reliability and fairness that the public generally holds about crime and corrections. The high rates of death, violence and injury in private corrections destabilize any possible belief in the justice served in such institutions. In addition, the relentless profit-squeezing occurring at virtually every private corrections facility is enough to make any citizen doubt that these companies protect

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<sup>360</sup> Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123, 123 (2008).

<sup>361</sup> *Id.* at 124.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

anything but their own self-interests. Privatized corrections makes a mockery out of any legitimate protective role these institutions might have, and greatly destabilizes community trust in the back end of the criminal justice system.

The criminal law derives some of its legitimacy from “citizens participat[ing] as clients, overseers, and participants in the production of justice.”<sup>365</sup> As discussed in greater detail in Part V, one way in which privatized corrections could gain more legitimacy in the people’s eyes would be to have more community oversight and participation in its regulation. As Fagan argues, such a “regulatory function influences not only the conduct of the institution, but also its perception by others coming into contact with it.”<sup>366</sup> Thus having the local community help oversee, at minimum, the health, safety, basic offender living conditions, and profit margins of these privatized corrections companies would not only improve the standards, but also increase legitimacy in the eyes of the public.

### 3. *Non-public Motives*

As discussed in Part I, the lack of any public motive within private corrections companies has created a system where the companies reduce inmate services and quality of life to chase after every last cent. This is not to say that public, government-run corrections have been any Shangri-La; indeed, various non-profits have amply documented the problems with publicly-run correctional facilities.

But privatizing corrections means that decisions are not focused on the best choice for the offenders or institution, but instead, the best choice for the company—or, in the case of the largest privatized correction companies, what is best for the shareholder. Fiduciary duty towards the shareholder in a publicly traded company requires that “[a] business corporation is organized and carried on primarily for the profit of the stockholders.”<sup>367</sup> Corporate law delineates that directors are bound by fiduciary duties and standards, which include “acting to promote the value of the corporation for the benefit of its stockholders.”<sup>368</sup>

Thus, publicly traded companies such as CCA and the GEO Group are legally and ethically required to focus on profit as the primary motivation for each action they take. In contrast, correctional facilities are (or are supposed to be) focused on the needs of offenders. Privatizing corrections risks serious conflicts between public and private interests,<sup>369</sup> with public interest losing out to the profit motive.

In addition, even a small amount of for-profit motivation in a traditionally non-profit sector can destabilize belief and deference for government.<sup>370</sup> This fate is particularly dangerous for the criminal justice system, which has recently been under great public scrutiny for its failures of justice.

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<sup>365</sup> *Id.* at 133.

<sup>366</sup> *Id.*

<sup>367</sup> *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

<sup>368</sup> *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

<sup>369</sup> Minow, *supra* note 322, at 1249.

<sup>370</sup> *Id.* at 1234.

### C. *Delegating Imprisonment*

Punishment and imprisonment has traditionally been a power reserved to the government, whether federal, state, or local. Of course, some governmental functions cannot be delegated at all.<sup>371</sup> Although delegating punishment and imprisonment seems to pass constitutional muster, do we truly want to delegate the function of incarcerating, punishing, deterring, and rehabilitating offenders to a private entity,<sup>372</sup> particularly one so focused on profit?

Granted, it is sometimes difficult to sharply separate public and private in our modern governance.<sup>373</sup> Some have argued that our system of privatization is less a governmental withdrawal than a public-private partnership where there is a regime of “mixed administration in which both public and private actors share responsibilities.”<sup>374</sup> Instead, privatization tends to delegate power over governmental programs to individual private actors.<sup>375</sup> This is particularly true with private corrections, “given that the right to physically constrain and coerce others is ordinarily reserved for the state.”<sup>376</sup> When there is mixed private-public administration, much of the discretion is left to the third-party private actors<sup>377</sup>—a result that can be disastrous, as demonstrated, when it comes private corrections.

Alexander Volokh has argued that there is no inherent, normatively relevant difference between public and private providers of government services, including prisons.<sup>378</sup> Volokh contends that prison privatization does not violate the federal non-delegation doctrine, since the doctrine, derived from Article I’s vesting clause, focuses on how much power Congress gives up; in other words, it doesn’t matter whether the recipient of the delegated power is public or private.<sup>379</sup> Yet even Volokh notes that for some states, the delegation doctrine is more cautious, warning that private delegations can be more worrisome than public ones due to the possibility of “public powers being abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government.”<sup>380</sup>

Even assuming that delegation of imprisoning and punishing offenders is within constitutional bounds, however, there are numerous reasons why the private corrections experiment of the last thirty years has not only been a failure, but has also had detrimental cost to society. The average citizen feels very distanced from

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<sup>371</sup> U.S. CONST., art. I, § 1; Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 823 (1987).

<sup>372</sup> Robbins, *supra* note 371, at 823.

<sup>373</sup> Metzger, *supra* note 331, at 1369.

<sup>374</sup> *Id.* at 1395.

<sup>375</sup> *Id.*

<sup>376</sup> *Id.* at 1397.

<sup>377</sup> *Id.* at 1395.

<sup>378</sup> Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C.D. L. REV. 133, 147 (2012).

<sup>379</sup> *Id.* at 154–55.

<sup>380</sup> *Id.* at 156 (quoting *Tex. Boll Weevil Eradication Found. Inc v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997)).

the inner workings of the criminal justice system. This distance is only increased by the use of private correction companies. When we grant a for-profit company the ability to control punishment, despite previous poor performance, it strongly signals to local citizens that they are true outsiders to the criminal process.

Moreover, outsourcing corrections contracts to the lower bidder transmits the message that once convicted, offenders are mere commodities like any other product, with cost savings the only metric that matters. As Justice Arbel of the Israeli Supreme Court contends, employing private corrections “undermines the moral authority underlying the activity of that enterprise and public confidence in it, since even if justice is done, it is not seen to be done.”<sup>381</sup> Public perceptions matter tremendously in criminal justice, and the wrong perceptions are created when privatized corrections are in charge.

#### V. RESTORING THE COMMUNITY ROLE IN IMPOSING PUNISHMENT

The role of the community in determining punishment, if expanded to its full breadth, encompasses not just the ability to decide and impose appropriate punishment, but also the right to determine the level of all the punishments that follow sentencing. My previous articles have argued for the need for more community participation in the back-end of sentencing: including parole, post-sentence probation, and post-release supervision.<sup>382</sup> There is no reason that this community participation and oversight could not extend to the wide realm of punitive sanctions doled out in private prisons, jails, and the many forms of alternative incarceration, like probation and halfway houses.

One practical way to help restore the community role in corrections punishment is to require a rotating committee of citizens to help supervise any prison, jail or alternative corrections facility run by a private, for-profit contractor.<sup>383</sup> This would include overseeing all aspects of private corrections as practiced, including outsourced services such as prison food, banking, transportation, telephony, visitation, and health care. Although general court oversight of prison systems is not uncommon, there are few oversight boards or committees reviewing correctional facilities, and very few with local citizen involvement.

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<sup>381</sup> Academic Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin. HCJ 2605/05 109 (2009) (Isr.), [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.htm](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm) [<https://perma.cc/Y6U8-LNAZ>].

<sup>382</sup> APPLEMAN, *supra* note 310, at 191–203.

<sup>383</sup> There is a strong case to be made that ALL correctional facilities, whether public or privately run, should have outside oversight. Unquestionably there are multiple problems with correctional facilities in general, not just ones run by prison privatizers. But the most critical place to begin is in private corrections, given its many issues.

The criminal justice system is familiar with the use of oversight boards or committees. Oversight boards and committees have been supervising and reviewing police departments for the past twenty-five years, with some limited success. There is no reason such boards could not be expanded to private correction facilities. As we have seen, private corrections, more than any other form of corrections, is most in need of community oversight.

Why use civilian community boards instead of court oversight? For one, court oversight, which usually only results as a consequence of protracted litigation, can be extremely expensive.<sup>384</sup> In addition, obtaining a consent decree for a court (or the federal government) to supervise a prison system is complicated and lengthy. In contrast, putting together an oversight board of civilians, or a mix of the local public and key community representatives, would be much easier and more efficient, requiring the power of the local or state government at most.

Moreover, incorporating local citizens into the workings of private corrections would ensure that a fresh take would be provided. Requiring the operations of private prisons, jails, and alternative corrections to pass before the eyes of a community oversight board would provide a window into any back-door dealings and secret machinations. Enhancing local, popular participation within an existing criminal justice institution,<sup>385</sup> such as the private corrections industry, combines the positives of community involvement without requiring new procedures or immediate overhaul of the existing system.

An external evaluation system of private correction facility operations is necessary, particularly considering the punitive sanctions imposed within. We cannot rely on any of the current parties—the state/county or the private corrections industry—to reliably protect the public interest. One way of achieving such public scrutiny, transparency, and accountability, however, is through a careful, focused use of a citizen oversight board. These citizen oversight boards have been used successfully in New York<sup>386</sup> and Los Angeles,<sup>387</sup> for both police and sheriff's departments. The basic structure could easily be adapted to oversee the many levels of private corrections that have evolved in today's market.

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<sup>384</sup> For example, litigation about Rhode Island's prison system, one of the smallest in the country (with 675 prisoners in custody), lasted 22 years and cost millions. See ACLU, NATIONAL PRISON PROJECT LITIGATION DOCKET 7 (2017), [https://www.aclu.org/sites/default/files/field\\_document/docket\\_march\\_2017\\_final.pdf](https://www.aclu.org/sites/default/files/field_document/docket_march_2017_final.pdf) [<https://perma.cc/QSU4-7GK9>].

<sup>385</sup> Lanni, *supra* note 295, at 363.

<sup>386</sup> New York City has a Civilian Complaint Review Board ("CCRB"), an independent agency "empowered to receive, investigate, mediate, hear, make findings, and recommend action on complaints against New York City police officers alleging the use of excessive or unnecessary force, abuse of authority, discourtesy, or the use of offensive language." *About CCRB: Mission*, CIVILIAN COMPLAINT REV. BOARD, <http://www1.nyc.gov/site/ccrb/about/about.page> [<https://perma.cc/XVX7-KWTL>] (last visited Sept. 1, 2017).

<sup>387</sup> Cindy Chang & Abby Sewell, *Los Angeles County Sheriff's Dept. to Get Civilian Oversight*, L.A. TIMES (Dec. 9, 2014), <http://www.latimes.com/local/california/la-me-sheriff-oversight-20141210-story.html#page=1> [<https://perma.cc/34PK-CQEK>].

Oversight boards are nothing new. The call to oversee prisons, however, has come with renewed force in recent years. Most recently, there has been popular demand to oversee the New York state prison facilities, alleging that the New York State Commission of Correction's actions and oversight have been practically useless.<sup>388</sup> This is no surprise. Having bureaucratic oversight of facilities run by bureaucratic institutions, whether public or private, is unlikely to result in any major change. It is critical that the community be heavily involved in such oversight, particularly with private corrections facilities, to avoid such self-serving administration.

There have been many calls for increased police transparency in the last few years. So, too, should there be demands for increased corrections transparency,<sup>389</sup> particularly those facilities run by private corrections companies. The ABA has endorsed such oversight corrections commissions, urging states, the federal government, and counties to “establish public entities that are independent of any correctional agency to regularly monitor and report publicly on the conditions in all prisons, jails, and other adult and juvenile correctional and detention facilities operating within their jurisdiction.”<sup>390</sup>

What would this independent citizen corrections commission look like? First, it would need to be staffed primarily with community members, possibly along with former prisoners and representatives from major religious organizations (since these institutions are often intricately involved in post-incarcerative life). All of these commission members would need to serve two to three years at minimum,<sup>391</sup> perhaps on a staggered routine to ensure continuity, to enable working smoothly and efficiently.

Critically, the private corrections oversight commission would need subpoena power and full access to all correction facility documents. The head of each private prison, as well as the heads of the privatized jails, halfway houses, and probation/post-release supervision programs, would need to report to such a commission on a regular basis, perhaps twice yearly, possibly more if there are persistent problems in any one sector of offender punishment.

What would this commission decide? To be truly useful, it would need to have real power to oversee and change practices in whichever correctional facility or alternative that it oversees. These powers would need to carefully scrutinize and oversee every aspect of the programs that could affect the punishment of offenders, including at minimum: the use of force, particularly in “disciplining” inmates; conditions of confinement; the hiring, retention, and treatment of facility staff; the

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<sup>388</sup> Michele Deitch & Michael B. Mushlin, *What's Going on in Our Prisons?*, N.Y. TIMES (Jan. 4, 2016), [http://www.nytimes.com/2016/01/04/opinion/whats-going-on-in-our-prisons.html?\\_r=0](http://www.nytimes.com/2016/01/04/opinion/whats-going-on-in-our-prisons.html?_r=0) [<https://perma.cc/H8UG-ZAG5>].

<sup>389</sup> *Id.*

<sup>390</sup> STEPHEN J. SALTZBURG, AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 1 (2008), <http://www.humanrightsfirst.org/wp-content/uploads/ABA-Resolution-and-Oversight.pdf> [<https://perma.cc/W7K3-8G4L>].

<sup>391</sup> This is similar to the set number of years served by the members of the LA County civilian review board. Chang & Sewell, *supra* note 387.



use of solitary confinement, especially as a punitive measure; re-entry planning; the procedures for parole or probation violations; and privatized health care and transport, whether these are used by private or state-run corrections. Moreover, there would likely need to be a subsection of the committee that reviewed complaints and allegations of wrongdoing, including inmate grievances, abuse claims, denial of access to health care and inmate deaths.<sup>392</sup>

As the ABA has noted about prisons in general, “[p]risoners still live in a netherworld with which few of us are familiar. . . . the operations of correctional and detention facilities [should] be transparent and accountable to the public they serve.”<sup>393</sup> This is all the more true for private prisons, jails, probation, parole and halfway houses—with such minimal transparency, the inner workings of such facilities need overview and overhaul. Despite this obvious need for correctional oversight, though, it is relatively rare to find any independent supervisory commission whose findings are disseminated to the public in the United States,<sup>394</sup> let alone any independent commission that oversees private correctional facilities. In contrast, prisons in EU member countries are subject to independent monitoring by the European Committee for the Prevention of Torture.<sup>395</sup>

The ABA section on criminal justice has recently called for independent public entities to monitor and publicly report on conditions in prisons, jails, and other correctional and detention facilities for both adults and juveniles in their jurisdictions, whether public or private. The ABA has underlined the necessity of accessing such facilities and programs; only by granting lay entities broad and unhindered access to private facilities and programs, correctional personnel, and offenders, as well as any data about these conditions and procedures, will any accurate view emerge about the operations.

Since corrections deals with extremely vulnerable populations, it is critical to provide adequate safeguards to protect those who communicate with the monitoring entity from retaliation or threats of retaliation.<sup>396</sup> And because obstruction, codes of silence, and layers of secrecy often surround corrections in general—and private corrections in particular—the citizen commission must have the power to subpoena witnesses and documents.<sup>397</sup>

These powers would need to be combined with random, surprise assessments of confinement conditions conducted by said private prison commissions, in order to ensure that reports from these for-profit corrections are accurate. Such personal visits would provide both transparency and accountability from the private punishment industry.

Each report by the commission should also be made available to the public on a timely basis, electronically and through media coverage.<sup>398</sup> This will increase the

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<sup>392</sup> Deitch & Mushlin, *Prisons*, *supra* note 388.

<sup>393</sup> SALTZBURG, *supra* note 390, at 4.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 3.

<sup>396</sup> *Id.* at 4.

<sup>397</sup> *Id.* at 6.

<sup>398</sup> *Id.* at 7.

transparency of the workings of the private corrections, as well as put pressure on the commission, the government, and the for-profit owners to change any substandard practices.

Certainly all correctional facilities and alternative corrections could use this type of oversight. But in a world of limited resources and time, the first place to start such monitoring would be in the world of for-profit, privatized corrections, which, as shown, have suffered the worst abuses.

There are numerous civilian review boards for the police, but there are few truly independent, community commissions to oversee state and local corrections, let alone private corrections. New York State has a correctional oversight board, run by the Correctional Association of New York, an NGO.<sup>399</sup> The Correctional Association of New York has been visiting prisons and reporting on conditions of confinement, under a legislative mandate for the past 165 years.<sup>400</sup> The Board of Directors of this organization is comprised of private citizens including “prominent citizens, lawyers, advocates, formerly incarcerated individuals, individuals associated with community-based organizations . . . and academics,”<sup>401</sup> but few lay citizens serve on the oversight board itself.

Although this is definitely a step in the right direction, the best bet would to have true lay diversity on the visiting committee itself, instead of members appointed by the mayor. This would permit the local citizenry to be more involved in the procedures at their local correctional facilities. Indeed, as one prison scholar notes, incorporating the local community in oversight roles helps improve correctional facilities by their very presence: “In facilities that confine people, the presence of civilian overseers humanizes everyone—inmates and staff—and makes the prison a better, more effective, and more enlightened institution for all.”<sup>402</sup>

In contrast, England has a much more comprehensive vision of prison oversight, containing three separate branches: a Prison Inspectorate that routinely inspects all correctional facilities and places of detention; a Prison Ombudsman to investigate prisoners’ complaints; and a system of Independent Monitoring Boards comprised of lay citizens, each monitoring a specific facility.<sup>403</sup>

Of course, as has been noted elsewhere, prison oversight is a many-tentacled beast, involving regulation, audit, accreditation, investigation, legal oversight, reporting, and inspection/monitoring,<sup>404</sup> among other roles. This Article’s vision for a civilian oversight board for private prisons would primarily focus on investigating reported problems and inspection/monitoring, similar to England’s Independent

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<sup>399</sup> Jack Beck, *Role of the Correctional Association of New York in a New Paradigm of Prison Monitoring*, 30 PACE L. REV. 1572, 1574 (2010).

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 1582.

<sup>402</sup> John M. Brickman, *The Role of Civilian Organizations with Prison Access and Citizen Members—The New York Experience*, 30 PACE L. REV. 1562, 1571 (2010).

<sup>403</sup> Michael B. Mushlin & Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383, 1392 (2010).

<sup>404</sup> Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438, 1439 (2010).

Monitoring Boards. The other aspects of oversight would be best assumed by either a state or federal oversight body.

The Independent Monitoring Boards of Britain and Wales merit some particular attention, as they are comprised almost entirely of local citizens. Anyone may apply to be on a monitoring board, and vacancies are routinely advertised.<sup>405</sup> Members are expected to serve two days per month. The members may enter the prison at any time, can go anywhere in the prison (subject to security considerations and personal safety), and can inquire into anything (except confidential medical files).

Independent Board Monitors visit their designated prison regularly, usually unannounced, as often as once a week; listen to the requests, concerns, and complaints of prisoners and report them if necessary; visit the kitchen, healthcare unit, and segregation units; and meet once a month, along with the director of the prison, to discuss inspection results and any concerns.<sup>406</sup> In addition, Board members are encouraged to publish their annual reports, which are publicly available on the Boards' websites and issued to the press.<sup>407</sup>

Despite the fact that these Independent Board Monitors are not executive bodies, and thus cannot demand action, their oversight has been extremely positive, improving offender treatment and increasing their protection from abuse and ill-treatment.<sup>408</sup> This positive influence stems largely “through the actual presence—in the prison, in the cells, on the landings and in the exercise yards—of people from the outside world.”<sup>409</sup> In other words, the interjection of the local community has worked wonders towards ensuring that the conditions and punishment imposed upon offenders were appropriate.

The best short-term way to tackle the problems of privatized corrections is to require the local community to oversee these institutions to help improve conditions of incarceration. In the long run, however, we must eliminate both the piecemeal and wholesale outsourcing of criminal punishment to private, for-profit entities.

#### CONCLUSION

Privatizing corrections monetizes the criminal justice system in a deeply disturbing way, rooted in a shameful history of slavery, Jim Crow, and greed. Profiting from the physical incarceration and regulation of other humans, a function normally and properly only performed by a locally elected government, is not only distasteful and often inhumane, but has serious, deleterious effects on offenders, communities, and the proper functioning of punishment in our society.

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<sup>405</sup> Vivien Stern, *Revised and Updated Speech by Baroness Vivien Stern to the Conference on Prison Oversight, Austin, Texas, April 25, 2006: The Role of Citizens and Non-Profit Advocacy Organizations in Providing Oversight*, 30 PACE L. REV. 1529, 1530 (2010).

<sup>406</sup> *Id.* at 1531.

<sup>407</sup> *Id.* at 1530–31.

<sup>408</sup> *Id.* at 1532.

<sup>409</sup> *Id.*

Nonetheless, it appears that privatizing corrections has taken a firm hold of the criminal justice system, from the beginning (privatized probation and transportation), to the middle (private jails, prisons, and services), to the end (privatized halfway houses, recovery homes, and post-release supervision). Such privatization is so pervasive that most citizens fail to realize its extent, or their role as unwilling investors in large private corrections companies.

The ultimate solution is, of course, forbidding any private, for-profit ownership or investment in corrections and punishment. In a time where privatization is generally lauded as a public good, this goal, however, is likely to take time and tremendous effort. So, what to do in the meantime?

The community must play a part. By taking a strong, proactive role in overseeing private corrections through the use of citizen oversight boards, the lay citizenry can help ensure that these for-profit entities are meeting minimal standards in living conditions, health care, food services, the imposition of discipline, the regulation of violence, and the general welfare of offenders.

The ultimate goal must be eradicating the profit motive from corrections. This eradication may be a long and drawn-out struggle, however, given the continual budget woes of states and counties. Coming up with innovative short-term solutions involving the local community may therefore be the best and fastest way to begin to combat the growing trend of cashing in on convicts.