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QUESTIONS OF LEGALITY

Privatized corrections

Questions of legality

Lauren-Brooke Eisen

New York University

Correspondence
Lauren-Brooke Eisen, 120 Broadway, 17th Floor, New York, NY 10271.
Email: eisenl@brennan.law.nyu.edu

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Research Summary: In this article, I look at some of the statutory and case law that has shaped the evolving regulation of the private prison industry. I also examine some critical gaps in legal issues regarding private contractors that manage prisons, jails, and detention facilities. The privatization of justice encompasses all for-profit firms that make money in the prison-industrial complex. Critical unanswered legal questions run the gamut from whether it is legal for corporations to pay undocumented detainees to work inside detention centers to whether it is legal for a private probation company to extend a probationer's supervision.

Policy Implications: The United States has never fully wrestled with many of the questions that private prisons raise. As private firms stretch across state lines contracting with the government at the local, state, and federal levels, their authority and accountability is not always settled law. Additionally, moral considerations have infrequently made their way into America's jurisprudential history in grappling with issues around privatizing corrections, raising possibilities of future litigation focusing on ideological grounds.

KEYWORDS
legal legality, privatization, privatized corrections

I want to thank all three witnesses for their contribution this morning in terms of enabling this committee to understand the move to privatization of correction facilities in America, and some of the legal issues, some of the practical problems and some of the public policy

issues involved.… We may want to revisit this question at some time in the future. I think we will need more experience with it. It is very recent. Its implications, I think, potentially are very far reaching. And this is not, indeed, a minor undertaking. It is something which in year 2000 we may look at in terms of failure or it may have disappeared from the scene or, indeed, it may have become something very significant in terms of this country.

— Congressman Robert W. Kastenmeier, Judiciary Committee Member, Hearing on Privatized Corrections (1985)

1 | INTRODUCTION

In November 1985, Congress convened an oversight hearing on the privatization of corrections. Private prisons were brand new at the time, a fledgling industry. The previous year, the Federal Bureau of Prisons (BOP) had signed a 3-year contract with a private firm to house 60 juveniles in La Honda, California. Additionally, Corrections Corporation of America (now rebranded as CoreCivic and one of the first companies to manage prisons and jails) had recently secured contracts to operate facilities for undocumented immigrants in Houston and Laredo, Texas; a federal prerelease treatment center in Fayetteville, North Carolina; two juvenile facilities in Memphis, Tennessee; the Hamilton County Jail in Chattanooga, Tennessee; and a work camp in Panama City, Florida.

Legislators hoped the hearings would provide insight into certain questions about this budding industry: Would privatization save money? Would conditions of confinement be improved in private prisons? Is the government even legally authorized to delegate this power to private companies?

So novel was the industry at the time that Kentucky Congressman Ron Mazzoli asked the lawyer for Corrections Corporation of America, "What do your people wear? Do they wear uniforms?" The company's lawyer answered, "Uniforms" (*Privatization of Corrections*, 1985, p. 46).

A staff attorney for the American Civil Liberties Union (ACLU) testified at the hearing, "Our fears about privatization stem from the perception that we do not have yet in place a mechanism that makes private authorities or their agents responsible for their actions in the same way that government authorities can be held accountable under current law" (*Privatization of Corrections*, 1985, p. 7). Yet the idea of contracting out the management of our prisons was so new that the ACLU's staff attorney—speaking for an organization today that explicitly states the "American economy should not include locking people in cages for profit" (American Civil Liberties Union, n.d., para. 1)—told the committee that they were not ready to take a position on the privatization of corrections (*Privatization of Corrections*, 1985, p. 5).[1]

Legal scholar Professor Ira Robbins also testified at the hearing asking questions about both the constitutionality as well as the philosophy of relying on private firms to outsource correctional management. He raised issues and questions that scholars and policy makers are still grappling with today. Robbins asked, "To what extent, for example, should a private corporation employee be allowed to use force, perhaps serious or deadly force, against a prisoner? Another example is whether a private company employee should be entitled to make recommendations to parole boards, or to bring charges against a prisoner for an institutional violation, possibly resulting in the forfeiture of good-time credits toward the inmate's release" (*Privatization of Corrections*, 1985, p. 66).

Richard Crane, Vice President of Legal Affairs for Corrections Corporation of America—the one who was asked about the uniforms—testified in front of the committee that there were no legitimate legal reasons not to contract with private prison firms. Crane said, "I will conclude by saying that there are a number of objections on legal grounds to the incarceration of prisoners by private companies. I

do not think they are well founded. I think the intentions are good. There is concern about the rights of the inmates, but I believe that all of these matters can be addressed in the contract. They can be addressed by requiring standards" (*Privatization of Corrections*, 1985, p. 30).

Two years later, in September 1987, President Ronald Reagan created The President's Commission on Privatization, established to study the breadth of activities that could be transferred to the private sector. One chapter was focused on prisons. The authors noted that by 1983, 41 states and the District of Columbia were either under court order to improve conditions or subject to litigation challenging their operations (The President's Commission on Privatization, 1988, p. 146).[2] In its 269-page report, the Commission recommended that local, state, and federal prisons be privatized, finding that, "The nation's prisons and jails are under increasing strain. … Many prisons are out-of-date as well as overcrowded. The average prison cell is 40 years old, and 10% of convicts are placed in prisons built before 1875" (p. 146).[3]

The Commission acknowledged that federal, state, and local governments had recently begun to contract with the private sector to "design, construct, and operate confinement facilities" and noted its opinion of legal authority for government to do so (The President's Commission on Privatization, 1988, p. 146). As to the government's authority to enter into these contracts, at the federal level, the Commission believed that this authority emanated from statutory law (18 U.S.C. § 4082(b), 1973).[4]

At the time of these hearings and Commission reports, the nation's prisons were bursting at the seams. Between 1972 and 1985, the nation's prison population more than doubled to 440,000 inmates. The conditions resulting from this growth played a major role in prison riots across the nation—the most notorious was the 1971 Attica uprising, where nearly 1,300 inmates took control of a maximum-security prison near Buffalo, New York, seizing hostages, and issuing demands in front of a national television audience. The eyes of the nation transfixed on the upstate New York prison, where the 5-day riot resulted in the deaths of 29 prisoners and 10 hostages. An additional 118 people had been shot. The 1972 New York Special Commission on Attica called the incident "the bloodiest encounter between Americans since the Civil War" (Lohr, 2012, para. 9). In Texas, the state prison system was so overcrowded that prisons were filled to 200% capacity. Inmates slept on hallway floors and outside in tents. One Texas prison had to serve meals constantly from 2:00 a.m. to 11:00 p.m. to ensure everyone got fed (Taylor, 1985). Even the federal prison population operated between 27% and 59% over capacity (Greenfeld, 1987).

State after state faced a massive crisis to reduce its prison populations or build additional, expensive facilities, and policy makers had to choose. It turned out that taxpayers were unwilling to foot the bill to pay for more prisons, and legislators would lose reelection if they appeared soft on crime. Any "discussion of alternatives to incarceration was the political kiss of death" (Selman & Leighton, 2010, p. 43).

Around this time, private firms were willing to take their chances and build prisons on spec, forecasting that there were enough people being sentenced to lengthy prison terms in the courts without the necessary prison space to house them. If the private prison industry had a pivotal moment, it was the mid-1980s. The nation—and the world—started to pay attention to the private industry as it wove its way into the fabric of the American correctional system. Not always bearing the names of state departments of corrections and county jails, some correctional officers' uniforms suddenly bore corporate logos. In 2011, *The New York Times* published a piece about the phenomenon, in which it was noted that, "Over time, most states signed contracts, one of the largest transfers of state functions to private industry" (Oppel, 2011, para. 8).

The last four decades ushered in an era of prison privatization that was almost unthinkable in the 1980s. Today, more than half the states and the federal government rely on private firms to run prisons, and most Immigrations and Customs Enforcement (ICE) detention beds are managed by the private

sector. Five states house at least 25% of their prison population in privately operated facilities (Carson, 2018, p. 14). And prison populations only continued to grow in the ensuring years. In fact, the number of people behind bars grew by 350% between 1980 and 2014 (Executive Office of the President, 2016).

Private prisons quickly proliferated over the last four decades with little-to-no regulatory scrutiny. Perhaps because so many prison facilities were under emergency court orders to reduce the number of incarcerated people they housed, state and federal policy makers did not feel they had the time to explore alternatives to incarceration or even how to provide necessary oversight and accountability to ensure this fledgling industry would remain answerable to the public. Thomas Beasley, the founder of Corrections Corporation of America, said the company was founded on the principle that you could sell prisons "just like you were selling cars, or real estate, or hamburgers" (Selman & Leighton, 2010, p. 58). Dealing with lagging budgets and barely making court-ordered deadlines, most states and the federal government did not create laws that would properly differentiate the private prison industry from other private contractors. Given that the people running private prison firms analogized their role to selling hamburgers, it is puzzling that the government did not do a better job of differentiating the industry.

As they continue to become entrenched in American corrections, in this article, I look at critical gaps in legal issues with private prisons. Some of the early questions have been grappled with, such as whether the government has the authority to delegate these powers to private firms. Yet other details of the public–private partnerships are less settled, for example, whether private prison officials have the authority to issue disciplinary violations. Do incarcerated people have the right to sue private prison officials for harm they cause to them behind bars? Do private prison firms need to comply with state and federal open records requests? What about the rights of noncitizens detained in private immigration detention centers? I argue that the United States has never fully wrestled with many of the questions that private prisons raise. As private firms stretch across state lines contracting with the government at the local, state, and federal level, their authority and accountability is not always settled law.

2 | CONSTITUTIONALITY

Since the inception of private prisons, legal scholars and policy makers have questioned the constitutionality of allowing private firms to manage and control correctional facilities (Field, 1987, pp. 662–663; *Privatization of Corrections*, 1985, pp. 65–101; Ratliff, 1997, pp. 371–375; Robbins, 1989, pp. 544–577). Commentators have noted that corrections is one of the most "sobering" and distinct of government's responsibilities, encompassing the "ability to deprive citizens of their freedom, forc[ing] them to live behind bars and totally regulate their lives . . . unlike any other power the government has" (Field, 1987, p. 669). Robbins has written that "while prison privatization arguably may not be wise as a matter of public policy, this does not mean that delegating the incarceration function to a private company would necessarily be unconstitutional" (1988, p. 952).

State and local governments today frequently contract out fire services, paramedics, ambulance services, road construction and maintenance, garbage collection, and police—even jails and prisons (Benson, 2011). In a 1989 article in the *New Orleans Times Picayune*, the author noted that, "By the reckoning of the 17,000-member American Correctional Association, running a prison is just another traditional government service, like education or garbage collection, that can prosper in the hands of private management. Half the battle lies in convincing the public that private interests can handle felons as adeptly as they do college degrees and trash bags" (Rose, 1989). Yet running prisons and jails and collecting garbage are inherently different services. In a keynote speech at a 1985 national convention of the National Association of Criminal Justice Planners, Michael E. Smith, the former director of the

Vera Institute of Justice, a New York City–based research and policy institute remarked, "Justice is not a service, it's a condition, an idea. … It's not like garbage collection. Prisoners are not garbage" (Tolchin, 1985, p. A17).

Since the 1980s, when private prisons started to manage prisons and jails, legal scholars have grappled with the complicated constitutional questions privatization of corrections entails.

2.1 | Does contracting with private prison firms violate the democratic process?

At their inception, in the mid-1980s, one of the attractions in contracting with private prison was the speed with which companies could build the facilities and the lack of political capital government officials needed to spend to build them. Government officials and taxpayers alike clung to notions that private industry would raise the initial capital to build facilities more cheaply and efficiently than government. Corporations could circumvent years of government studies, bids, and approval by voters to issue government bonds to finance prison construction (Eisen, 2018).

When the government—whether a county or a state—intends to build a new correctional facility, it almost always needs to solicit the approval of voters in a referendum or bond issue. Governments building their own prisons tend to finance the construction of new correctional facilities through taxes and with general obligation bonds. These bonds—while backed by the government—still require voters to authorize the government to borrow money. Through this political process, community members have frequently defeated plans to construct new jails and prisons (Dolovich, 2005, p. 437, n. 63; Joel, 1993, p. 58).[5] Contracting with the private sector to build these facilities does an end-run around that political process. Some scholars argue that private financing allows for governments to ignore the will of the people and effectively force communities to pay for the facility through taxes (Field, 1987, pp. 669–670).

Another argument is focused on the worry that private prison firms are not held accountable to the public in how they manage their facilities in the same way that government corrections are (Field, 1987, pp. 669–670). Although communities often protest alleged human rights abuses at private prisons and the media frequently attempts to write about unconstitutional conditions of confinement in both public and private prisons, it is more difficult to demand change at facilities managed by private firms because their leadership is not as accountable to the community.

2.2 | Nondelegation doctrine issues

Early on, scholars asked whether the government could constitutionally "delegate" the authority to manage prisons and jails to private parties. The crux of this inquiry is focused on the government's delegation of core governmental duty to the private sector. Some scholars feared this delegation went too far, allowing the government to abdicate responsibility for running correctional institutions, thereby posing a "danger that private parties will misuse public power to serve their own ends" (Ratliff, 1997, p. 381).

Article I of the U.S. Constitution states that "all legislative Powers herein granted shall be vested in a Congress of the United States" (U.S. Const. art. I, § 1). And although the U.S. Constitution does not explicitly state that Congress is unable to delegate its powers to other agencies or actors, the U.S. Supreme Court has held that Congress may not delegate its powers to other branches of government or private actors (*Carter v. Carter Coal Co.*, 1936; Robbins, 1988, p. 915). Succinctly translated, the doctrine was written to ensure that legislative and policy decisions are not delegated "without proper safeguards" (Field, 1987, p. 674).

Over the years, as the Supreme Court has reviewed more cases debating the "nondelegation" doctrine, it has held that Congress needs merely to articulate an "intelligible principle" about how private prisons operate (*J.W. Hampton, Jr. & Co. v. United States*, 1928, p. 409). In 1928, the Supreme Court held that as long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power" (*J.W. Hampton, Jr. & Co. v. United States*, 1928, p. 409). The law as it applies to private prisons has effectively established that as long as the delegation "implement(s) well defined correctional policy with sufficient oversight," it does not run afoul of the Constitution (Mushlin, 2017).[6] Indeed, where the delegation is provided with adequate "guidance and oversight," courts have tended to uphold the delegation (Mushlin, 2017).

Federal courts have stayed away from strict adherence to the "nondelegation" doctrine as "they have recognized that the modern regulatory state cannot function without broad rulemaking and adjudicative powers for executive bureaucrats" (Ratliff, 1997, p. 381). Professor Robbins spilled a great deal of ink exploring this question, pointing out that federal courts have tended to accept the delegation of federal powers to private actors (Robbins, 1988, p. 914). As applied to the private prison context, the conclusion cited in most cases has been that contracting with private firms to run prisons does not violate the "nondelegation" doctrine.

In one of the few cases challenging privatized corrections as per se unconstitutional, *Pischke v. Litscher* (1999), several inmates in a Wisconsin state prison sought habeas relief and injunctive and declaratory relief to invalidate a Wisconsin statute authorizing prison authorities to enter into contracts with private prisons in other states for the confinement of Wisconsin prisoners. The Seventh Circuit rejected the constitutional argument on Thirteenth Amendment grounds, citing the "express exception" to the prohibition on involuntary servitude for people incarcerated in federal or state prisons (*Pischke v. Litscher*, 1999, p. 499). Judge Posner saw no constitutional infirmity whatsoever; in dicta, he described the challenge as "thoroughly frivolous" and noted he could not "think of any … provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government" (*Pischke v. Litscher*, 1999, p. 499).

Plaintiffs in Oklahoma also argued that a state statute authorizing the county of Tulsa to contract with a private company to operate the Tulsa County Jail was an unconstitutional delegation of government authority (*Tulsa Cty. Deputy Sheriff's Fraternal Order of Police v. Bd. of Cty. Comm'rs*, 2000). The statute in question authorizing private jails in Oklahoma stated that private contractors must follow the "standards prescribed and established for county jails, including but not limited to standards concerning internal and perimeter security, discipline of inmates, employment of inmates, and proper food, clothing, housing, and medical care" (Okla. Stat. tit. 19, § 744, 1991). The Oklahoma Supreme Court held the legislation a proper delegation of authority because the statute explicitly provided adequate standards for jail operations to assist the counties in implementing jail privatization (*Tulsa Cty. Deputy Sheriff's Fraternal Order of Police v. Bd. of Cty. Comm'rs*, 2000).

Similarly, in Alaska, a prisoner challenged the constitutionality of his transfer to a private prison out of state to Arizona (*Hertz v. State*, 2001). The Appeals court in Alaska held that the Alaska Department of Corrections did not unconstitutionally delegate its power to incarcerate Hertz. In finding that the delegation was proper, it pointed to state legislation articulating that Alaska inmates may be sent to private out-of-state prisons if the commissioner finds that "(1) there is no other reasonable alternative for detention in the state; and (2) the agreement is necessary because of health or security considerations involving a particular prisoner or class of prisoners, or because an emergency of prisoner overcrowding

is imminent" (Alaska Stat. § 33.30.031, 1992). Influential in the Court's decision was the fact that the Arizona Department of Corrections retains authority over all significant decisions involving Alaska inmates housed at their facilities (*Hertz v. State*, 2001, p. 895, n. 21).[7]

2.3 | Due process and civil rights violation claims

Other circuit courts have followed suit in denying private prison inmates habeas corpus petitions and even, at times, refusing to remand the cases because doing so would be a "waste of judicial resources." For example, the Ninth Circuit held there was no due process violation in transferring prisoners to out-of-state private prisons barring the prisoner from visiting with legal counsel (*White v. Lambert*, 2004, p. 1013). And in *Montez v. McKinna*, the Tenth Circuit denied a pro se habeas petition, challenging interstate prison transfers under state and federal law in part because "there is no federal constitutional right to incarceration in any particular prison or portion of a prison" (*Montez v. McKinna*, 2000, pp. 865–866). Both plaintiffs' petitions for certiorari were denied, and neither case made it before the Supreme Court, which missed a prime opportunity to resolve a novel and conflicting issue of first impression in many jurisdictions.

In a landmark decision, in 2009, the Israeli Supreme Court ruled held that privatization of prisons is a per se violation of human rights (HCJ 2506/06 *Acad. Ctr. of Law & Bus. v. Minister of Fin,* 2009). This case is notable not only for its denouncement of private prisons but also for the fact that its ruling was not based on the potential consequences of that same privatization. Instead, the Israeli Supreme Court held that the Israeli law creating the country's first privatized prison violated Israel's Basic Law: Human Dignity, because privatization itself inherently violated the human dignity of prisoners. These types of challenges have been few and far between in the United States. So far, the U.S. Supreme Court has yet to take up the issue and determine the constitutionality of private prisons beyond the narrow issues of state actor, liability, and delegation of authority.

It is surprising that the Supreme Court has not taken up the issue and has not decided whether private prison facilities run afoul of constitutional liberties and, more importantly, human dignity. The Supreme Court has granted certiorari on cases dealing with cabined tortious liability and damages issues facing private institutions and their state counterparts, issues that certainly do not provide the Court with the ability (even if it were inclined to decide) to prohibit privatized corrections on due process, nondelegation, or other similar constitutional grounds.

Yet conditions in privatized U.S. prisons are currently being challenged throughout the country. Non-governmental organizations and private individuals have brought several high-profile lawsuits alleging that various outcomes related to privatization of people in prisons and detention facilities violate fundamental human rights (Order Granting Defendants' Motion to Dismiss, *Am. Friends. Serv. Comm. v. Brewer*, 2011, p. 662; *Parsons v. Ryan*, 2014, p. 662).[8]

3 | LEGAL RECOURSE FOR PEOPLE INCARCERATED IN PRIVATE PRISONS

3.1 | Incarcerated individuals' access to the courts

42 U.S. Code, Section 1983, provides that if a state actor uses the legal system to deprive you of your constitutional rights, you may have a cause of action against that actor, providing a civil cause of action against the person responsible.

But in 1996, Congress passed the Prison Reform Litigation Act (P.L.R.A.), a law aimed at reducing the number of civil lawsuits brought by prisoners, essentially making it more difficult for prisoners

(public or private) to file lawsuits in federal court (Prison Litigation Reform Act, 1996). Enacted in response to what Congress considered to be frivolous prisoner litigation, the statute was "designed to make it more difficult for prisoners to take their complaints to federal court" (Boston, 2000, p. 305).[9] After Congress enacted the P.L.R.A. in 1996, many states enacted their own version of the federal statute (Maryland Prisoner Litigation Act, 1996; Pennsylvania Prison Litigation Reform Act, 1998; Texas State Inmate Litigation Act, 1995; Wisconsin State Prison Litigation Reform Act, 1997).

The main provisions of P.L.R.A. include requiring prisoners first to attempt to resolve the complaint through the prison's grievance procedure; requiring prisoners to pay court filing fees in full; requiring that after three suits or appeals that get dismissed because they are frivolous, malicious, or fail to state a claim, a prisoner cannot file another lawsuit in forma pauperis (28 U.S.C. § 1915(g), 2012);[10] and lastly requiring that prisoners cannot file suit for mental or emotional injury unless there is also physical injury (42 U.S.C. § 1997a(e), 2012).[11] In essence, the P.L.R.A. ensures that no action under 42 U.S.C.A. § 1983 can be brought, with respect to prison conditions, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted ("Exhaustion of remedies in suits by prisoners with respect to prison conditions," 1998).

Sweeping in scope, the P.L.R.A. requires exhaustion of administrative remedies for all prisoner suits regardless of whether they involve general circumstances of incarceration or allege an Eighth Amendment violation based on use of excessive force ("Exhaustion of remedies in suits by prisoners with respect to prison conditions," 1998; *Porter v. Nussle*, 2002). To bring suit, a prisoner has to "make use of whatever grievance procedures are available … in the prison system and take [the] grievance all the way to the top by taking every appeal available" (*Porter v. Nussle*, 2002, p. 523). This requirement applies not just to § 1983 suits, but to *all* "action[s] … brought with respect to prison conditions" (*Porter v. Nussle*, 2002, p. 524). The P.L.R.A. made it substantially more difficult to sue as a prisoner, whether public or private.

Given its far-reaching provisions, it is not surprising that over the last two decades, the P.L.R.A. has had a dramatic impact on jail and prison litigation. According to a recent study, from the time the P.L.R.A. was enacted to 2014, the number of filings has decreased by more than 50% when compared with the number of cases filed per every 1,000 inmates nationally (Schlanger, 2017, p. 73).[12]

The law has been heavily criticized for making it almost impossible for inmates to file lawsuits against the prisons and people within them who violate inmates' rights. A recent *New Yorker* article put it this way: "There are currently no regulations governing prison grievance processes, and, in two decades since the law's passage, many prisons' procedures have become so onerous and convoluted—'Kafkaesque,' in the words of one federal judge—that inmates whose rights have been violated are watching their cases slip through the cracks" (Poser, 2016).

With that said, questions remain unanswered with respect to how the P.L.R.A. affects private prison litigants. Does the P.L.R.A. apply to suits brought by private prison inmates? Are private prison officials entitled to qualified immunity or a good faith defense?

3.2 | Private prisons inmates access to the federal courts after the P.L.R.A

Private prison officials have been held accountable as state actors in numerous federal court decisions. Although the Supreme Court has yet to address the relationship between the P.L.R.A. and private prisons directly, circuit courts have uniformly held that the P.L.R.A. applies to suits brought by inmates against private prison officials. In *Roles v. Maddox* (2006), the Ninth Circuit held that the P.L.R.A. exhaustion requirement applied to private prison inmates. There, Roles was incarcerated in an Idaho private prison operated by CoreCivic. The suit stemmed from an alleged incident in which a CoreCivic employee confiscated magazines from Roles's cell. Rather than exhaust the prison's internal grievance

procedures, Roles brought a § 1983 claim against CoreCivic, asserting that his First and Fourteenth Amendment rights were violated by the confiscation by private prison officials. The district court dismissed, and the Ninth Circuit affirmed, holding that the P.L.R.A.'s exhaustion provision applies with "equal force" to prisoners held in private prisons (*Roles v. Maddox*, 2006, p. 1017). The Ninth Circuit reasoned that the plain language of the statute makes clear that the exhaustion rule is to apply to all prisons, state owned or otherwise (*Roles v. Maddox*, 2006, p. 1017).[13] The Court noted the congressional intent behind exhaustion—namely, the "conservation of judicial resources through alternative dispute resolution"—necessitated a broad reading and application of the P.L.R.A. (*Roles v. Maddox*, 2006, p. 1017).

The Ninth Circuit is one of many lower courts that have addressed the P.L.R.A.'s application to private prisons. Meanwhile, the Supreme Court is unlikely to hear a challenge to the P.L.R.A.'s application any time soon. There seems to be a consensus among the circuit courts that the P.L.R.A. and its exhaustion requirement "plainly [apply]" to private prisons (*Boyd v. Corrs. Corp. of Am.*, 2004, p. 994; *Pri-Har v. Corrs. Corp. of Am.*, 2005, p. 888; *Ross v. Cty. of Bernalillo*, 2004, p. 1184).[14]

3.3 | Are private prison officials entitled to qualified immunity in civil rights actions?

As it concerns private prison officials' ability to invoke qualified immunity in civil rights cases, courts started to distinguish between privately operated and publicly operated prisons. In traditional civil rights lawsuits against prison employees, they are entitled to qualified immunity. In particular, prison staff are not liable in damages unless (1) their actions violate clearly established statutory or constitutional rights or (2) it is proven that the prison official acted with malice toward the inmate (*Hope v. Pelzer*, 2002, p. 739). In 1997, the U.S. Supreme Court differentiated the immunity doctrine for civil rights claims against private prison officials.

In *Richardson v. McKnight*, a prisoner held in a private prison in Tennessee sued under § 1983, alleging that private prison officials violated his constitutional rights when they placed him in "extremely tight physical restraints," which then caused him physical injury (*Richardson v. McKnight*, 1997, p. 401). The prison officials moved to dismiss on qualified immunity grounds. The lower courts held that the immunity doctrine did not apply and that the prison officials would be liable if it was determined that constitutional rights were violated. In fact, the United States Court of Appeals for the Sixth Circuit concluded, primarily for reasons of "public policy," that privately employed prison guards are not entitled to the immunity provided their governmental counterparts (*McKnight v. Rees*, 1996, p. 425). The Court articulated a strong argument for treating private prison officials differently from government ones, noting that, "As long as a profit can be realized from the venture, we have no fear that denying qualified immunity to these defendants will result in a dearth of qualified applicants seeking entry into the field" (*McKnight v. Rees,* 1996, p. 425). The U.S. Supreme Court affirmed and declined to extend immunity to the private prison employees (*Richardson v. McKnight*, 1997, p. 413).

The Court had several rationales for not extending immunity in *Richardson*. First, the Court looked to history and found "no evidence of a historical tradition of immunity for private parties carrying out [prison management]" (*Richardson v. McKnight*, 1997, p. 407). In fact, the Court listed a slew of cases where the common law provided mistreated prisoners in states with prison leasing systems remedies against mistreatment by the private entities leasing the prisoners from the state. Some of these cases date back to the late 1800s when prisoners or their families were permitted to recover from private contractors for injuries they caused them while incarcerated, including for a chain-gang death and other injuries caused by private contractors through unlawful whipping (*Richardson v. McKnight*, 1997, pp. 405–406).[15]

Second, the Court rejected the defendant's argument that "mere performance of a government function" should warrant immunity. For the purposes of immunity, it did not matter that private prison guards performed the same functions as public prison guards (*Richardson v. McKnight*, 1997, pp. 408–409).

Third, the Court noted that "competitive pressures" in the market and sufficient protections available to private prisons (i.e., private-sector insurance) make it so that private prison officials are not "unwarrant[ly] timid" in carrying out their duties (*Richardson v. McKnight*, 1997, pp. 409–410). According to the Court, these competitive pressures are significant as a "firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job" (*Richardson v. McKnight*, 1997, p. 409).

Although the Court in *Richardson* did not grant immunity, that holding came with several caveats. First, the Court noted that its decision was made in the context of private prisons operating with limited direct supervision by the government, undertaking this work for a profit, and potentially in competition with other businesses for the government contract (*Richardson v. McKnight*, 1997, p. 413). The Court indicated its decision might be different if these factors were not present and if this were a case of "a private individual briefly associated with a government body serving as an adjunct to government … or acting under close official supervision" (*Richardson v. McKnight*, 1997, p. 413). Second, the Court stated that even though there was no immunity available for private prison defendants, it did not rule out a possibility that defendants could assert a "special 'good faith' defense" to the action (*Richardson v. McKnight*, 1997, p. 413).

Since *Richardson*, courts have held that qualified immunity does not apply to private prison employees in most cases (*United States v. Thomas*, 2001, p. 448).[16] In the case of private prison doctors, however, case law has moved in the other direction (*Morris v. Ghosh*, 2011, p. *5).[17] It is also important to note that the Court's decision in *Richardson* does *not* prevent a state from using common-law immunities to shield private prison guards from state tort actions (*Robinson v. Corrs. Corp. of Am.*, 2002, p. *6).[18] For example North Carolina has conveyed the same degree of immunity to private and public prison guards through legislation (N.C. Gen. Stat. § 148-37(g), 2007).[19] Despite these state workarounds, it is settled law that private prison guards are *not* entitled to qualified immunity from civil lawsuits.

4 | NO *BIVENS* REMEDY FOR THOSE SERVING TIME IN PRIVATE FEDERAL FACILITIES

In *Corr. Servs. Corp. v. Malesko* (2001), the Supreme Court addressed the issue of how to apply *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* (1971) to an action brought by a federal inmate against a private prison corporation (*Corr. Servs. Corp. v. Malesko*, 2001, p. 63). A "*Bivens* action" refers to a suit for damages when a federal officer acting under the color of federal authority allegedly violates the U.S. Constitution (*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 1971). In *Malesko*, the prisoner was serving an 18-month sentence and was diagnosed with a heart condition, limiting his ability to engage in physical activity. The BOP transferred Malesko to a private prison run by Correctional Service Corporation (CSC). He was assigned to live on the fifth floor, and CSC required inmates residing below the sixth floor to use the stairs. Malesko alleged that because a CSC employee did not allow him to use the elevator, he was forced to climb stairs and suffered a heart attack as a result. Malesko filed a *Bivens* action against CSC and unnamed CSC employees, seeking damages.

The Supreme Court ruled against Malesko, finding *Bivens* did not extend a right of action for damages against private entities acting under color of federal law (*Corr. Servs. Corp. v. Malesko*, 2001). The Court noted *Bivens* is meant to deter individual federal officers, not a private agency, from committing constitutional violations, holding "if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury" (*Corr. Servs. Corp. v. Malesko*, 2001, pp. 70–71). The Court went on to note that it has implied a right of action only when plaintiffs are left without a remedy or when it is essential to provide an effective deterrent (*Corr. Servs. Corp. v. Malesko*, 2001, p. 70). Here, Malesko sought a remedy only against the corporation. The Court held that such a remedy was not necessary to deter unlawful activity and Malesko could avail himself of common-law tort remedies (*Corr. Servs. Corp. v. Malesko*, 2001, p. 74).[20]

Post-*Malesko*, prisoners held in private facilities operated under contract with the *federal* government are not able to bring civil rights claims against private prison corporations. This is the case even though incarcerated people in private prisons can bring § 1983 actions against private prisons operated under contract with *state or local* governments. Congress could create a cause of action for constitutional violations by private prison operators (American Bar Association, 2011).[21] Even though it is unlikely to occur, Congress *should* create this private right of action. This legislation would provide a measure of accountability and a degree of symmetry between private prisons operated for state and local governments and private prisons operated for the federal government.

Although *Malesko* resolved the issue of whether actions could be brought against private prison corporations contracting with the federal government, it did not resolve whether inmates can bring claims against private prison guards and staff. Since *Malesko*, lower federal courts have grappled with this issue and have split. The Tenth and Fourth Circuits held that a *Bivens* action does not lie against individual employees of private prisons because *Bivens* does not authorize a federal right of action where there is a remedy under state law (*Peoples v. CCA Det. Ctrs.*, 2005, p. 1102).[22] District courts in the First and Third Circuits have taken a contrary view (*Sarro v. Cornell Corr., Inc.*, 2003, p. 61).[23] In *Sarro v. Cornell Corrections, Inc.*, the court reasoned that private guards act "under color of federal law" because of the role they play in exercising "powers traditionally exclusively reserved to the government" (*Sarro v. Cornell Corr., Inc.*, 2003, p. 60). The court stated that the "core" purpose of a *Bivens* action is served by allowing an action since doing so would "deter individual federal officers from committing constitutional violations" (*Sarro v. Cornell Corr., Inc.*, 2003, p. 60).[24]

Most recently, in *Pollard v. The GEO Group, Inc.*, the Ninth Circuit allowed an inmate to pursue a *Bivens* action against employees of a private corporation operating a federal prison, holding that the availability of state remedies, alone, is a not sufficient basis to displace *Bivens* (*Pollard v. GEO Grp., Inc.*, 2010, p. 593). The Supreme Court reversed and held that where the alleged unconstitutional conduct of the private prison employees "typically falls within the scope of traditional state tort law" and those state tort remedies are adequate, there is *not* an implied *Bivens* action (*Minneci v. Pollard*, 2012, p. 120).[25] *Pollard* makes it clear that if state-law tort remedies are available and adequate, private prison inmates can only obtain relief against private prison employees under state tort law.

Courts have had to determine whether specific doctrines that affect prison litigation apply to private prisons. The first instance involves deciding whether private prison officials are entitled to qualified immunity. The second instance concerns whether a federal inmate may bring a *Bivens* suit against private prison corporations, officials, and so on. In cases that have reached the Supreme Court dealing with these questions, the Court indicated that private prisons do not fit the paradigm governing state-run

facilities and that doctrines developed for state-run facilities do not *automatically* apply to these entities. Although not every doctrine (i.e., good faith) is fully fleshed out in the private prison context, there is a good deal of clarity based on circuit court and Supreme Court jurisprudence. As more litigation is generated, hopefully the cases will shed additional light on the questions discussed earlier and provide guidance to private inmates seeking to bring suits against private prison corporations, officials, or both.

5 | STATUTORY PROVISIONS PROHIBITING PRIVATE PRISONS

Even though the courts have grappled with issues of constitutionality, although sparse, some laws bar the government from contracting with private prisons. Today, at least 25 states and the federal government have passed laws authorizing private prisons (Ratliff, 1997, p. 373). Yet a handful of states have done the opposite and have proactively enacted legislation to prohibit their state department of corrections from contracting with private prisons within their jurisdictions.

5.1 | State laws

Currently, three states explicitly ban the use of private prisons: New York, Illinois, and Iowa. All three state prohibitions are statutory and are not incorporated into each state's constitution. Numerous factors can help explain why these states took a different route. Legal scholar Brett Burkhardt argued that news framing by the *Chicago Tribune* and *New York Times* around 1990 was focused on the moral illegitimacy of private prisons (Burkhardt, 2014, p. 290). Burkhardt argued the media fostered cultural opposition and public resentment toward private prisons and posited that ideology and certain variables—liberalism, union strength, and unemployment—played important roles in New York and Illinois contracting for corrections management (Burkhardt, 2014, p. 290).

In 1990, Illinois enacted the Private Correctional Facility Moratorium Act (the "Act") and amended its charter to prohibit contracts with private parties for the operation of state prisons (730 Ill. Comp. Stat. Ann. 140/2, 2012).[26] Under the statute, the Illinois Department of Corrections cannot contract with private contractors for the transportation of Illinois prisoners to and from out of state. The Act also prohibits the ownership, operation, or management of correctional facilities by for-profit private contractors.

In support of the prohibition, Illinois lawmakers reasoned that the "management and operation of a correctional facility or institution involves functions which are inherently governmental" (730 Ill. Comp. Stat. Ann. 140/2, 2012). Although there is a lack of legislative history on the 1990 law, it seems that the power of (politically conservative) guard unions prevented outsourcing to private facilities (Jackson, 2005, p. 277).

In 2007, the Iowa legislature passed an amendment to § 904.119 of the Iowa Code, prohibiting any public–private state partnership to house individuals in private prisons. The statute reads, "The department shall not enter into any agreement with a private sector for-profit entity for the purpose of housing inmates committed to the custody of the director" (Iowa Code Ann. § 904.119, 2007).

Also in 2007, New York passed Correction Law §§ 120–121, under which the state expressly prohibited the "private operation or management of a correctional facility" (N.Y. Correct. Law §§ 120–121, 2009). The New York Senate stated the purpose of the bill: "To specifically preserve as a non-transferable governmental responsibility the duty to maintain custody and supervision of persons committed or sentenced to state and local correctional facilities by prohibiting the replacement

of state and local correction officers by private guards" (Nozzolio, 2007, para. 4). The legislature was concerned about training and wages offered to private guards as well as about how privatization would function at times of "crisis," although no examples of such crises were cited. The legislature also provided an economic rationale, citing a study in which it was shown that "where a private system is run fairly well, there are little or no savings to the government" (Nozzolio, 2007, para. 5).

The primary motivation behind the ban was a mounted push by prison unions to amend the statute. Indeed, that is what happened. Section 120 was added to ensure that "the supervision and maintenance of inmates in custody at correctional facilities would continue to be provided exclusively by peace officers who are in the competitive, non-competitive or exempt class of New York State's civil service system" (Nozzolio, 2007, para. 6).

These state bans do not seem to preclude federal agencies (i.e., ICE) from establishing their own private detention facilities in the same states. For example, despite the ban in place in New York, the U.S. Marshals Service contracted with GEO to manage a private civil detention center in Queens, New York (GEO Group, Inc., n.d.).[27] According to GEO Group, the company provides for the "secure care, custody, and control to those awaiting deportation procedures who have attempted to enter the country illegally" (GEO Group, Inc., n.d.). Per New York's statute, however, no state inmate can be housed at a correctional facility managed or owned by a private firm.

Although no one has ever challenged the lawfulness of New York's private detention center in court, one could make an argument that its very existence is unauthorized because state legislators expressly banned private contracts for correctional facilities in the state. In a memo written by Senator Michael Nozzolio, the law's sponsor, he expressed concern over immigration detention. Nozzolio wrote that, "The Immigration and Naturalization Service recently canceled a contract with a private company after an investigation by I.N.S. found that as part of the process of cutting costs, the government had on its hands untrained $8.00 an hour guards, totally unaware of their responsibilities in an emergency" (Nozzolio, 2007, para. 5). Given the analogy to private immigration detention in the sponsor's memorandum in support of the legislation, one could at least argue that even if technically legal, the philosophy of allowing a private immigration detention facility in New York is at odds with the state's own policy makers.

5.2 | Federal laws

No federal laws prohibit the federal government from contracting with private firms to manage jails, prisons, and detention centers. Yet some policy makers have introduced federal legislation to bar private contractors from operating these facilities.

At the federal level, in 2001, Senator Russell Feingold and Representative Ted Strickland introduced the Public Safety Act, which would have banned the incarceration of federal prisoners by private contractors and curtailed federal grants to states using private prisons (Public Safety Act, 2001). In 2015, Senator Bernie Sanders introduced the Justice Is Not for Sale Act, which would have banned private prisons, reinstated the federal parole system, and eliminated quotas for the number of detained immigrants (Justice Is Not for Sale Act, 2017).

Both Senators Hillary Clinton and Sanders called for an end to private prisons during the 2016 presidential campaign trail (Foley, 2015). Soon thereafter, Washington State Democrats issued a resolution (a) calling for the abolition of private, for-profit incarceration in Washington State and in the United States and (b) declaring that they will not accept donations from companies in the for-profit prison industry (Benton Cty. Democratic Cent. Comm., 2018).

6 | DOES OUR LEGAL FRAMEWORK ENCOURAGE PERVERSE INCENTIVES TO INCREASE LENGTH OF STAY?

One significant criticism of the power of private prisons, and ultimately a concern about due process rights, is the undue power that staff at private prisons have on the disciplinary infractions they are authorized to give to prisoners as well as to their role extending parole. In states with indeterminate sentencing, the prison term does not state a specific release date, merely a range of time, such as "one-to-three years." Many states with indeterminate sentencing rely on parole boards and so-called "good-time credit" for participation in certain educational or rehabilitative programming to determine a person's sentence.

Correctional officers have great discretion to dole out disciplinary violations that are included in a prisoner's parole files, possibly swaying parole boards that have the discretion to release individuals within the range of their indeterminate sentence. Because many corporations that manage prisons are paid per prisoner per day, they have a financial incentive to extend inmate stays as long as possible, thereby likely advocating to reduce a prisoner's chances for parole or good time off by recommending disciplinary infractions (DiIulio, 1990). Each prisoner released produces a revenue loss for private prison operators, thereby incentivizing them to ensure lengthier prison stays (Ratliff, 1997, p. 393). When prisons are operated by private firms, the process can be biased against the inmate. The correctional officer writing the infraction—and possibly the hearing officer—may be employed by a for-profit company with a financial stake in maintaining a full prison (Dolovich, 2005, p. 520).

Political scientist Don DiIulio Jr. argued for a normative approach to thinking about the private management of prisons and jails. "Should the authority to administer criminal justice in prisons and jails, to deprive citizens of their liberty, and to coerce (even kill) them, be delegated to contractually deputized private individuals, or ought it remain in the hands of duly authorized public officials?" (DiIulio, 1990, p. 156). Some scholars argued that private prison firms' "financial biases should bar them from assuming power to determine release dates, to write disciplinary rules or make final disciplinary decisions, to set security classifications, or to control work assignments or work credits" (Ratliff, 1997, p. 389).[28] This line or reasoning indicates a direct conflict between prisoners' liberty interest and for-profit firms' profit motives.

The Supreme Court has weighed in on the constitutional due process guarantees applicable to prison disciplinary proceedings. In *Wolff v. McDonnell* (1974), the Court observed that the unique requirements of prison life necessarily involve the retraction or withdrawal from incarcerated people of many rights and privileges routinely afforded to ordinary citizens. In *Sandin v. Conner* (1995), the Court held that a short period of confinement in punitive segregation (30 days in this case) was within the conditions inherent in a valid incarceration sentence and did not create a liberty interest that would entitle an incarcerated person to due process protections.

Yet case law on the authority for private prison operators to discipline incarcerated individuals is a bit thorny. In 1998, the Supreme Court of Tennessee held that the Tennessee Department of Correction's (TDOC) uniform disciplinary procedures, under which disciplinary violations at a prison operated by a private prison firm were initially heard by a board made up of private prison staff, did not rise to the level of unlawful delegation of authority under Tennessee state law (*Mandela v. Campbell*, 1998; Private Prison Contracting Act, 1986). Tennessee state law prohibits a contract for Correctional Services from disciplining a prisoner (Private Prison Contracting Act, 1986, sec. 110).[29] Two prisoners who received disciplinary violations at the South Central Correctional Facility, a state prison operated by the private firm Corrections Corporation of America, argued that it was an unauthorized delegation

of authority to allow a disciplinary board comprised of private contractor employees to sanction them (*Mandela v. Campbell*, 1998).

In reviewing the evidence, the Court found that the board made recommendations to a TDOC liaison and that final approval of the disciplinary recommendation rested exclusively with a representative of the TDOC. Because the board merely issued a recommendation and the sanction was not imposed until the TDOC designee reviewed the case and approved the board's recommendation, the Court held that this was not an unlawful delegation of authority (*Mandela v. Campbell*, 1998, p. 535). The holding has been reaffirmed since, and in 2003, the Court of Appeals of Tennessee noted, "The procedure required by statute and approved by our Supreme Court allows disciplinary panels made up of employees of private contractors to conduct disciplinary hearings and make recommendations, but requires the concurrence of a TDOC employee designated by the Commissioner before punishment can actually be imposed" (*Young v. Tennessee Dep't of Corr.*, 2003, p. *1).

Ruling in favor of a prisoner's claim that the disciplinary proceedings against him were illegal because the state is prohibited by statute from delegating prison disciplinary procedures to private contractors, in *Pigg v. Casteel* (1999), the Court of Appeals of Tennessee agreed with the prisoner who was sanctioned after a corrections officer searched the prisoner's cell and found seven pieces of fabric allegedly taken from a prison workshop. At a hearing conducted by a disciplinary panel composed of three private prison employees, the panel found the prisoner guilty of possessing contraband and sentenced him to 5 days of punitive segregation along with ordering other disciplinary sanctions. The Court found that because a hearing summary that was mandated by the Department of Corrections disciplinary procedures was not found in the record, they could not know for certain whether the commissioner's designee participated in the decision to issue a disciplinary violation. The Court said that it was implicit that the function of the commissioner's designee was not to serve merely as a rubber stamp for the actions of the prison's disciplinary board but to take an active and decisive role in the disciplinary process (*Pigg v. Casteel*, 1999).

Similarly, in 2009, the Court of Appeal of Louisiana, First Circuit held that prisoners at private prisons may lose good time credits as part of disciplinary sanctions if the State Department of Corrections approves the penalty of a loss of good time (*Simon v. Stalder*, 2009).[30]

The ability to delegate the authority to private contractors who operate prisons to write up disciplinary violations and fill out forms (and even recommendations) to parole boards varies from state to state. At least one scholar has reviewed state statutes that authorize private contractors to operate prisons and jails finding that 12 states take a "strikingly lax approach to prison privatization" while 9 of these states have "not made even token attempts to limit the breadth of contractors' power over inmates' liberties" (Ratliff, 1997, p. 407). The vague language in these statutes does not prohibit private contractors from issuing disciplinary violations and recommending (or not recommending) parole release to a parole board in possible violation of prisoners' due process rights (Ratliff, 1997, pp. 408–409). Some states contract with private prison operators to manage prisons and jails despite no authorizing statute allowing these contracts, opening up legal questions as to what the private prison operator's authority is to engage in writing up disciplinary infractions and making recommendations to parole boards (Ratliff, 1997, p. 398).

Some clarity exists, however, in the at least 11 states that prohibit private prison operators from granting, denying, or revoking prisoners' good-time credits (Ratliff, 1997, p. 412).[31] Yet as some academics have noted, there is little research regarding whether correctional officers and staff employed by private prison firms are abusing their discretion this way (Dolovich, 2005, p. 521). In one recent study of prisons in Missouri, however, a scholar did find that on average people serving time in private prisons served sentences 7% longer than those in public prisons (Mukherjee, 2017). The author attributed this difference to the increased use of conduct violations in private institutions.

7 | PUBLIC DISCLOSURE LAWS

Public disclosure laws are a bit of a Pandora's box when it comes to private prison corporations. Today, all federal governmental agencies are subject to public disclosure laws. For example, the BOP, ICE, and the U.S. Marshalls Service (USMS) are bound by the Freedom of Information Act (FOIA) and other government open records laws (Waks, 2013, p. 1071). Congress passed the FOIA in 1966 as a bipartisan effort to make them more transparent (Casarez, 1995, p. 264; Freedom of Information Act, 1966).

Making them less accountable to the public, private contractors are not under the same legal obligations as the government to be transparent about their operations. This also applies to private firms managing prisons and detention centers. The FOIA statute does not name or exempt private contractors, yet judicial and administrative interpretations of FOIA have effectively exempted private contractors from compliance (Sekera & Agostino, 2017). Additionally, the 2013 Department of Justice (DOJ) procedural manual on processing FOIA requests states, "courts have held that private citizens and corporations, and non-profit organizations are not subject to the FOIA" (U.S. Department of Justice, 2014, p. 8; see also Sekera & Agostino, 2017).

Yet despite the historical precedent to exempt private contractors from FOIA disclosures, recent developments in state and federal jurisprudence indicate that courts may be leaning toward requiring private prison contractors to comply with FOIA or their statewide versions of it.

These companies emerged quickly in the mid-1980s during a time of correctional stress given the increase in prison populations. Government officials relied on the industry to circumvent bond issues requiring voter approval of new prisons, turning to private firms to build these facilities and increase their correctional capacities. At both the state and the federal level, policy makers did not take the time to create thoughtful oversight provisions that would have required the same transparency laws that government agencies are required to comply with.

The BOP relies on private contractors to house most of its noncitizens who are convicted of federal crimes. There are currently more than 18,000 federal inmates in 11 private federal prisons across the country, accounting for 11% of the BOP population (Federal Bureau of Prisons [FBP], n.d.-a). Most of these people are noncitizens subject to deportation (FBP, n.d.-a, n.d.-b). In fact, a BOP spokesperson recently stated that 96% of inmates in private prisons are noncitizens (Meyersohn, 2017). Originally conceived as a way to cut costs and outsource the care and custody of individuals who did not need extensive services and programming, the BOP began contracting with private prisons in the mid-1990s (Davies, 2016).

The federal government has also essentially delegated the authority to operate immigration detention centers to private firms. Today, nearly three quarters of ICE's average daily immigration detainee population is held in facilities operated by private prison companies (Luan, 2018). The government pays these operators fees ranging from approximately $60 to $130 a day per detainee (Conlin & Cooke, 2019). Two for-profit prison companies—the GEO Group and CoreCivic—hold more than 70% of privately contracted immigration detention beds (Carson & Diaz, 2015). Recently, private immigration detention centers have come under scrutiny for poor medical care and mistreatment of detainees (Human Rights Watch, 2016).

In 2016, the DOJ's Inspector General—DOJ's internal watchdog—called on the BOP to oversee more rigorously its contracts with private prison companies. The Inspector General found that privately run federal prisons are more dangerous than those managed by the BOP and need more oversight, suggesting that the BOP "needs to improve how it monitors contract prisons in several areas" (Office of the Inspector General [OIG], 2016, p. i). The authors of the report found that these contract prisons

consistently fail to measure up to federal standards in preventing dangerous conditions, intercepting contraband, and ensuring internal accountability for staff misconduct (OIG, 2016, p. ii). That same month, DOJ announced its decision to discontinue the use of private prisons (Yates, 2016, p. ii). The Department of Homeland Security (DHS) responded to the DOJ memo by forming a subcommittee to review the use of private immigration detention facilities (Homeland Security Advisory Council–New Tasking, 2016).

Given the dangerous conditions at some of these facilities plus an inability to find out what is occurring in federal prisons and detention centers managed by private firms, it is troubling that the public cannot gain full transparency and use FOIA to request documents (Davies, 2016).[32]

Proving how difficult it is to find out what happens in federally contracted prisons or detention centers, the Detention Watch Network (DWN) and the Center for Constitutional Rights (CCR) submitted a FOIA request to DHS and ICE in November 2013, asking for records related to the "Detention Bed Mandate," which they defined as a policy, since 2007, of maintaining a certain numerical level of detention (*Det. Watch Network v. U.S. Immigration & Customs Enf't*, 2016, p. 259). After DHS and ICE failed to provide the documents, DWN and CCR sued DHS. Per court order, ICE was required to produce contracts it had signed with local governments and private contractors for the operation of immigration detention facilities, yet ICE still withheld some information, including details about "unit prices, bed-day rates, and staffing plans—[were] withheld pursuant to FOIA Exemption 4, which protects commercial information that is privileged or confidential and obtained from a person" (*Det. Watch Network v. U.S. Immigration & Customs Enf't*, 2016, p. 260).

The district court ruled that the FOIA exemption for records compiled for law enforcement purposes that would disclose techniques and procedures did not apply to staffing plans contained in government contracts with private detention facility contractors, and thus, ICE and DHS could not withhold records from requester (*Det. Watch Network v. U.S. Immigration & Customs Enf't*, 2016).

In a strange turn of events, and illustrative of the extent to which private firms will go to avoid turning over public documents, the government chose not to appeal while GEO Group and CoreCivic intervened to appeal the decision to the Second Circuit Court of Appeals, which dismissed their petition (Center for Constitutional Rights, 2017). GEO Group then petitioned the Supreme Court for a full review of the case, asking for the right to prevent the government from releasing information under FOIA.

Although it received little attention, the Supreme Court's decision to let stand the Second Circuit Court of Appeals ruling, rejecting GEO and CoreCivic's effort to avoid turning over what the Second Circuit deemed public information, sheds light on the Supreme Court's stance that private contractors have no standing under FOIA to interfere with government transparency.

Over the last decade, policy makers have woken up to the private contractor loophole, attempting to increase transparency in private correctional facilities. For example, in 2005, Ohio Congressman Ted Strickland introduced the Private Prison Information Act (2005). It required any nongovernmental entity contracting with the federal government to run a correctional facility to release information about its operations under the same requirements that government agencies abide by. The legislation has been introduced in every Congress since then and has never moved past a committee hearing.

Private firms have campaigned against the legislation, arguing that existing government oversight of private prison contracts is sufficient. CoreCivic submitted written testimony to Congress that the Private Prison Information Act was "a solution in search of a problem" and would "impose upon the private sector an unprecedented requirement to respond to requests for information from the general public." The company, still unwilling to distinguish themselves from other types of government contractors, wrote they believe that the bill "unfairly and arbitrarily singles out one class of federal government contractors—private prison operators. One could reasonably extend the failed logic and intent of this

legislation to include all federal government contractors—for-profit and non-profit" (*Private Prison Information Act of 2007 (Part II)*, 2008, pp. 3–4). Ironically, the industry takes the opposite view in cases where they advocate for providing immunity for their employees in civil rights actions. In their brief in *Richardson*, the industry argued that because private prison guards perform the same work as state prison guards, they must require immunity to a similar degree (*Richardson v. McKnight*, 1997, p. 408). Since 2012, seven separate bills have been introduced on Capitol Hill seeking to improve the transparency and accountability of private prisons. Each bill has died in committee.

At the state level, laws vary in terms of whether private prison contractors are required to comply with open records request. Aside from a handful of states where legislation extends public records disclosures to private corporations taking government money such as Connecticut, Florida, and South Carolina, private prisons are not covered by the same freedom of information and open records laws as are other government functions. In some states, however, litigation has produced clarity, finding private firms performing core governmental functions relating to incarceration are required to comply with public records requests (Tartaglia, 2014, pp. 1723–1724).

For example, in 1991, a Florida Circuit Court held that CoreCivic is "acting on behalf of" the county for purposes of the Public Records Act, performing an essentially governmental function, commenting that, "It is difficult for the Court to conceive of a function more integrally related to the purpose and responsibility of a county government than that of holding in custody, caring for, and controlling persons arrested by county and other duly authorized law enforcement authorities and persons serving post-conviction sentences" (*Times Pub. Co. v. Corr. Corp. of America*, 1991, p. *2). Similarly, in a case brought by Prison Legal News (PLN), Tennessee's Court of Appeals recently ruled that CoreCivic was required to produce records under the state's public records law because it was the functional equivalent of a government agency (*Friedmann v. Corr. Corp. of America*, 2013).[33] PLN also prevailed in litigation against CoreCivic in Texas when it asked for access to operational information under the state's public records law (Order Granting Plaintiff's Motion for Summary Judgment, *Prison Legal News v. Corr. Corp. of Am.*, 2014).[34]

Given that private firms operating jails, prisons, and immigration detention centers perform an inherently governmental function, they should legally be required to comply with open records requests. Through unsuccessful attempts to gain transparency about what occurs in the "black box" of corrections and immigration detention facilities, it is clear how difficult it is to gain this information (Kaneya, 2016).[35] Without explicit state and federal legislation requiring these private contractors to comply with open records laws, these firms will continue to argue that they are not required to turn over the records requested by the public.

8 | PRIVATE CONTRACTORS AND IMMIGRANT DETAINEE LABOR

Currently, a series of class action lawsuits across multiple states challenges the legality of forcing noncitizens in private immigration detention centers to work for wages that fall well below the federal minimum wage. These lawsuits also allege that the multi-billion-dollar companies are unjustly enriching themselves by forcing detainees to work for low wages. Detainees have sued private operators in California, Washington, Colorado, Georgia, and New Mexico, all naming GEO Group or CoreCivic as defendants.

Each lawsuit claims that detainees were paid subminimum per diem wages to provide full detention center operation support—meal preparation, laundry and custodial services, and so on—in place of the private prison firms hiring market value employees, all in violation of state and federal law. They also

allege that the continuing operation of both corporations' immigration detention facilities, through use of immigrant detainee labor, directly and unfairly benefited CoreCivic and GEO Group. Both private prison firms, however, argue they are in compliance with ICE standards.

In September 2017, the Washington State Attorney General filed a lawsuit against The GEO Group for not paying minimum wages to the detainees working at the facility. The lawsuit alleges that the company received "millions in ill-gotten profits" (Washington State Office of the Attorney General [WAAG], 2017, para. 1). The lawsuit further alleges that GEO uses immigration detainee labor to conduct all nonsecurity functions at Tacoma's Northwest Detention Center (NWDC) and since 2005 has paid thousands of detainee workers $1 per day (WAAG, 2017, para. 2). Washington State's minimum wage is $11 per hour. GEO Group asked the court to either bring ICE in as a party to the case (the contract to operate the facility is between ICE and GEO Group) or dismiss the case. The district court judge ruled that ICE is not a necessary party to the suit, and therefore there is no reason to dismiss the case because the plaintiff did not join ICE (Order Denying Defendant's Motion to Dismiss, *State of Washington v. The GEO Grp., Inc.*, 2018).

In one class-action lawsuit filed in the Middle District of Georgia, individuals detained at the Stewart Detention Center in Lumpkin, Georgia, allege that CoreCivic, "maintains a deprivation scheme intended to force detained immigrants to work for nearly free" and that the company's "deprivation scheme ensures that the individuals detained in Stewart provide the billion-dollar corporation with a ready supply of available labor needed to operate the facility" (Complaint & Demand for Jury Trial, *Barrientos v. CoreCivic, Inc.*, 2018, p. 2). The complaint alleges that CoreCivic pays detained immigrants between $1 and $4 per day to perform this work and that if the company needs "volunteers" to work back-to-back shifts or more than 5 days per week, the company "employs a policy of threatening detained immigrants until they comply." The lawsuit also notes that CoreCivic does not pay detainees anything close to the federal minimum wage (Complaint & Demand for Jury Trial, *Barrientos v. CoreCivic, Inc.*, 2018, p. 11).

In 2014, immigrant detainees at an Aurora, Colorado, facility sued GEO Group for wage theft. The most recent class-action lawsuit filed was brought by detainees in a private immigration detention center in New Mexico who allege wage theft against CoreCivic's Cibola county correctional center.

The Thirteenth Amendment—most famous for abolishing slavery—simultaneously abolished "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted" (U.S. Const. amend. XIII, § 1). This has resulted in incarcerated people being forced to work at jails and prisons across the nation. Many of them are paid pennies on the dollar. But these cases may carve out an exception for immigrant detainees housed in private facilities. ICE facilities are not prisons but "administrative detention facilities." The distinction is slight, but legally, immigration is a civil issue, not a criminal one. This slew of class action lawsuits are poised to determine whether private firms are authorized to pay such low wages to detainees to perform work around their facilities. If the detainees prevail in their lawsuits, this body of litigation may also shape future litigation of convicted individuals in jails and prisons who argue that they are not being paid fair wages for their work behind bars.

9 | CONCLUSION

During the last few decades, courts have consistently found that the government is legally authorized to delegate the authority to manage prisons, jails, and detention centers to private contractors. Much of the litigation in recent years has grappled with what exactly that authority looks like. Some of the recent case law answers questions originally posed in the mid-1980s when private prisons first emerged.

For example, courts have generally found that as long as governments lay out the parameters of private firms' authority and retain final approval of major decisions such as issuing disciplinary violations, corporations have a long leash with which to operate these facilities. The Supreme Court, however, has imposed some limited checks on private firms. Specifically, it has declined to extend immunity to employees of private prisons. The Court has relied on cases dating back to the 1800s when private parties leased prison labor from the government as well as hanging its hat on the notion that competitive market pressures differentiate private firms from the government. The Supreme Court has also found that prisoners held in private facilities operated under contract with the *federal* government cannot file *Bivens*-style federal lawsuits against private prison employees or the corporations that manage the facilities. Yet, there is a civil rights action for prisoners held in private correctional facilities authorized by state or local governments.

Despite carved out guidance from the courts on these narrow issues, there are many more critical gaps in the law around accountability, transparency, and constitutionality when it comes to the privatization of corrections. In this article, I only touch the surface when it comes to the legality of private prison firms authorizing their employees to assert their authority and whether that authority is an abuse of discretion. For purposes of length, I could not include all the relevant (and many of them fascinating) issues in this article.

Questions remain regarding private prison operators' authority to chase and capture individuals who escape prison past the perimeter of their property line. For example, does that authority lie with the state or the private prison contractor or both? One major corporation that manages prisons in Florida asserts that its contracts authorize company employees to chase prisoners who escape the facility but that they are required to notify the local sheriff's deputies or police about the escape (Sanders, 2012). Somewhat less transparent, another major private prison firm indicates that they are contractually authorized "to follow the same operational procedures and policies that are followed by prisons operated by the state" (Sanders, 2012, para. 14). Other examples are as follows: Do private prison companies who merely own the real estate of the prison have any authority to make decisions about the facility's operations? What are the legal implications of allowing a private contractor to lobby for specific policies that would put more people behind bars, ultimately increasing the corporations' revenues?

There are also myriad ways in which the private sector has crept into the justice system, raising additional legal questions around proper delegation of government authority and constitutionality, in addition to ethical implications. Historically managed by government probation departments, probation supervision is now often delegated to for-profit firms. Because so many courts and state agencies do not have the resources to supervise misdemeanor defendants, several are contracting out supervision services to private firms. In this arrangement, people who cannot pay their fine in full at the time of sentencing are given probation because they need more time to make their payment. These companies perform debt collection activities, collecting probationers' fines for courts in addition to charging fees to probationers for these services. This delegation raises concerns over the companies' direct financial interest in ensuring probationers remain under supervision for lengthy time periods. Another salient issue relates to the constitutionality of these companies extending sentences for probationers.

Privatized health care has also come under scrutiny for its low quality of care provided to incarcerated individuals. Lawsuits have been filed against many of these health-care companies for substandard care. Legal questions swirl as to how to hold private health-care companies responsible for what some deem as medical treatment that falls within the realm of cruel and unusual punishment. Are governments who sign these contracts with private health-care providers liable or the corporations or both?

Recent investigations into private prisoner transport companies have also raised questions about liability for inhumane treatment while individuals are bused or flown between correctional facilities and detention centers.

Although the Israeli Supreme Court determined "that the very existence of a prison that operates on a profitmaking basis reflects a lack of respect for the status of the inmates as human beings," American jurisprudence has traditionally focused on procedural concerns around delegation, jurisdiction, and authority. Moral considerations have less frequently made their way into America's jurisprudential history in grappling with issues around privatizing corrections. Opponents of the industry worry that the profit motive is deeply (and morally) at odds with the goal of corrections, which is to treat and rehabilitate individuals to keep them from returning to prison. The Supreme Court has not yet addressed perhaps some of the most important inquiries related to private prisons such as the ideological conflict between reducing the number of people behind bars with the financial incentives of private prison operators to incarcerate as many people as they can and how we navigate this conflict moving forward.

ENDNOTES

[1] "[T]he ACLU probably will not take a position with respect to the public policy aspects of privatization – whether privatization is a good or bad way to go from a political, economic or social point of view; whether privatization will be more effective or efficient in carrying out the goals of the correctional or criminal justice system; or whether it makes a difference that the correctional goals of deterrence, punishment, incapacitation, rehabilitation are carried out by private entities or by government. There is considerable debate on these questions in the civil liberties community and elsewhere" (*Privatization of Corrections*, 1985, p. 5).

[2] Citing Bureau of Justice Statistics (1984).

[3] Testimony of James K. Stewart, Director, National Institute of Justice.

[4] See 18 U.S.C. § 4082(b) (1973) (amended by 18 U.S.C. § 4082 [1984]) (providing in part that "[t]he Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise."); and 18 U.S.C. § 3621 (2008) (stating in part that "[t]he Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise.").

[5] Dolovich (2005) noted that despite voter support for punitive criminal justice policies such as incarceration, voters often do not want to finance these facilities. Joel (1993, p. 58) stated that, "In the 1980s, an average of 60 percent of all local referenda for jail bonds was rejected."

[6] Mushlin (2017) citing Volokh (2002).

[7] Noting the Agreement Between State of Alaska and Corrections Corporation of America, Inc., ASPS # 99–001 (June 29, 1998): § 3.4 and § 4.26 (CADC will relinquish physical custody on demand of State); § 3.5 (CADC must obtain written pre-approval of State prior to transferring prisoners to other contract facilities); § 4.1 and § 4.41 (CADC must comply with Cleary FSA); § 4.6(J) (CADC will cooperate with State parole process); § 4.21 (CADC disciplinary decisions may be appealed to DOC); § 4.23 (final decision on award or forfeiture of good time rests with State); § 4.29 (CADC will hold hearings on request of State); § 4.33 (State will defend any post-conviction action); § 4.34 (State may inspect CADC at all reasonable times to ensure it maintains standards compatible with those of the State).

[8] See *Parsons v. Ryan* (2014) class action challenge by private prison inmates concerning health-care practices and isolation units; the appellate court upholding the injunction and declaratory judgment of the district court; Order Granting Defendants' Motion to Dismiss, *Am. Friends. Serv. Comm. v. Brewer* (2011) detailing a nonprofit's suit to enjoin the Arizona Department of Corrections (ADC) from awarding any contracts for new private prisons, despite dismissing the case for plaintiffs' lack of standing. Significantly, courts have held that worsened conditions traced to prison privatization constitute a violation of basic human rights. See, e.g., Order Approving Settlement, *Depriest v. Epps* (2012) finding severe violations at private youth prison facility, including sexual and physical abuse; *Parsons v. Ryan* (2014, pp. 657, 662, 678) affirming district court order granting class certification where plaintiffs sued and settled with the ADC for unconstitutional systemic deficiencies and "specified statewide ADC policies and practices that govern the overall conditions of health care services and confinement."

[9] See also *Porter v. Nussle* (2002, pp. 524–525, "Congress enacted § 1997e(a) [the PLRA requirement] to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case."

[10] In forma pauperis statutes allow for indigent litigants to file suit without paying filing fees. Under the P.L.R.A., prisoners who file three frivolous or malicious in forma pauperis complaints are barred from filing further suits in forma pauperis. This "three-strikes" provision may be suspended if a prisoner seeking in forma pauperis status is in "imminent danger of serious physical injury."

[11] See 42 U.S.C. § 1997a(e) (2012) providing that "[n]o Federal civil action may be brought by a prisoner confined in any jail, prison, or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury." Courts have often refused to apply the "imminent danger exception," citing a litany of reasons. See, e.g., *Polanco v. Hopkins* (2007) holding that the imminent danger exception was inapplicable because inmate failed to demonstrate risk of injury from exposure to mold in prison shower or from alleged unjust discipline); *Ball v. Famiglio* (2013) holding that the imminent danger exception was inapplicable in part because no threat of future harm where inmate's burns and bruises were from a single incident.

[12] Schlanger (2003), in an earlier paper, argued that prison litigation had decreased since P.L.R.A. and potential explanations were examined.

[13] See also 42 U.S.C. § 1997a(e) (2012): "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in *any* jail, prison, or other correctional facility until such administrative remedies as are available are exhausted" (emphasis added).

[14] See, e.g., *Boyd v. Corrs. Corp. of Am.* (2004, p. 994): "[T]he PLRA's exhaustion requirement applies to prisoners held in private facilities."; *Pri-Har v. Corrs. Corp. of Am.* (2005, p. 888): "By its terms, § 1997e(a) applies to prisoners confined in 'any' prison. Accordingly, § 1997e(a) applies to federal criminal prisoners in any prison, regardless of whether it is a federal prison or a privately operated facility."; *Ross v. Cty. of Bernalillo* (2004, p. 1184): "Nothing in the language or policy of the PLRA excuses prisoners in privately operated institutions from exhausting available administrative remedies."

[15] *Richardson v. McKnight* (1997, pp. 405–406), citing *Boswell v. Barnhart* (1895) (wife can recover from contractor for chain-gang-related death of husband); *Dade Coal Co. v. Haslett* (1889) (convict can recover from contractor for injuries sustained while on lease to private company); *Dalheim v. Lemon* (1891) (contractor liable for convict injuries); *Tillar v. Reynolds* (1910) (work farm owner liable for inmate beating death); *Weigel v. Brown* (1912) (prison contractor liable for unlawful whipping).

[16] Even though private prison officials are not entitled to qualified immunity, they are still considered to be "public employees" for other federal purposes. See, e.g., *United States v. Thomas* (2001) (holding that a private prison guard was a public official for the purposes of a federal bribery statute).

[17] See, e.g., *Morris v. Ghosh* (2011, p. *5) (applying qualified immunity to privately employed prison physicians and medical directors).

[18] See *Robinson v. Corrs. Corp. of Am.* (2002, p. *6) (holding that the state may by legislation confer common law immunity from state tort actions on private prison officials).

[19] Under North Carolina law, a private prison employee is immune from liability for "mere negligence."

[20] *Corr. Servs. Corp. v. Malesko* (2001, p. 74): "In sum, respondent is not a plaintiff in search of a remedy . . . [n]or does he seek a cause of action against an individual officer."

[21] The American Bar Association (2011, p. 338) has called on Congress to establish a cause of action allowing private inmates to sue corporations for damages stemming from constitutional violations (disapproving of cases holding prisoners in private prisons lack a *Bivens* remedy against those who mistreat them).

[22] See also *Holly v. Scott* (2006).

[23] See also *Jama v. U.S.I.N.S.*(2004).

[24] In addition to the court's reasoning in *Sarro*, permitting a *Bivens* suit against private prison officials provides for symmetry on the federal, state, and local levels. In other words, federal inmates in private prisons would have the same remedy for constitutional violations that inmates in federal prisons have.

[25] *Minneci v. Pollard* (2012) (holding that a prisoner could not assert an Eighth Amendment Bivens claim for damages against private prison employees). See also *Espinoza v. Lindsay* (2012) (declining to extend *Minneci v. Pollard* barring *Bivens* suits to Fourteenth Amendment claims).

[26] 730 Ill. Comp. Stat. Ann. 140/2 (2012): "[T]he State shall not contract with a private contractor or private vendor for the provision of services relating to the operation of a correctional facility or the incarceration of persons in the custody of the Department of Corrections."

[27] Originally opened in March 1997, the Queens Detention Facility (QDF) housed detainees for ICE until the contract was transferred to the Office of the Federal Detention Trustee (OFDT) in mid-2005. After the contract transfer, GEO Group began management and operation of the facility on behalf of the U.S. Marshals Service (USMS) to house primarily presentenced detainees.

[28] Ratliff (1997) argued that most state and federal private prison statutes are unconstitutional.

[29] Private Prison Contracting Act, 1986, sec. 110: "No contract for correctional services shall authorize, allow or imply a delegation of the authority or responsibility of the commissioner to a prison contractor for any of the following: (1) Developing and implementing procedures for calculating inmate release and parole eligibility dates; (2) Developing and implementing procedures for calculating and awarding sentence credits; (3) Approving inmates for furlough and work release; (4) Approving the type of work inmates may perform and the wages or sentence credits that may be given to inmates engaging in that work; and (5) Granting, denying or revoking sentence credits, placing an inmate under less restrictive custody or more restrictive custody; or taking any disciplinary actions."

[30] See also *Singleton v. Wilkinson* (2007) (finding that an inmate in a private prison facility may lose good time as part of a disciplinary penalty where the Department exercises oversight and approval to validate a private prison contractor's decision to impose a forfeiture of good time as a disciplinary penalty).

[31] Ratliff (1997) cited state statutes in Arizona, Arkansas, Colorado, Florida, Louisiana, Mississippi, Ohio, Tennessee, Virginia, West Virginia, and Wyoming.

[32] In one case, journalist Seth Freed Wessler needed to sue the BOP to gain access to records under FOIA.

[33] *Friedmann v. Corr. Corp. of America* (2013) (holding that settlement agreements are considered public records under the Public Records Act. Thus, as the functional equivalent of a government agency, CCA was required to turn over settlement agreements related to the operation of the correctional facilities unless otherwise provided by state law). PLN is a nonprofit human rights news publication focusing on the U.S. prison system and prisoners' legal rights.

[34] Order Granting Plaintiff's Motion for Summary Judgment, *Prison Legal News v. Corr. Corp. of Am.* (2014) (holding that CoreCivic is a "governmental body" under Chapter 552 of the Texas Public Information Act, required to comply with the Act's obligations to disclose information). See also Tartaglia (2014).

[35] For example, in February 2016, journalists working for *Mother Jones* magazine filed a public records request for documents from Corrections Corporation of America regarding a contract to house Hawaii prisoners in Arizona. Their inquiry concerned asking for documents related to levels of violence at the prison, including requesting information about the use of force and disciplinary measures put in place to reduce violence at the Arizona prison. Seven months later, the journalists received some, but not all, of the records they requested after a lengthy process of corresponding with the Hawaii Department of the Attorney General and a request for $23,000 to produce the records.

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AUTHOR BIOGRAPHY

Lauren-Brooke Eisen is senior fellow in the Brennan Center's Justice Program where she focuses on improving the criminal justice process through legal reforms. Previously Eisen worked as a senior program associate at the Vera Institute of Justice in the Center on Sentencing and Corrections and served as an assistant district attorney in New York City. Eisen has taught an undergraduate seminar on mass incarceration at Yale and currently serves as an adjunct instructor at the John Jay College of Criminal Justice. Eisen is author of *Inside Private Prisons: An American Dilemma in the Age of Mass Incarceration* (Columbia University Press, 2017).

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