

The Prison-Keeper's Dilemma: Unsustainable and Undesirable Business Practices in Privatized Corrections

By Stephen Raher

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I. Introduction

In his seminal book on government bureaucracies,¹ public administration scholar James Q. Wilson briefly mentions the curious rebirth of privately operated prisons. After describing the early American use of private prisons and the resulting failure of the system due to corruption, Wilson notes that “[o]f late, adult jails and prisons once again are being operated by private firms such as the Corrections Corporation of America (CCA).”² His discussion of privately operated prisons was necessarily brief, due to the lack of any “good, independent studies of the efficiency of such enterprises.”³ Wilson wrote these words in 1989. Twenty years later, much more has been written about the modern American experiment in privatized prisons. While solid data is still elusive, many operational studies have uncovered serious failings in the country’s private carceral apparatus. In their mildest forms, operational failures manifest as poor management and control. At worst, private prisons can facilitate serious corruption or become the scenes of horrific crimes.

¹ James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (1989).

² *Id.* at 360.

³ *Id.*

The argument over whether private prisons work often centers on one or more of three issues: operational effectiveness, cost savings, and the morality of incarceration for profit. The preponderance of available data seems to cast doubt on whether private prisons are more effective or less expensive than government-run counterparts. The moral dimension is, ultimately, non-reducible. Nevertheless, policy-makers throughout the nation continue to debate each of the three issues. These well-worn arguments are not, however, the focus here. Rather, this paper examines a set of issues which has received less attention in the literature, but is fertile ground for analysis—the business law aspects of the private prison industry.

Early during the twentieth century prison privatization movement, skeptical lawmakers raised many legal questions. Could the state delegate carceral power to a private contractor? How would governments negotiate contracts with prison operators? How would risk be allocated? For a variety of reasons, these questions quickly took a backseat to the need for rapid expansion of state prison systems. Once the private prison industry had gained a toehold and developed an operating record, policymakers began debating whether the experiment was working—this debate still rages today. Lost in the fray was the more fundamental question of whether correctional outsourcing is feasible from a contractual and financial perspective. As shown in this paper, prisons are not amenable to government outsourcing.

After a brief history of privatized corrections in the United States, this paper examines the general effects of non-governmental prison operation, with a focus on how contractors have exploited their private status to the detriment of inmates, taxpayers, and contracting agencies. A discussion of contractual issues follows, beginning with weaknesses in government procurement and contract monitoring systems. Section II.C considers contract duration and pricing structures—the two issues most relevant to risk allocation—including analysis of sample contract terms. The paper concludes with a section on the complex and precarious financing of the industry. Because many prison contracts still allocate considerable risk to contracting agencies, this section begins with a brief overview of municipal financing as it relates to prison construction. Then, the debt structure of the private firms is discussed. After an early period of investor enthusiasm, the leading private prison firms experienced financial chaos after employing complex leveraging strategies. The industry engineered a financial revival beginning in 2001, thanks largely to an influx of revenue from new federal contracts. The paper concludes with an outline of policy recommendations for winding down the private prison sector.

A. History of Privatized Prisons in the United States

The birth of the American prison system is a notorious paradox. In the words of historian David Rothman, “[i]n the 1820s and 1830s, when democratic principles were receiving their most enthusiastic endorsement, when the ‘common people’ were participating fully in politics and electing Andrew Jackson their president, incarceration became the central feature of criminal justice.”⁴ Prisons were originally part of a uniquely American rejection of British social control mechanisms.⁵ As a general matter, British and early colonial responses to dependent and deviant populations (i.e., the poor, the criminal, the insane, and the orphan) were disorganized, harsh,

⁴ David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *The Oxford History of the Prison: The Practice of Punishment in Western Society* 100, 100 (Norval Morris & David J. Rothman, eds., 1998).

⁵ *Id.* at 102-104.

and heavily influenced by religious doctrines.⁶ Prisons were one component of a broad-based reform movement that originated in the late eighteenth century and flourished in the early to middle nineteenth century. Governments assumed responsibility for the operation of various charitable institutions—asylums, reformatories, penitentiaries, and orphanages—designed to cure deviant behavior.⁷

The initial use of incarceration in America was a novel alternative to British criminal sentencing schemes, which relied heavily on corporeal and capital punishment. But Americans quickly became dissatisfied with prisons, seeing them as breeding grounds for criminal behavior.⁸ The Jacksonian-era rebirth of the penitentiary (and concomitant renaissance of other charitable institutions such as the asylum) sought to reclaim the penitentiary as a rehabilitative institution.⁹ In what was gradually becoming a familiar cycle, the Jacksonian reform movement also ended in broad disillusion, as prisons once again became warehouses of cruelty and inefficiency.¹⁰ This time, however, the reformers had laid the foundation for a major systemic change, through the penitentiary's enhanced emphasis on convict labor. Pioneered by penal reformers in New York, some American prisons in the mid-nineteenth century began providing inmate labor, for a fee, to private business firms. Early contract labor arrangements typically entailed multiple private firms contracting for prison labor, with inmates working in prison workshops, manufacturing goods which were then sold by the contracting firms.¹¹

After the Civil War, the system of convict labor took a decided turn in favor of greater private control of prisoners, particularly under the “convict leasing” system employed in many southern states. Many southern states restricted or even abolished contract prison labor during Reconstruction, but the economic depression of the 1870s saw states looking to cut prison costs and businesses looking for cheap labor. When “redeemer” Democratic governors began ending Reconstruction in the southern states, many prisons began leasing large numbers of inmates to private industries. This iteration of inmate labor differed from earlier models in two notable regards. First, the scale was much larger—in some states, two or three companies would effectively lease all available prison labor.¹² Second, companies typically assumed de facto custody of leased convicts.¹³ Although some politicians and social reformers were disturbed by the extremely harsh conditions that inmates endured under convict leasing arrangements, the ultimate demise of the system was due to economic concerns. As organized labor became more powerful, unions set their sights on abolishing private firms' use of convict labor, citing the unfairness of making free-world laborers compete with the low-cost and easily exploited pool of inmate workers. The battle was long and complicated, but ultimately, the convict leasing system

⁶ David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 1-14 (rev. ed., 1990).

⁷ See generally, *id.* at 30-154.

⁸ Rothman, *supra* note 4, at 102-104.

⁹ *Id.* at 106 (“reformers hoped that the solutions that they devised to prison design problems would be relevant to the wider society. With no ironies intended, they talked about the penitentiary as serving as a model for the family and the school. The prison was nothing less than ‘a grand theatre for the trial of all new plans in hygiene and education.’”).

¹⁰ *Id.* at 107-114.

¹¹ Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776-1941* 53-86 (2008).

¹² *Id.* at 102.

¹³ Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 Am. Crim. L. Rev. 111, 127 (2001).

was abolished during the 1880s and '90s, with the last vestiges disappearing in the early twentieth century.¹⁴

The role of private contractors in the corrections system did not completely disappear after the end of the convict lease system. Most notably, private (often not-for-profit) entities have long been used to operate juvenile facilities and community-based corrections programs, such as halfway houses.¹⁵ But generally, the use of prisoners as commodities in profit-making industries disappeared in twentieth century American corrections—until the 1980s. The modern advent of privately operated adult secure facilities came in 1979 when the Immigration and Naturalization Service (INS) issued a contract to the international security firm Wackenhut, for the operation of an immigrant detention facility in Aurora, Colorado. Corrections Corporation of America (CCA) incorporated in 1983 and began operations under its first contract the next year. From its inception, the private prison market has always been thin, with two dominant firms—CCA and Wackenhut Corrections Corporation. Wackenhut started as a subsidiary of the Wackenhut Corporation, and is now an independent entity, recently renamed “The GEO Group.” Over the years, many smaller firms have been acquired by CCA and Wackenhut. In 1998 (after much consolidation had already occurred) there were twelve private prison companies operating in the United States—CCA and Wackenhut controlled a combined 77 percent of the total domestic private bed capacity.¹⁶ Of the twelve companies listed in the 1998 census of private facilities, at least three have subsequently been acquired by larger firms.¹⁷

The growth of the industry during the 1980s and early '90s can best be described as a perfect storm, involving three interrelated policy dynamics.¹⁸ First, changes in sentencing policy ensured an unrelenting increase in prison populations, necessitating new facility construction. Second, unconstitutional conditions within state prison systems led to judicial mandates to alleviate overcrowding—a challenge most states responded to by building more prisons. Third, the increasing political clout of the fiscal conservatism movement made paying for prison expansion more difficult.

Late twentieth century sentencing changes (the first factor of the perfect storm) prioritized incarceration as the preferred response to crime. Fueled by misinformation and

¹⁴ *Id.* at 137-192.

¹⁵ Douglas McDonald, et al., Abt Associates, *Private Prisons in the United States: An Assessment of Current Practice*, at 4-5 (1998).

¹⁶ Bureau of Justice Assistance, James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons*, tbl. 3, at 4 (2001) [hereinafter “Austin & Coventry”] (CCA and Wackenhut controlled 51.4% and 25.1% of the market, respectively).

¹⁷ CiviGenics, Inc., was acquired by Community Education Centers in 2007. *Infra*, note 332. Correctional Services Corporation was acquired by GEO/Wackenhut in 2005. GEO Group, Inc., Annual Report (Form 10-K), at 1 (Mar. 17, 2006). Correctional Systems, Inc. was acquired by Cornell Companies in 2005. Cornell Companies, Annual Report (Form 10-K), at 33 (Mar. 16, 2006).

¹⁸ *Cf.* John W. Kingdon, *Agendas, Alternatives, and Public Policies*, 98 (2d ed., 1995) (“Crises, disasters, symbols, and other focusing events only rarely carry a subject to policy agenda prominence by themselves. They need to be accompanied by something else. . . . [Or, quoting a case-study interview subject,] ‘A fortuitous catalyst [is often] thrown into an existing environment.’”). Although no author has compiled detailed state-level case studies of this policy process in the context of prison privatization, some isolated discussions do exist. *See generally*, C. Elaine Cummins, *Private Prisons in Texas, 1987-2000: The Legal, Economic, and Political Influences on Policy Implementation* (Oct. 25, 2000) (unpublished Ph.D. dissertation, American University) (on file with American University Library); Stephen Raher, *Walls of Stone, Bars of Gold: A Politico-Economic History of Colorado’s Prisons* (Nov. 2002) (unpublished paper, University of Colorado Graduate School of Public Affairs) (on file with author).

sensational media portrayals of crime, voters in the 1980s became fixated on lengthy prison sentences for convicted offenders—providing vote-seeking legislators an incentive to advocate for longer sentences. Culminating in Lee Atwater’s fear-based Willie Horton campaign during the 1988 presidential election, public opinion increasingly reflected insecurity about personal safety and a belief that imprisonment was the most effective solution.¹⁹ In addition to generalized public anxiety about crime, drug policy increasingly occupied center stage in criminal justice policy debates, with federal and state lawmakers in a seeming competition to craft the harshest drug sentencing regime.²⁰ By 2003, drug offenders constituted 20 percent of state prisoners and 55 percent of the federal prison population, representing a twelve- and seventeen-fold increase, respectively, since 1980.²¹ All told, this period of tough-on-crime politics saw the nation’s total prison population increase from 319,598 in 1980 to 1.4 million in mid-year 2003—an increase of 334 percent.²²

The second contributing factor to the rise of the modern private prison industry is a direct result of the first. More stringent sentencing policy predictably lead to a higher prison population; however, this population increase was not accompanied by adequate expansion of the nation’s carceral infrastructure. Not surprisingly, this resulted in overcrowding and substandard prison conditions. While deplorable prison conditions had been tolerated throughout the nation’s history, states could not turn their backs on such problems in the 1980s and ‘90s, due to the birth of prisoners’ rights litigation in the 1960s and ‘70s.²³ Due to the more robust judicial approach to vindicating prisoners’ constitutional rights, more prison systems found themselves under court supervision. So pronounced was the overcrowding and resultant litigation that by mid-1988, the corrections systems of thirty-nine states, the District of Columbia, and two territories were operating under court orders to remedy unconstitutional conditions.²⁴ These judicial pressures made lawmakers much more susceptible to private-sector promises of quick and cheap prison construction and operation.

Ironically, after the private sector reaped the benefit of the states’ need to rapidly expand their carceral capacity, private operators received a windfall from the Supreme Court and Congress. First, after judicial-crafted remedies created the need for a massive prison-building campaign, the U.S. Supreme Court substantially curtailed the ability of judges to impose reforms on correctional systems, adopting a substantially deferential standard in *Turner v. Safley*.²⁵ Next, ten years after *Turner*, Congress went several steps further and enacted the Prison Litigation

¹⁹ See generally, David C. Anderson, *Crime and the Politics of Hysteria: How the Willie Horton Story Changed American Justice* (1995).

²⁰ See generally, Eva Bertram et al., *Drug War Politics: The Price of Denial* 134-150 (1996).

²¹ Marc Mauer and Ryan S. King, The Sentencing Project, *The 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, 9-10 (Sept. 2007), available at http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp_25yearquagmire.pdf

²² Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics: 2003* (Ann L. Pastore & Kathleen Maguire, eds.), 478, tbl. 6.1 (2005).

²³ See e.g., Michael B. Mushlin, *Rights of Prisoners* § 1:4, at 14-18 (3d 3d., 2002) (describing the demise of the constitutional common-law “hands-off doctrine” during the 1960s and ‘70s, culminating in the U.S. Supreme Court cases *Wolff v. McDonnell*, 418 U.S. 539 (1974); and *Procunier v. Martinez*, 416 U.S. 396 (1974), overruled by *Thornburgh v. Abbott*, 490 U.S. 401 (1989)).

²⁴ McDonald, *supra* note 15, at 8.

²⁵ 482 U.S. 78, 89 (1986) (“when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”).

Reform Act (PLRA), placing numerous procedural restraints on prisoner lawsuits.²⁶ The ultimate result of *Turner* and the PLRA is to lessen the likelihood that prisoners will prevail on civil rights claims,²⁷ a dynamic that benefits the private prison industry by reducing litigation costs. Despite the change in the legal landscape, the initial period of vigorous judicial vindication of prisoners' rights created a policy window that opened long enough for the private prison industry to establish itself. Once companies could show an operating track record (even a checkered one), pitching new contracts to policy makers became easier. Notably, even though *Turner* and the PLRA provided legal cover for prison operators (both private and governmental), private operators were dealt a small setback when the U.S. Supreme Court held that contractors are not entitled to a qualified immunity defense in § 1983 suits.²⁸

The third and final factor that catalyzed the industry is the maturation of the fiscal conservatism movement that began in the 1970s. As fiscal conservatives claimed policy victories on the national level, states were expected to take on increased responsibilities.²⁹ At the same time federal responsibilities were devolving to the states, citizens demanded protection from tax increases, frequently imposing constitutional restrictions on state taxing and borrowing. When states encountered the recession of the early 1980s, these new revenue constraints led to profound turmoil in government budgeting.³⁰ Private prisons benefited from this movement in two ways. First, despite the overall pressure to reduce spending, prisons often enjoyed favored status, due to public fear of crime and the ability of the state to justify public safety as an essential governmental function.³¹ Second, even though incarceration as a concept received

²⁶ Pub. L. 104-134, §§ 801-810, codified as 18 U.S.C. § 3626 (2008).

²⁷ See e.g., Dorothy Schrader, Cong. Research Serv., Prison Litigation Reform Act: An Overview (C.R.S. Report No. 96-513) at 9 (May 30, 1996) (describing the PLRA's main effect as "limit[ing] the authority of the federal courts to fashion remedies to correct violations of federal rights.>").

²⁸ See *infra*, notes 103-106 and accompanying text.

²⁹ Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*, 42 (2007) ("The federal retreat [from social spending] required subnational polities and institutions to take responsibility for social problems whether they wanted to or not, forcing them to deal with the newly dispossessed, who ranged from unemployed youth to financially needy students to homeless families. The contemporary rise of the local state, celebrated by so many geographers, represents in part a generally reactionary move to reexternalize, or keep external, such social burdens and fiscal costs."). While Gilmore's work is specific to California, it is generally an excellent portrayal of a narrative that was repeated in many states. Not only is the California story indicative of other states' experiences because all states, to some degree, face similar challenges as actors in the federalist system, but California's policy innovations (especially in the realm of taxpayer activism) were often exported to other states. For example, understanding Colorado's recent fiscal policy necessitates an understanding of ballot-measure activist Douglas Bruce (author of the Taxpayers' Bill of Rights), who formed his political ideology in southern California during the 1970s and '80s. See, *Off Limits*, Denver Westword, Aug. 31, 1994, at 9.

³⁰ Gilmore, *supra* note 29, at 42-50.

³¹ *Id.* at 83-86 ("The central contradiction for the waning welfare-warfare, or military Keynesian, state was this: the outcomes of tax struggle translated into delegitimation of programs the state could use to put surpluses back to work, while at the same time, the state retained bureaucratic and fiscal apparatuses from the golden age. The massive restructuring of the state's tax base in effect made surplus the Keynesian state's capacities. However, the state did not disappear . . . Rather, what withered was the state's legitimacy to act as the Keynesian state. . . . [T]he new state built itself in part by building prisons. . . . The result was an emerging apparatus that, in an echo of the Cold War Pentagon's stance on communism, presented its social necessity in terms of an impossible goal—containment of crime, understood as an elastic category spanning a dynamic alleged continuum of dependency and depravation. The crisis of state capacity became, peculiarly, its own solution, as the welfare-warfare state began the transformation, bit by bit, to the permanent crisis workfare-warfare state, whose domestic militarism is concretely recapitulated in the landscapes of depopulated urban communities and rural prison towns.").

avored political status, fiscal constraints made borrowing for new construction difficult—thus privatization emerged as a popular proposal. This popularity depended on notion that contract facilities would avoid the need for state borrowing or expansion of public payrolls. At the same time, by expanding prison capacity through private facilities, policy makers could claim cost savings through private sector “innovations.”

After its initial growth stage, the private prison industry encountered a period of financial distress in the late 1990s.³² Highly publicized operating failures battered the image of the industry. The failures included a barrage of escapes, assaults, and murders at CCA’s Northeast Ohio Correctional Center³³ and a series of assaults, murders, a riot, and guard brutality at two Wackenhut prisons New Mexico.³⁴ Industry observers expected that two pieces of Congressional legislation in 1996 and 1997 would result in an infusion of new contracts for the industry.³⁵ In anticipation of those new contracts, prison companies embarked on aggressive financing plans which ultimately left the industry in even greater turmoil. CCA and Wackenhut both experimented with real estate investment trusts (REITs), and ultimately saw their stock prices decline precipitously due to investor disapproval. CCA’s REIT-financing experience was so disastrous that in 2000, its independent auditor expressed “substantial doubt” about the ability of CCA (then operating under the name Prison Realty Trust) to continue as a going concern.³⁶ Although CCA and Wackenhut both recovered from their late ‘90s financial slumps, they remain highly leveraged and depend on further expansion to pay down corporate debt.

By 2000, growth in private prisons seemed to be slowing³⁷—no state was soliciting new private prison contracts, and some existing contracts had been curtailed or rescinded.³⁸ Yet, between that year and 2005 (the most recent year for which data is available), 151 new privately operated prisons came on-line, and the private sector’s share of all U.S. correctional facilities jumped from 16 percent to 23 percent.³⁹ What caused this resurgence? Although there are several contributing factors, the primary catalyst has been the birth of the “national market” for private prison beds.

³² See *infra*, notes 372-395 and accompanying text.

³³ See generally, John L. Clark, Corrections Trustee for the District of Columbia, *Report to the Attorney General: Inspection and Review of the Northeast Ohio Correctional Center* (Nov. 25, 1998), available at <http://www.usdoj.gov/ag/youngstown/youngstown.htm>.

³⁴ McDonald & Patten, *supra* note 15, at xxii-xxiii.

³⁵ See *infra*, notes 365-369 and accompanying text.

³⁶ Prison Realty Trust, Inc., Annual Report (Form 10-K), at F-16 (Mar. 30, 2000).

³⁷ Austin & Coventry, *supra* note 16, at 6 (“indications show that growth in privatization may be slowing. For example . . . private facility bed capacity has not increased since January 1, 1998. Additionally, stock prices for most of the major firms have dropped substantially in the past year. There have also been a number of highly publicized management problems with several privately operated facilities.”).

³⁸ Judith Greene, *Bailing Out the Private Prison Industry*, Prison Legal News, May 2002, at 1.

³⁹ James J. Stephan, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 2005* (NCJRS 222182), 1 (2008). In 2005, there were a total of 415 privately operated prisons in the United States, housing an average daily population of 105,451 inmates. *Id.* at app. tbl. 9. Although the Bureau of Justice Statistics issues annual revisions to these figures, the data does not provide information on company-specific market shares, nor the total capacity of the private prison system. Ever since the abrupt end to Prof. Charles Thomas’s Private Corrections Project at the University of Florida (see *infra*, notes 175-176 and accompanying text), there has been no centralized source of information on the capacity of the industry as a whole—one of many indicators of the lack of transparency that hinders informed policy decisions.

B. Dueling Markets

The most recent development in private prisons is the emergence of two distinct markets for prison beds. As McDonald and Patten describe the current state of the industry, the two markets can be labeled the “dominant mode” and the “national market.” The dominant mode (the model originally presented to policy-makers as the “private prison fix”) entails a state agency contracting for some of its needed prison beds, and forming a one-to-one relationship with a contractor.⁴⁰ The second, national, market for private prisons is an outgrowth of the speculative prison-building boom of the 1980s.⁴¹ In this market, prison operators advertise available capacity to jurisdictions across the country, often filling a facility with inmates from multiple agencies.⁴² Despite the growing prevalence of facilities on the national market,⁴³ little research has been done on the effects of this system.

Not surprisingly, there is qualitative evidence to suggest that inmate management is more difficult when prisoners are shipped to foreign jurisdictions.⁴⁴ Not only are prisoners less happy when serving time far away from family and friends, but housing inmates from different jurisdictions (who are subject to different administrative regulations) in one facility often breeds tension.⁴⁵ There are systemic problems as well. McDonald and Patten’s 1998 survey of private prisons found that states paid higher per diem rates for out-of-state facilities than for in-state contracts.⁴⁶ The same survey revealed monitoring problems attendant to use of the national market. Survey data show that 52 percent of in-state contract facilities are monitored by government staff devoting over eighty hours per month to the facility—with nearly half (48 percent) of these facilities covered by full-time monitors.⁴⁷ In contrast, 90 percent of national-market facilities received less than twenty hours of monitoring a month.⁴⁸ Moreover, in-state contract monitors were four times as likely to receive job-specific training than those assigned to

⁴⁰ McDonald & Patten, *supra* note 15, at 5 (“[T]he state prison system is the contractor’s sole client at the facility; the only prisoners held in the facility are those under the jurisdiction of the client state agency. Moreover, the prison is in the same state as the publicly operated prisons, which creates at least some of the conditions supportive of a close integration between the publicly operated facilities and the privately operated prisons.”).

⁴¹ *See infra*, notes 328-330 and accompanying text.

⁴² McDonald & Patten, *supra* note 15, at 6 (“Many of these facilities that are oriented to the national market may not have any prisoners at all from the correctional agencies in the states in which they are located. Indeed, they may have *no* relationship at all with the state governments in these states, other than an obligation to pay corporate income taxes. Owners of private property do not need licenses from state correctional agencies to build and operated detention facilities and, until recently, most state legislatures have not established regulatory systems for the states or localities to govern private prison operations.”).

⁴³ *Id.* at 7 (the authors identified 84 privately operated prisons in 1998 which had contracts to house state inmates from a foreign jurisdiction).

⁴⁴ *E.g.*, Matthew T. Clarke, *Uprisings at CCA Prisons Reveal Weaknesses in Out-of-State Imprisonment Policies*, Prison Legal News, Jan. 2005, at 26.

⁴⁵ *Id.*, *see also*, Colo. Dept. of Corr., *After Action Report: Inmate Riot – Crowley County Correctional Facility July 20, 2004* 14 (Oct. 1, 2004) (on file with author) [hereafter “CCCF After Action Report”] (Citing “[i]nmates’ allegations of treatment disparity between Colorado inmates and Washington inmates regarding allowable property and food portions” as a contributing factor in the 2004 riot at the CCA-operated Crowley County facility).

⁴⁶ McDonald & Patten, *supra* note 15, at 7, 9 (all national-market contracts examined in the survey charged per diem rates over \$35, which exceeded the price of 55% of in-state contracts).

⁴⁷ *Id.* at 30.

⁴⁸ *Id.*

out-of-state facilities.⁴⁹ Predictably, qualitative data from the survey showed that correctional staffers generally perceived service from out-of-state facilities to be of lower quality.⁵⁰ Despite the problems inherent in the national market, states with inadequate prison capacity (and a lack of political will to reduce prison populations) are left with no immediate alternative other than seeking beds from this non-traditional market. While utilization of out of state beds is more expensive in the long term, it avoids immediate outlays for new prison construction, thus allowing for short-term budget balancing.

While McDonald & Patten's survey focused on state governments' utilization of out-of-state prisons,⁵¹ the national market has been significantly enhanced through the workings of a federal agency, the Office of the Federal Detention Trustee (OFDT). Created in 2000,⁵² the OFDT was formed in response to Congressional "concerns about the problem of inadequate planning and management of detention space in the Department of Justice."⁵³ The House committee report accompanying the enabling legislation anticipated the office would be given responsibility for "oversight of detention management, as well as improvement and coordination of detention issues" throughout the Department of Justice.⁵⁴ When the bill emerged from conference, however, it contained slightly broader language, authorizing the trustee to "exercise all powers and functions authorized by law relating to the detention of *Federal prisoners* in non-Federal institutions."⁵⁵ At the time the bill was enacted, all federal non-military prisoners were held by one of three Department of Justice agencies—the Bureau of Prisons (BOP), U.S. Marshals Service (USMS), or the Immigration and Naturalization Service (INS). Because the final language was not limited to the Department of Justice, OFDT has retained power over certain aspects of immigrant detention, even when INS moved to the new Department of Homeland Security. OFDT has changed the dynamics of the modern private prison industry, with many of these changes distorting what little competition existed. Moreover, the OFDT's role as a centralized federal procurer of beds on the national market has disadvantaged state governments in need of additional prison capacity.

During its short existence, the OFDT has carried out two types of prison procurement—contracting for entire facilities, and more piecemeal "bed brokering." The facility-level contracting—which follows the traditional, or "dominant" mode of state contracting—has provided a new source of revenue for the private prison industry. Ironically, while OFDT has played a crucial role in the constructive federal bailout of the industry, its procurement processes contradict many of the economic arguments in favor of privatization. Industry supporters frequently point to competition as a benefit of correctional outsourcing.⁵⁶ OFDT's procurement

⁴⁹ *Id.*

⁵⁰ *Id.* at 31 ("Not surprisingly, the most publicly visible troubles in privately operated prisons have occurred most often in these arrangements whereby governments contract with out-of-state facilities to hold prisoners. State contract administrators and monitors also rated their performance below that observed at in-state facilities with which states had (mostly) exclusive relationships. In 38 percent of all contracts or agreements with out-of-state facilities, the monitors or administrators rated the quality of the service as below that of comparable facilities in their own department of correction, compared with 7 percent of the contracts with in-state facilities.").

⁵¹ *See, id.*, at 8, tbl. 1.2 (listing ten states that housed inmates in out-of-state facilities as of December 31, 1997).

⁵² Pub. L. 106-553, app. B, 114 Stat. 2762, 2762A-52 (2000).

⁵³ H.R. Rep. 106-680, at 13 (2000).

⁵⁴ *Id.*

⁵⁵ Pub. L. 106-553, 114 Stat. at 2762A-52 (emphasis added).

⁵⁶ *E.g.*, Ass'n. of Private Corr. & Treatment Orgs., Increased Accountability (APCTO), <http://www.apcto.org/increaseaccountability.html> (last visited Feb. 8, 2009) ("Private operators must . . . [c]ompete to earn the privilege of

practices, however, vitiate any pretense of competitive bidding. OFDT frequently issues sole-source contracts for entire facilities.⁵⁷ In other cases, OFDT has issued a “sources sought” notice, seeking bids, but defined the eligibility requirements so narrowly as to limit the pool of eligible bidders to one company, subsequently announcing a sole-source award.⁵⁸ Notably, most of OFDT’s solicitations are limited to bidders with an existing facility, a requirement that not only limits the potential pool of bidders, but also increases the incentive for companies to avoid or terminate state contracts in favor of more lucrative federal contracts.

OFDT’s other major procurement activity is the Detention Services Network (“DSNetwork”), a national online bed-brokering platform which has fused the national private corrections market with advanced information technology. OFDT advertises DSNetwork as “a multifaceted, full-service Internet site to meet all detention service needs.”⁵⁹ Other than a cursory explanation of the features and technology behind the DSNetwork, OFDT provides no information on the system, such as the identity of entities providing beds through the system, the number of inmates placed through the system, or the amount of money disbursed for DSNetwork placements. In fact, other than one webpage with USMS statistics,⁶⁰ OFDT has released little information about its operations. While OFDT also performs work for the BOP and Immigration and Customs Enforcement (ICE), almost all publicly available data concerning the agency’s operations are limited to USMS. The three federal civil detention agencies (BOP, ICE, and USMS) are the only agencies who use DSNetwork to purchase prison beds.⁶¹ Because these federal agencies are generally better funded than state corrections department, DSNetwork’s facilitation of federal bed procurement runs the risk of applying upward price pressure on state

operating a correctional facility, and then re-bid on a regular basis.”); *see also*, Bruce L. Benson, *Do We Want the Production of Prison Services to be More “Efficient”?*, in *Changing the Guard: Private Prisons and the Control of Crime* 163, 174 (Alexander Tabarrok, ed., 2003) (“Private producers cannot simply cut costs by cutting quality and continue to count on an undiminished flow of revenues because consumers will turn to substitutes that are of higher quality for the price or to lower-price substitutes of comparable quality. Thus, competition forces private firms to offer relatively high-quality services at relatively low prices. Technological efficiency results from competitive pressures and from the profit motive.” Although Benson provides this general discussion of competition, he does proceed to note some ways in which the private prison industry has not, and should not, follow classical economic theory.).

⁵⁷ *E.g.*, Solicitation 101507 (Oct. 16, 2007) (notice of intent to award sole source contract to GEO Group, on behalf of U.S. Marshals Service, for Robert A. Deyton Detention Facility in Clayton County, Georgia); Solicitation ODT-7-R-0001 (Jun. 7, 2007) (notice of intent to issue a non-competitive contract on behalf of U.S. Marshals Service); Solicitation ODT-USMS-7-0001 (May 18, 2007) (notice of intent to award sole source contract to CCA, on behalf of U.S. Marshals Service, for Pinal County, Arizona detention facility).

⁵⁸ *Compare* Sources Sought Notice, ODT-6-R-0002 (Jan. 6, 2006) (seeking an “existing secured detention facility located within the geographic boundaries of Leavenworth, Kansas with a capacity of not less than 802 beds”) *with* Presolicitation Notice, ODT-6-R-0002 (Feb. 8, 2006) (declaring one responsible source and awarding sole-source contract to CCA); *compare* Sources Sought Notice ODT-USMS-5-0001 (Mar. 30, 2005) (seeking an “existing secured detention facility located within the geographic boundaries of San Diego County, California with a capacity of not less than 700 beds”) *with* Presolicitation Notice ODT-5-R-0004 (May 10, 2005) (declaring one responsible source and awarding sole-source contract to GEO Group).

⁵⁹ Office of the Fed. Detention Tr., *DSNetwork Initiative* (information brochure), available at http://www.usdoj.gov/ofdt/dsn_brochure.pdf.

⁶⁰ OFDT Statistics, <http://www.usdoj.gov/ofdt/statistics.htm> (last visited Feb. 8, 2009).

⁶¹ Office of the Fed. Detention Tr., *The Electronic Business Process for Intergovernmental Agreements* 4 (Nov. 2007).

governments in need of immediate bed space. Moreover, because DSNetwork appears to be available to any local government or private agency that wishes to make beds available,⁶² it has the potential to radically increase the scope and size of the national bed market.

C. The New Growth Market: Immigrant Detention

The Immigration and Naturalization Service (INS)—now known as Immigrations and Customs Enforcement (ICE)—has always relied heavily on privatized facilities. Not only did INS issue the first modern contract for a privately operated correctional facility, but it continues to utilize a growing network of privately operated detention centers. Precise data on ICE privatization is difficult to find. The Bureau of Justice Statistics reports that in 2007, ICE housed 20,711 immigrant detainees in “intergovernmental service agreement” (IGSA) and Bureau of Prisons facilities.⁶³ While ICE does not publish a list of the IGSA facilities, it did include such a list in a 2008 solicitation for a telecommunications services contract.⁶⁴ The IGSA facilities are mostly county jails, although a few state prisons appear on the list as well. The solicitation separates IGSA facilities into two categories: those which hold detainees for seventy-two hours or less, and those which hold for over seventy-two hours. In total, the solicitation lists 206 “over seventy-two” facilities and 139 “under seventy-two” facilities, but does not provide information on the total size of each contract.⁶⁵ While the majority of ICE detainees are held in IGSA facilities, about one-third are held in ICE facilities.⁶⁶ These ICE facilities consist of both contractor owned-and-operated detention centers, as well as ICE-owned facilities. The ICE website lists eighteen such facilities, of which six are contractor-owned-and-operated.⁶⁷ Of the remaining twelve detention centers, all are owned by ICE, but operated by contractors.⁶⁸

Although immigrant detention policy necessarily begins with ICE, it does not end there. Perhaps the single greatest salvation of the industry (and certainly of CCA) has been the series of

⁶² *Id.* at 11.

⁶³ Heather C. West & William J. Sabol, Bureau of Justice Statistics, *Prisoners in 2007* (NCJRS 224280) 26, app. tbl. 18.

⁶⁴ Immigrations and Custom Enforcement, Solicitation Number HSCETE-08-R-00001 (Jan. 3, 2008) (on file with author). The solicitation documents have subsequently been removed from the Federal Business Opportunities website.

⁶⁵ *Id.* at 28-36.

⁶⁶ West & Sabol, *Prisoners in 2007*, *supra* note 63, app. tbl. 18, at 26.

⁶⁷ Immigration Detention Facilities, <http://www.ice.gov/pi/dro/facilities.htm> (last visited Feb. 7, 2009). The webpage actually lists 22 facilities, however, one (San Pedro Service Processing Center) is closed, and three (Pinal County Adult Detention Center, Stewart Detention Center, and Willacy County Detention Center) are IGSA facilities.

⁶⁸ See Immigrations and Custom Enforcement Solicitations HSCEOP-06-R-00012 (May 5, 2006) (Aguadilla Service Processing Center), HSCEDM-09-R-00008 (Jan. 14, 2009) (El Centro Service Processing Center), HSCEDM-08-R-00012 (Aug. 21, 2008) (El Paso Service Processing Center), HSCEDM-09-R-00001 (Jan. 14, 2009) (Florence Service Processing Center), HSCEDM-08-R-00009 (Feb. 26, 2008) (Krome Service Processing Center), HSCEDM-08-R-00007 (Jan. 15, 2008) (Port Isabel Service Processing Center); and Immigrations and Custom Enforcement Contracts ACB-4-C-0001 (Broward Transitional Center), ACB-3-C-0002 (Buffalo Federal Detention Center). The remaining four facilities do not have procurement information listed in Federal Business Opportunities. However, two (LaSalle Detention Facility and South Texas Detention Facility) are listed as management contract facilities in Wackenhut/GEO’s annual report. GEO Group, Inc., Annual Report (Form 10-K), at 10, 12 (Feb. 15, 2008). ICE’s website states that the remaining two facilities are operated under contract by CCA (Otay Detention Facility) and Ahtna Technical Services, Inc. (Varick Federal Detention Facility).

“Criminal Alien Requirements” (CARs) issued by the Federal Bureau of Prisons. Since 1999, the BOP has issued several contracts for privately operated facilities to hold low-security foreign nationals who are serving criminal sentences prior to deportation.⁶⁹ In all there have been eleven solicitations under the CAR series, although the three most recent (CARs 9 through 11) are still pending. One phase (CAR-3) was cancelled prior to award.⁷⁰

Obtaining salient information about the CAR contracts is extremely difficult.⁷¹ Based on available solicitation documents, the six CAR contracts for non-federal facilities⁷² may potentially provide capacity of up to twenty-two thousand beds.⁷³ Award notices for CAR phases 4 through 8 estimate that the aggregate price for the four contracts, over their respective four-year base periods, will be near \$1.1 billion.⁷⁴ Given the favorable terms and pricing structures utilized by the BOP,⁷⁵ the CAR contracts are particularly valuable to prison operators. Not only has the CAR process infused cash into an industry that might otherwise be on the brink of insolvency, but the BOP’s preference for contracting with pre-existing facilities places the agency in a superior competitive position vis-à-vis state corrections departments that are in need of additional prison capacity.

⁶⁹ See e.g., Bureau of Prisons, Solicitation RFP-PCC-00010 (“CAR 6 RFP”), Section C, at 11 (May 26, 2006) (Seeking “management of a contract correctional institution(s) to accommodate approximately 7,000 beds for a low security adult male population consisting primarily of criminal aliens. The criminal alien population will ordinarily be low security non-U.S. citizen, primarily Mexican, adult males with sixty months or less remaining to serve on their sentences.”).

⁷⁰ See, Notice of Cancellation of Environmental Impact Statement Process: Criminal Alien Requirement, Phase III—Arizona and California, 67 Fed. Reg. 31,826 (May 10, 2002) (although the notice references a cancellation notice in *Commerce Business Daily* (CBD), this notice, along with many other CBD documents pertaining to the early CARs is no longer available).

⁷¹ The author requested documents pertaining to four CAR contracts under the Freedom of Information Act (FOIA). The Bureau of Prisons denied the author’s request for a FOIA fee waiver and demanded payment of \$1,642.95 before it would produce the responsive documents. See Letter from Wanda M. Hunt, Bureau of Prisons, to Stephen Raher (Dec. 2, 2008) (on file with author). The author promptly appealed the fee waiver denial, but the Department of Justice has failed to comply with the statutory timeline for administrative adjudication and has not responded to repeated inquiries concerning the status of the appeal.

⁷² CAR-7 is excluded from this analysis, as it is a “management only” contract for the federally-owned correctional institution in Taft, California. See Bureau of Prisons Solicitation PCC-RFP-0011 (“CAR-7 RFP”) (Aug. 8, 2006).

⁷³ See Bureau of Prisons Solicitations RFP-PCC-0005 (“CAR-1 RFP”) (Aug. 10, 1999) (seeking up to 7,500 beds); RFP-PCC-0006 (“CAR-2 RFP”) (Apr. 5, 2000) (seeking approximately 1,500 beds); RFP-PCC-0008 (“CAR-4 RFP”) (Feb. 13, 2004) (seeking approximately 1,000 beds); RFP-PCC-0009 (“CAR-5 RFP”) (Jun. 21, 2005) (seeking approximately 1,200 beds); RFP-PCC-0010 (“CAR-6 RFP”) (May 26, 2006) (seeking approximately 7,000 beds); RFP-PCC-0012 (“CAR-8 RFP”) (Apr. 29, 2008) (seeking approximately 4,000 beds).

⁷⁴ See Bureau of Prisons Award Notices DJB1PC002 (Feb. 13, 2004) (\$129 million contract to CCA, CAR-4); DJB1PC003 (May 24, 2006) (\$76 million contract to Reeves County, Texas, CAR-5); DJB1PC007 (Jan. 18, 2007) (\$187 million contract to Reeves County, Texas, CAR-6); DJB1PC006 (Jan. 18, 2007) (\$122 million contract to Management and Training Corp., CAR-6); DJB1PC008 (Jan. 18, 2007) (\$63 million contract to LCS Corrections Servs., CAR-6); DJB1PC004 (Jan. 18, 2007) (\$269 million contract to Cornell Companies, CAR-6); DJB1PC005 (Jan. 18, 2007) (\$119 million contract to CCA, CAR-6); DJB1PC009 (Apr. 25, 2007) (\$143 million contract to Management and Training Corp., CAR-7); DJB1PC010 (Apr. 1, 2009) (\$226 million contract to CCA, CAR-8).

⁷⁵ See *infra*, notes 270, 289-292, and accompanying text.

II. Effect of Non-Governmental Status

Supporters of privatization frequently cite the industry's non-governmental status as a benefit, insofar as it allows for "innovation."⁷⁶ Although this assertion is questionable to begin with,⁷⁷ it also fails to take into account the detriments associated with carceral operations by non-governmental entities. The disadvantages of non-governmental prison operations are numerous and varied. This section begins with a general discussion of the problems of prison operators' non-governmental status. It then focuses on the two most prominent issues: liability and public access to information.

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

neither the straightforward retreat of sovereignty, nor its outright expansion. Rather the private prison is fundamentally premised on a dynamic that combines these tendencies, that seems to represent both the apparent retreat and the advance of the state in the prison context. It is in this sense that private prisons must be understood in terms of the *extension and diffusion* of sovereignty.⁷⁸

In other words, states can expand the prison system (arguably the most extreme use of state's coercive powers) while simultaneously relinquishing government control over many features of the carceral apparatus. As White elaborates, "the juridical structure of the private prison attenuates and ultimately insulates the state from accountability of a more symbolic, political kind. Private prisons tend to distance public officials from responsibility for the way private prisons are run."⁷⁹ Although White describes corruption as the most obvious example, he also notes that "the private prison converts the problems of prisons—which are endemic and substantial in every case—into management questions and questions of relative performance, efficiency, contract interpretation, and so forth."⁸⁰

⁷⁶ Notably, leading privatization supporter Charles Thomas recently admitted that promises of innovation were oversold. See, Charles W. Thomas, *Correctional Privatization in America: An Assessment of Its Historical Origins, Present Status, and Future Prospects*, in *Changing the Guard: Private Prisons and the Control of Crime* 57, 81-82 (Alexander Tabarrok, ed., 2003), ("I expected that the private sector would bring much by way of creativity and innovation to corrections that would then cause the diffusion of innovative approaches to public correctional agencies. I was more wrong than right in this regard. I have seen a great deal of creativity and innovation on the front of facility design and construction as well as in the greater willingness of the private sector to accept technological innovation in, for example, the area of security. Thus far, however, I am unimpressed by the creativity that the private sector has brought to the table in such areas as staffing patterns, performance incentive programs for employees, fringe benefit and retirement programs for employees, and innovative programs for prisoners that include adequately sophisticated measures of in-program and postrelease outcomes.").

⁷⁷ See e.g., Austin & Coventry, *supra* note 16, at 37-38 ("As pointed out by Gaes and colleagues [*infra* note 169], a coherent theory of why privately operated prisons would outperform public facilities has yet to emerge. Indeed, one could argue that the private sector has simply drawn upon the methods used by the public sector with respect to inmate management and staffing and only attempted to reduce the costs associated with that model. In effect, the private sector may be applying a more efficient model that is essentially mimicking the public sector. . . . Should this approach be considered by policymakers, the future of privatization may be very limited as the public sector in turn copies the private sector's methods.").

⁷⁸ White, *supra* note 13, at 137.

⁷⁹ *Id.*, at 139.

⁸⁰ *Id.*

Supporters of privatization are fond of rationalizing the industry's shortcomings by claiming that prisons are messy enterprises that will never be perfect.⁸¹ Of course, this argument is not limited to private operators—state corrections officials also seek to explain their failures with similar logic. The diffusion of sovereignty can be illustrated by the different ways in which private and public actors employ these arguments. To use a hypothetical, suppose a concerned party (e.g., a family member of a prisoner, an inmate's attorney, or a policy advocate) identifies a failure within a prison system. The process of ameliorating this failure begins quite similarly whether the prison is publicly or privately operated. Assuming, as is often the case, the concerned party cannot resolve the issue with the corrections department, she can raise the issue with the legislature.⁸² Often, general apathy toward prison conditions will preclude any meaningful response. But in cases where legislators are motivated to seriously inquire about the operating failure, prison administrators (public or private) will often respond by arguing, in essence, that they have a difficult job which cannot be understood by those outside the corrections profession.⁸³ After the opening inquiry and response, the argument becomes a garden-variety policy debate—both sides will articulate their own narrative, and the outcome will be determined through the legislative process. If the prison administrator can persuade the legislature that his job is complex and specialized, the status quo will prevail.

The difference between the public and private prison systems comes when the concerned party prevails in her argument. A legislature is able to demand immediate change from a state corrections agency. In contrast, the legislature is constitutionally prohibited from impairing an existing contract with a private operator. Even if the needed change can be accomplished without unconstitutionally impairing the operator's contractual rights, an unwelcome change

⁸¹ See e.g., True Facts About Corrections Corporation of America (CCA) and Privatization, <http://www.thecca360.com/facts.php> (last visited Jan. 26, 2009) (“The nature of the industry means that the potential for incidents and disruptions always exists.”). Although this CCA-created webpage declares “as a result of CCA’s dedication to safety and continual improvement of services, average rates for violent incidents and escapes at CCA facilities are lower than rates at similar public facilities,” CCA provides no substantiating evidence, thus raising questions of data analysis and methodology, see *infra* note 168. CCA’s unsubstantiated claim is even more suspect in light of Austin & Coventry’s data analysis, which found that although for some operations metrics there is not a statistically significant difference between public and private facilities, there is “one major exception: in this comparison [controlling for facility security level], the privately operated facilities have a much higher rate of inmate-on-inmate and inmate-on-staff assaults and other disturbances.” Austin & Coventry, *supra* note 16, at 52, 57.

⁸² A party could, in theory, address his concerns directly to a private prison operator, but if the issue is at all serious, the contractor is quite unlikely to negotiate with a private citizen. Contracts and corporate literature are quite clear that private prison operators view their only “customers” as contracting agencies, not inmates, family members, or policy advocates.

⁸³ This argument has deep historical roots, see Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in *The Oxford History of the Prison*, *supra* note 4, 151, 152 (when late nineteenth century prisons devolved into a state of “pervasive overcrowding, corruption, and cruelty. . . . Wardens did not so much deny this awful reality as explain it away, attributing most of the blame not to those who administered the system but to those who experienced it.”). This dynamic—which implicitly or explicitly blames inmates for the systemic failings of the prison system—can also be seen in the growth of the corrections industry as a “profession” complete with its own vocabulary and framework of technical rationality—tools which help to dehumanize inmates and channel prison employee dissatisfaction by directing it against inmates, politicians, and prisoner rights advocates who “don’t understand” the challenges facing the profession. Cf. generally, Guy B. Adams & Danny L. Balfour, *Unmasking Administrative Evil* (1998).

may provoke the private operator to terminate the contract at the soonest opportunity.⁸⁴ Moreover, the legislature must rely on the corrections agency to effectively resolve problems with private operators. This reliance on administrators not only inserts another layer of bureaucracy in an already opaque accountability system, but may ultimately fail to solve problems if the agency is timid in enforcing contractual terms because of a dependency on private-sector capacity.

A recent example of the “prisons are difficult business” argument, and the concomitant muddying of the waters of accountability, played out in an eight-year court battle in Texas. While serving a six-month sentence in a Wackenhut-operated prison, Gregorio de la Rosa, Jr. was murdered in a prison yard when two inmates smuggled a weapon out of their housing unit.⁸⁵ De la Rosa’s estate argued that Wackenhut was negligent because it failed to search the attackers when they left their housing unit, as required by Texas prison regulations.⁸⁶ The jury found Wackenhut negligent, but the company appealed, saying the verdict could not stand because it was not supported by expert testimony.⁸⁷ Wackenhut argued that “specialized knowledge was required to show [it] had a duty to search the inmates passing through the crash gate or that the failure to search the inmates violated this duty.”⁸⁸ The Texas Court of Appeals ruled against Wackenhut, noting that the company had not cited a single relevant case to support its argument.⁸⁹

The de la Rosa case shows that the “prisons are messy” argument does not always prevail. Indeed, due to the particularly egregious facts of de la Rosa’s murder,⁹⁰ it is not entirely surprising that the jury overcame any potential bias based on de la Rosa’s status as a prisoner. Given the weakness of Wackenhut’s legal arguments, it is also unsurprising that the company lost on appeal. Nonetheless, the same arguments may well have prevailed in a legislative venue, where the focus is on broad policy, not vindicating the rights of an individual crime victim. Moreover, unlike an appellate court, legislators are overtly guided by value judgments—such as legitimate policy beliefs (e.g., an inherent bias in favor of outsourcing) and less principled factors, such as campaign contributions.

⁸⁴ For example, when Nevada Department of Corrections raised concerns about CCA’s operations of the Southern Nevada Women’s Correctional Center, CCA elected not to renew its contract, citing operating losses. See Corr. Corp. of Am., Annual Report (Form 10-K) (Mar. 7, 2005) at 50.

⁸⁵ *Wackenhut Corr. Corp. v. de la Rosa*, No. 13-06-00692, 2009 WL 866791, at *1-2 (Tex. App. – Corpus Christi, Apr. 2, 2009).

⁸⁶ Wackenhut conceded that it was obligated to comply with a state regulation that stated “[t]he officer *shall* conduct pat-searches of inmates before permitting entrance or exit to or from any department within the area of responsibility.” *Id.* at 1 (emphasis by court). But, Wackenhut argued its employee’s failure to search the attackers did not violate the policy because the housing unit did not constitute a “department.” Brief of Appellant at 32, *Wackenhut Corr. Corp. v. de la Rosa*, No. 13-06-00692, 2009 WL 866791, at *1-2 (Tex. App. – Corpus Christi, Apr. 2, 2009) [hereafter “Wackenhut Appellate Brief”].

⁸⁷ Wackenhut Appellate Brief at 26 (“In this case, proof of negligence required expert testimony. Expert testimony in a prison case is essential to support a claim because jurors are not familiar with what is reasonable care in a prison environment.”).

⁸⁸ *Wackenhut Corr. Corp.*, 2009 WL 866791, at *21.

⁸⁹ *Id.*, n.33.

⁹⁰ *Id.* at *1 (“A few days before his expected release, Gregorio [de la Rosa] was beaten to death by two other inmates using a lock tied to a sock, while Wackenhut’s officers stood by and watched and Wackenhut’s wardens smirked and laughed.”).

An example of legislative acquiescence to industry arguments can be found in the 2008 Congressional hearings concerning the Private Prison Information Act.⁹¹ Witness Tom Jawetz (an ACLU staff attorney) testified concerning the need for increased public access to information on private prison operations. While raising doubts about Jawetz's credibility, Rep. Louis Gohmert (R-TX) asked him if he had ever requested a tour of a private prison.⁹² When Jawetz replied that a two-hour tour does not give the visitor a comprehensive picture of facility operations, Gohmert flippantly replied, "Well, there is a way to have an opportunity to live in a facility."⁹³ Most importantly, Gohmert's colloquy misses Jawetz's point. Jawetz testified that he *had* taken a tour of the Willacy County Detention Center (operated by Management and Training Corporation (MTC)) and noted substandard housing conditions, but could not use FOIA to access MTC's records pertaining to maintenance of the housing units because the records weren't held by a federal agency.⁹⁴

While cases such as the de la Rosa murder show that serious operating failures can be addressed by courts, in reality inmate access to courts is curtailed by judicial doctrine and the PLRA.⁹⁵ In addition, interested parties outside the prison system typically do not have standing to challenge prison operations in court. Thus, many legitimate concerns that do not involve the loss of life or limb must be raised with non-judicial oversight bodies, usually legislatures. When prison operators are able to diffuse legislative attention by arguing that the only appropriate remedy is through contract (a less public process than legislation), the state's control of its carceral apparatus is diminished.

On a more specific level, outsourcing is an effective way for governments to evade numerous generally applicable accountability measures. The most prominent such evasion in the realm of federal correctional outsourcing has been avoidance of environmental planning laws. As a general rule, contractors are subject to the National Environmental Policy Act (NEPA)⁹⁶ when constructing a prison destined for use under a federal contract. The federal government's recent habit of contracting for use of pre-existing facilities, avoids NEPA since there is no federal involvement at the time of construction.⁹⁷ The interest of contractors and the federal government in avoiding NEPA is more than theoretical. Federal courts have held that one purpose of NEPA is to ensure public participation in the planning process⁹⁸—a goal in direct conflict with prison-planners' objective of managing public opposition.⁹⁹

⁹¹ See *infra*, notes 121-127 and accompanying text.

⁹² *Private Prison Information Act of 2007 (Part II): Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 110-190 (2008), at 65 [hereafter "H.R. 1889 Hearing"].

⁹³ *Id.* at 66.

⁹⁴ *Id.* at 56.

⁹⁵ See *supra*, notes 25-26 and accompanying text.

⁹⁶ 42 U.S.C. § 4321-4370f.

⁹⁷ See e.g., *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975); *Citizens Alert Regarding the Environment v. U.S. Envtl. Protection Agency*, 2003 WL 1889242 (D.D.C. 2003) (both holding that the possibility of future federal funding of a project is not sufficient to make NEPA applicable).

⁹⁸ E.g., *Siera Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011 (2d Cir. 1983); *Envtl. Defense Fund, Inc. v. Stamm*, 430 F.Supp. 664 (N.D. Cal. 1977); *Citizens Against Toxic Sprays, Inc. v. Bergland*, 428 F.Supp. 908 (D.Or. 1977).

⁹⁹ Cf. U.S. Dept. of Justice, Nat'l. Inst. of Corr., *An Information Brief: Issues in Siting Correctional Facilities*, at iv (May 1992) ("We must learn better ways to manage public opposition because we can expect that the future will hold more, not fewer, decisions about where to locate correctional facilities.").

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

A. Liability

Questions of liability largely center around allocating the risk for contractor violations of inmate civil rights. In the early stages of the twentieth century prison privatization movement, many issues of contractor liability implicated unsettled areas of the law. In 1988, the Supreme Court issued its first ruling addressing the liability of contractors in the prison system. In *West v. Atkins*, the Court held that a contract physician performing work in a state prison system was acting under color of state law and was thus amenable to suit under 42 U.S.C. § 1983 for alleged violations of an inmate's Eighth Amendment rights.¹⁰⁰ This rule has subsequently been applied several times to allow § 1983 suits against private prison operators.¹⁰¹ The *West* holding provided some encouragement to prisoner rights advocates, since § 1983 is an important mechanism for vindicating inmates' constitutional rights. Because a § 1983 action may only be brought against a person acting under color of state law,¹⁰² the *West* holding was a necessary step in clarifying the applicability of § 1983 to private contractors in a correctional system.

Once the Court had established the applicability of § 1983 to corrections contractors, the next major question was whether a contractor was entitled to the defense of qualified immunity.¹⁰³ The Supreme Court addressed this question in *Richardson v. McKnight*, when it held that prison guards employed by CCA could not raise a qualified immunity defense against a prisoner's § 1983 suit over injuries allegedly inflicted by the defendants.¹⁰⁴ Although *Richardson* increased the potential liability of private prison operators, its enduring effect is somewhat uncertain for two reasons. First, the Court's holding relied at least in part on a finding

¹⁰⁰ 487 U.S. 42, 54 (1988) ("Respondent, as a physician employed by North Carolina to provide medical services to state prison inmates, acted under color of state law for purposes of § 1983 when undertaking his duties in treating petitioner's injury. Such conduct is fairly attributable to the state.")

¹⁰¹ E.g., *Rosborough v. Management & Training Corp.*, 350 F.3d 459 (5th Cir. 2003) (per curiam) (corporation operating prison under contract with State of Texas was performing a public function and thus was subject to the limitations of the Eighth Amendment), *but cf. Richardson v. McKnight*, 521 U.S. 399, 413 (1996) (Supreme Court expressly declined to hold whether private prison corporation was acting under color of state law for purposes of prisoner's § 1983 suit); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 550-551 (5th Cir. 2005) (court recited, with implied approval, defendant prison corporation's concession that it acts under color of state law when providing juvenile correctional services, but held that defendant was *not* a state actor when making personnel decisions (citing *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996) ("An entity may be a state actor for some purposes but not for others."))).

¹⁰² *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

¹⁰³ For a discussion of qualified immunity, see *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1984) ("The conception animating the qualified immunity doctrine . . . is that where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences." (internal quotation marks omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982))).

¹⁰⁴ 521 U.S. 399 (1996).

that CCA's operations were not heavily supervised by the state.¹⁰⁵ Thus, it is unclear whether the same result would follow in a state with a more aggressive monitoring program. Second, four justices (three of whom are still on the Court) dissented from the *Richardson* holding, citing both legal and policy objections.¹⁰⁶

Today's confused jurisprudence regarding § 1983 and private prisons raises important fiscal questions. The government-supervision factor articulated in *Richardson* presents an uncertain relationship with vicarious liability in the context of § 1983 liability. It is settled law that the doctrine of respondeat superior does not apply to § 1983 actions.¹⁰⁷ Accordingly, a prisoner bringing a § 1983 claim against corrections officials must prove that the defendants had personal involvement in the alleged deprivation of rights.¹⁰⁸ But courts have not specified how *Richardson*'s supervision factor interfaces with the respondeat superior doctrine. In other words, if state supervision is not sufficient to allow a contractor to raise a qualified immunity defense, might a state monitoring employee nonetheless have enough personal involvement in a deprivation of rights to impose liability? The outcome is fiscally important, since most government agencies voluntarily indemnify employees against § 1983 judgments. Thus, if a contractor and government supervisor can both be held liable, the government may well end up paying the employee's judgment (through indemnification) and the contractor's (by means of passed-through costs in future rate adjustments).

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

B. Public Access to Information

Another problematic aspect of prison privatization is the extent to which outsourcing obscures public understanding of prison operations.¹⁰⁹ At the same time private prison operators defend their track record, they are able to obstruct evidence-based counterarguments by shielding important operating information from public disclosure. As a general matter, federal and state statutes mandating disclosure of government records frequently provide protections for information relating to contractor activities—either through express disclosure exemptions for

¹⁰⁵ *Id.* at 409 (“The firm is systematically organized to perform a major administrative task for profit. It performs that task independently, with relatively less ongoing direct state supervision.” (citations omitted)).

¹⁰⁶ *Id.* at 422–423 (Scalia, J., dissenting) (“Today’s decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners . . . are to be treated quite differently in the matter of their financial liability. The only sure effect of today’s decision—and the only purpose, as far as I can tell—is that it will artificially raise the cost of privatizing prisons. . . . Neither our precedent, nor the historical foundations of § 1983, nor the policies underlying § 1983, support this result.”).

¹⁰⁷ *Polk County v. Dodson*, 454 U.S. 312 (1981).

¹⁰⁸ *E.g.*, *Schnitzler v. Reisch*, 518 F.Supp. 2d 1098 (D.S.D. 2007) (denying defendant’s motion for summary judgment because alleged involvement of warden and corrections department director in programming decision raised material issue of fact).

¹⁰⁹ This section focuses on the ability of the general public to access information about private prison operations. The closely related issue of *government* access to information concerning contractor performance is discussed separately, in section III.B.

trade secrets or judicial doctrines holding disclosure laws inapplicable to records in possession of a contractor. These protections are often based on the premise that contractors provide specialized services to the government as part of a larger business model. For example, if a hypothetical aviation manufacturer (AirCo) was forced to disclose information about its design process simply because it sold planes to the government, the company would risk revealing trade secrets and would be at a competitive disadvantage solely because the government happened to be among its customers. Such disclosure would not only harm AirCo, but this disadvantage would distort the entire market, thus imposing spill-over effects on all participants. This logic does not apply easily in the realm of private prisons.

Governments are the *only* customers of private prison operators, thus the only private parties harmed by mandated disclosure are the contractors themselves. Moreover, there are no substantial trade secrets in the private prison industry. Although a trade secret can consist of “any information that can be used in the operation of a business . . . and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others,”¹¹⁰ it most commonly applies to formulas, patterns, data compilations, computer programs, devices, methods, techniques, or processes.¹¹¹ Although private prison operators likely employ methods and processes in the conduct of their business (e.g., operating procedures, educational programs), such information is only entitled to trade secret protection if it is valuable, secret, and definite.¹¹² Notably, information does not qualify as a trade secret if it is “generally known or readily ascertainable through proper means by others to whom it has potential economic value.”¹¹³

The ill fit between trade secrets law and private prisons can be illustrated through an example. Private prison operators typically assert a proprietary interest in facility staffing plans.¹¹⁴ Case law is not entirely clear whether such information is eligible for trade secret protection as a matter of law.¹¹⁵ But assuming for purposes of argument that government contractors’ staffing plans are protected, the AirCo hypothetical again illustrates the policy justification for such protection. A party concerned with the quality of products being sold by AirCo to the government would not usually have a need for AirCo’s personnel data. Potential problems with AirCo’s planes can be determined by examining the product itself—whether the plane is manufactured by ten employees or a hundred employees is not material. In the case of a privately operated prison, however, staffing in large part *is* the product that the government contracts for. Thus, shielding such information under a claim of trade secret protection unnecessarily hinders independent evaluation of whether the government has received a fair bargain under the contract.

To the extent that private prison operators do have a proprietary interest in operational data, this private interest is almost always outweighed (except in cases of bona fide sensitive security information, e.g., facility architectural drawings) by public disclosure. Scholarly

¹¹⁰ Restatement (Third) of Unfair Competition § 39 (1993).

¹¹¹ *Id.*, cmt. d.

¹¹² *Id.*

¹¹³ *Id.*, cmt. f.

¹¹⁴ See e.g., GEO Group, Inc., Response to Florida ITN DMS 08/09-026, *infra* note 209, § 2.F.39 (“Staffing Plan,” redacted in its entirety at bidder’s request).

¹¹⁵ E.g., *E.T. Moyer v. Eure*, 204 S.E.2d 221, 224 (N.C. App. 1974) (dictum indicating that list of plaintiff’s sales personnel does not qualify as trade secret); *The Finish Line, Inc. v. Foot Locker, Inc.*, No. 1:04-CV-877-RLY-WTL, 2006 U.S. Dist. LEXIS 3294, at *27 (S.D. Ind. Jan. 18, 2006) (listing of contact information for plaintiff’s district managers held not eligible for trade secret protection).

research on the efficacy of private prisons has been hampered by a lack of reliable data. To the extent that such data is kept secret due to the inapplicability of public records statutes to private contractors, policy makers will never receive adequate information to determine the operational success or failure of prison privatization.

Access to federal records is governed by the U.S. Freedom of Information Act (FOIA).¹¹⁶ Commentators have long noted that FOIA raises serious questions vis-à-vis private prison operators.¹¹⁷ Although FOIA presumptively requires disclosure of records actually held by the contracting agency,¹¹⁸ federal agencies that contract with private prisons may receive summarized reports which misrepresent the underlying data.¹¹⁹ When critical information is held by the contractor, not the supervising agency, FOIA is likely not applicable. Although no court seems to have ruled on this question in the context of private prisons, the Court of Appeals for the District of Columbia Circuit has held as a general matter that a government contractor (even one exercising an adjudicatory function under “detailed government control”) is not an “agency” for purposes of subjecting it to FOIA.¹²⁰

In 2007, Representative Tim Holden (D-PA) introduced H.R. 1889, which would make FOIA applicable to entities operating prisons under contract with the federal government.¹²¹ The Subcommittee on Crime, Terrorism, and Homeland Security initially held a hearing on H.R. 1889 on November 8, 2007, at which Rep. Holden cited problems with escapes and inmate assaults at CCA’s Northeast Ohio Correctional Center (NOCC). Although the NOCC operated under federal contract, CCA did not submit any operational reports to federal agencies, thus there was no meaningful information accessible to FOIA requesters. According to Rep. Holden’s testimony, state legislators and the media had been unsuccessful in obtaining information on the problems occurring at the NOCC.¹²² As subcommittee chairman Bobby Scott (D-VA) later explained, H.R. 1889 appeared uncontroversial at the time of the November 2007 hearing. Soon after the hearing, however, CCA contacted subcommittee staff “to express its strong opposition to the legislation and question the necessity of the bill.”¹²³

Due to CCA’s opposition, Chairman Scott held a second hearing on June 26, 2008. Although CCA declined to testify at the hearing, it submitted a written statement calling H.R. 1889 “a solution in search of a problem.”¹²⁴ In its statement, CCA claimed that government oversight is sufficient to allay any problems with access to information, and cited one example of

¹¹⁶ 5 U.S.C. § 552 (2007).

¹¹⁷ *E.g.*, Malcolm Russell-Einhorn, *Legal Issues Relevant to Private Prisons*, in Abt Associates, *Private Prisons in the United States: An Assessment of Current Practice*, Appx. 3, at 37-38 (1998); *United Technologies Corp., Pratt & Whitney Aircraft Group v. Marshall*, 464 F.Supp. 845 (1979) (government contractor could not prevent defendant federal agency from releasing, under FOIA, a mandatory annual statistical report the contractor had submitted to defendant pursuant to procurement regulations).

¹¹⁸ Russell-Einhorn, *supra* note 117, at 37.

¹¹⁹ *See infra*, notes 237-258 and accompanying text.

¹²⁰ *Pub. Citizen Health Research Group v. Dept. of Health, Educ. and Welfare*, 558 F.2d 537, 544 (D.C. Cir. 1981).

¹²¹ Private Prison Information Act of 2007, H.R. 1889, 110th Cong. (2007).

¹²² Hon. Tim Holden, Testimony before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, Nov. 8, 2007, available at <http://judiciary.house.gov/hearings/pdf/1108071.pdf>.

¹²³ H.R. 1889 Hearing, *supra* note 92, at 1 (statement of Rep. Bobby Scott, Chair, Subcomm. on Crime, Terrorism, and Homeland Security).

¹²⁴ *Id.* at 3 (statement of Corr. Corp. of Am.).

a FOIA requester being able to obtain facility reports from the contracting agency.¹²⁵ In addition to its own in-house lobbying, CCA employed three lobbying firms in its fight against H.R. 1889.¹²⁶ Moreover, the Reason Foundation (a conservative think tank) testified against H.R. 1889 at the 2008 hearing and the U.S. Department of Justice expressed concerns about the bill's potential costs.¹²⁷ The committee took no action on H.R. 1889 between the hearing and the adjournment of the 110th Congress.

Of course FOIA is only part of the access to information debate, since many private prison contracts are with state and local governments, thus implicating state open records statutes. While state statutes generally do not, on their face, apply to contractor records, some courts have recognized the unique status of private entities which are the functional equivalents of state agencies.¹²⁸

Not surprisingly, CCA has been as vocal in its opposition to falling under state open records law as it was to H.R. 1889. In 2008, a Tennessee trial court held that CCA was the functional equivalent of a state agency and was required to fulfill a request for records under Tennessee's Public Records Act. In reaching its decision, the trial court relied on Tennessee's functional equivalency test, articulated in *Memphis Publishing Co. v. Cherokee Children & Family Services*.¹²⁹ Stating that privatization should not act to curtail access to information on government operations,¹³⁰ the *Cherokee* court established a four-factor test to determine functional equivalency.¹³¹ The first, and "cornerstone," factor is "whether and to what extent the entity [e.g., a contractor] performs a governmental or public function."¹³² The remaining three factors are the level of government funding of the private entity, the extent of governmental control over the entity, and whether the entity was created by legislative action.¹³³

Although the trial court admitted the fourth *Cherokee* factor weighed against a finding of functional equivalency, it found that the remaining three factors all favored subjecting CCA to the Public Records Act. Not surprisingly, CCA appealed the decision. Although CCA is entitled to pursue its appellate remedies, the legal arguments it advances are at times counterintuitive. For example, when addressing the first *Cherokee* factor (the cornerstone governmental function

¹²⁵ *Id.* CCA's argument does not address the problem of contractors providing insufficient information to the supervisory agency, *see infra*, notes 237-258 and accompanying text.

¹²⁶ *See* 2008 lobbying disclosure reports of Akin, Gump, Strauss, Hauer & Feld; Podesta Group, Inc.; and McBee Strategic Consulting, LLC (all reporting H.R. 1889 lobbying on behalf of CCA) (on file with author), available at <http://disclosures.house.gov/ld/ldsearch.aspx>.

¹²⁷ *Id.* at 68-69 (Letter from Keith B. Nelson, Principal Deputy Assistant Attorney General, to Rep. Howard Coble, Member, Subcomm. on Crime, Terrorism, and Homeland Security).

¹²⁸ This does not, however, necessarily lead to the conclusion that private prisons meet the functional equivalency test in all situations. *E.g., State ex rel. Oriana House, Inc. v. Montgomery*, 854 N.E.2d 193 (Ohio 2006) (holding that private entities that are functionally equivalent to state agencies are subject to Ohio's Public Records Act, but concluding that a private non-profit organization operating a halfway house did not meet the functional equivalency test).

¹²⁹ 87 S.W.3d 67 (Tenn. 2002).

¹³⁰ *Id.* at 77 ("Privatization may be desirable in itself, but it should not come without . . . leaving public accountability intact. Not only should the public be able to monitor the private company's activities, but the monitoring should be on the same terms as when the public agency was the information vendor." (quoting Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information under State Law*, 27 Fla. U.L.Rev. 825, 833 (2000) (omission by the court))).

¹³¹ *Id.* at 79.

¹³² *Id.*

¹³³ *Id.*

test), CCA cites Tennessee's eighteenth- and nineteenth-century history of privately operated prisons as grounds for concluding it does not perform a governmental function.¹³⁴ While CCA's argument is historically interesting, it disregards the last 150 years of changes in correctional administration and the relevant statutory language.¹³⁵ Even more incredibly, CCA addresses the second *Cherokee* factor (the level of government funding) by arguing it receives *no* funding from the State of Tennessee. Despite the fact that *Cherokee* itself involved a private entity operating under a contract with the state,¹³⁶ CCA argues that its revenue from the state constitutes payment for services, not "funding."¹³⁷ Again, CCA's position misinterprets *Cherokee*, which focused on the extent, not the nature, of government funding.¹³⁸

The impact of reduced access to information is wide-ranging. Private prison operators are exceedingly protective of information regarding their operations, thus making informed analysis of the policy successes (or failures) of correctional privatization difficult to conduct. One recurring issue in this context is data on personnel recruitment and retention. This is an area in which federal and state contracts differ markedly. Federal contracts for private prisons are generally covered by the provisions of the Service Contract Act of 1965,¹³⁹ which requires contractors to pay wages at least equal to the local prevailing wage for same job class.¹⁴⁰ Thus, once a bidder identifies the location of its proposed facility, the contracting agency provides the minimum wages,¹⁴¹ and the contractor is able to incorporate those costs into its proposed price. In stark contrast, state contracting procedures typically do not contain comparable requirements, nor do most states require detailed wage information as part of a bidder's proposal. For example, a CCA proposal submitted to the State of Virginia¹⁴² contained a seven-page "Plan for Obtaining Qualified Workers," which consisted solely of generalizations¹⁴³ and vague descriptions of personnel programs such as "[u]se of employee development activities to promote positive employee relations." Thus, while the proposal is publicly accessible through Virginia's open

¹³⁴ Brief of Appellant at 24-32 ("CCA Appellate Brief"), *Friedmann v. Corr. Corp. of Am.*, No. M2008-01998-COA-R3-CV (Tenn. Ct. App. Dec. 31, 2008).

¹³⁵ The *Cherokee* court explained the purpose of the first factor as "ensur[ing] that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity." *Cherokee*, 87 S.W.2d at 79. Accordingly, the focus of the analysis is properly on the government agency's responsibilities at the time of contracting, not 150 years in the past. Regardless of CCA's characterization of historical correctional practices, it is unquestioned that the twenty-first century corrections system in Tennessee is the sole responsibility of government.

¹³⁶ *Cherokee*, 87 S.W.3d at 79-80.

¹³⁷ CCA Appellate Brief, *supra* note 134, at 32-36.

¹³⁸ *Cherokee* held that Cherokee Children & Family Services met the government funding factor because "over ninety-nine percent of its funding came from governmental sources," 87 S.W.3d. at 79, a standard which presumably covers CCA, a company that candidly admits it is "dependent on government appropriations." *Corr. Corp. of Am.*, Annual Report (Form 10-K) at 21 (Feb. 25, 2009).

¹³⁹ 41 U.S.C. §§ 351-358.

¹⁴⁰ 41 U.S.C. § 351(a), *see also* Federal Acquisition Regulations, Subpart 22.10 (implementing regulations).

¹⁴¹ *E.g.*, Federal Bureau of Prisons, Solicitation RFP-PCC-0015 ("CAR-11 RFP") § I.8 (Jun. 12, 2008).

¹⁴² *Corr. Corp. of Am.*, Proposal to Virginia Dept. of Corrections to Design, Build, Finance, and Operate a Medium Security Correctional Facility in Charlotte County, Virginia (Aug. 16, 2007).

¹⁴³ *E.g.*, *id.* at 59 ("Methods of recruitment for vacant positions are designed to attract qualified applicants from outside the organization, as well as within. The procedures will include, at a minimum:

- Recruitment strategies designed to attract qualified applicants from outside the organization;
- Schedules and post assignments that include cross sex staffing; and
- Establishing qualifications for applicants that permit experience to be substituted for education when that experience is extensive and pertinent to the duties of the position.").

records statute, CCA controls the meaningful data that show the extent to which its performance is consistent with its promises.

Compensation and other personnel information is of particular interest when measuring the effectiveness of correctional privatization. Because approximately 65 to 70 percent of a typical prison budget is spent on labor, the key to a contractor's profit margin lies in controlling personnel costs.¹⁴⁴ This is done either through reducing staff or reducing compensation—an approach that the industry says it can do without sacrificing quality of operations.¹⁴⁵ But there is good reason to doubt the industry's claims because compensation effects staff turnover, which in turn impacts facility safety.¹⁴⁶ Industry-wide staff-turnover data used to be included in a privately published statistical compendium which reported annual staff turnover rates as high as 53 percent in the private prison industry.¹⁴⁷ More recent editions, however, do not contain turnover data.¹⁴⁸ The only reliable compensation data for private operators is limited to high-level employees whose salaries and benefits must be reported to the Securities and Exchange Commission. While this information does not allow for a comprehensive analysis of industry compensation patterns, it does at least raise the question of where private sector cost savings come from. In 2007, GEO/Wackenhut reported total base salary and cash bonuses for five senior executives ranging from \$575,269 to \$2.7 million (with a mean of \$1.2 million).¹⁴⁹ During the same time, CCA paid base salaries and cash bonuses for seven senior executives ranging from \$353,550 to \$1.7 million (mean of \$765,406)—although executives were also eligible for bonuses of up to 150 percent of base salary.¹⁵⁰ Neither of these sets of figures includes stock options, deferred compensation, or fringe benefits. In 2001 (the most recent year for which data is available), the national average salary for a state corrections director was \$106,893, with no state paying over \$150,000.¹⁵¹ During the same year, CCA and Wackenhut had mean senior executive cash compensation of \$458,492 and \$576,900, respectively.¹⁵²

In addition to hindering research, contractor control of operational information disadvantages local communities which are selected for new private facility construction. The financial incentive for private operators to control public relations is not merely theoretical—

¹⁴⁴ See Austin & Coventry, *supra* note 16, at 16.

¹⁴⁵ *Id.* (citing Lawrence F. Travis, et al., *Private Enterprise and Institutional Corrections: A Call for Caution*, 49 Federal Probation 11, 13 (1985)).

¹⁴⁶ *E.g.*, CCCF After Action Report, *supra* note 45, at 65 (concluding that “[h]igh staff attrition rate and inexperience has contributed to lack of ability to appropriately respond to emergencies.”); see also *id.* at 62 (“It became apparent to responding CDOC Investigators and the CDOC SORT [“Special Operations Response Team”] Commander arriving on scene that a quicker and stronger response by the facility security staff at the initial onset of the riot would have limited the extent of the riot. Investigators believe that the lack of response was due to indecisive command level decision making or inadequate staffing and resources, or both. The facility’s command staff either could not or would not deal with the situation at its inception.”).

¹⁴⁷ *The 2000 Corrections Yearbook: Private Prisons* 101 (Camille and George Camp, eds., 2000), *cf.* Mark P. Couch, *Private Prison Operator Pitches Savings to State in Capitol Hearing*, Denver Post, Mar. 7, 2007, at B-05 (CCA customer relations executive self-reporting turnover of “30 percent to 40 percent of its Colorado workforce a year.”).

¹⁴⁸ See, *The 2002 Corrections Yearbook: Adult Corrections* (Camille Camp, ed., 2002).

¹⁴⁹ GEO Group, Inc. (f.k.a. Wackenhut Corrections Corp.), Definitive Proxy Statement (Form DEF 14A), at 21 (Apr. 3, 2008).

¹⁵⁰ Corr. Corp. of Am., Definitive Proxy Statement (Form DEF 14A), at 40 (Apr. 15, 2008).

¹⁵¹ *2002 Corrections Yearbook*, *supra* note 148, at 150.

¹⁵² Corr. Corp. of Am., Definitive Proxy Statement (Form DEF 14A), at 18 (Apr. 16, 2002); Wackenhut Corr. Corp., Definitive Proxy Statement (Form DEF 14A), at 10 (Apr. 1, 2002).

CCA and Wackenhut are both candid about the risks posed by local opposition.¹⁵³ One apparent strategy in private facility siting is to locate new prisons in economically depressed rural communities.¹⁵⁴ Despite mounting evidence that prisons are not good economic development tools,¹⁵⁵ prison developers often sway local opinion leaders by promising robust payrolls and large property tax payments.

Although academic researchers have produced sound evidence questioning the economic development aspects of prisons, such studies—written in the jargon of peer-reviewed journals and frequently using fairly abstract variables as indicators of economic impact—are often ineffective in influencing public opinion. Without access to reliable data on private prison compensation, it is difficult for potential host communities to make an informed decision on a proposed private prison, although anecdotal evidence often suggests promises of high-paying jobs are overreaching.¹⁵⁶ Notably, private prison operators—particularly CCA—have recently increased their public relations efforts related to facility siting. In early 2008, CCA launched a specialized website based on the marketing slogan “caring for our communities, caring for our neighbors.”¹⁵⁷ Although the site contains little hard data, it inundates users with repetitive claims of healthy economic development, typically couched in generalized platitudes.¹⁵⁸ While CCA

¹⁵³ Corr. Corp. of Am., Annual Report (Form 10-K), at 24 (Feb. 27, 2008) (“Our success in obtaining new awards and contracts sometimes depends, in part, upon our ability to locate land that can be leased or acquired, on economically favorable terms When we select the intended project site, we attempt to conduct business in communities where local leaders and residents generally support the establishment of a privatized correctional or detention facility.”); GEO Group, Inc. (f.k.a. Wackenhut Corrections Corp.), Annual Report (Form 10-K), at 23 (Feb. 15, 2008) (similar description of siting risks).

¹⁵⁴ See Corr. Corp. of Am., Form 10-K, *supra* note 153, at 24 (“Some locations may be in or near populous areas and, therefore, may generate legal action or other forms of opposition from residents in areas surrounding a proposed site.”); GEO Group, Inc., Form 10-K, *supra* note 153, at 23 (“Otherwise desirable locations may be in or near populated areas and, therefore, may generate legal action or other forms of opposition from residents in areas surrounding a proposed site.”).

¹⁵⁵ Terry L. Besser & Margaret M. Hanson, *Development of Last Resort: The Impact of New State Prisons on Small Town Economies in the United States*, 35 J. of the Community Development Society 1-16 (2004); Susan E. Blankenship & Ernest J. Yanarella, *Prison Recruitment as a Policy Tool of Local Economic Development: A Critical Evaluation*, 7 Contemporary Justice Review 183-198 (2004); Douglas Clement, *Big House on the Prairie*, 14 FedGazette n. 1 (Jan. 2002); Ryan Scott King, et al., *An Analysis of the Economics of Prison Siting in Rural Communities*, 3 Criminology and Public Policy 453-480 (2004); David Shichor, *Myths and Realities in Prison Siting*, 38 Crime and Delinquency 70-87 (1992).

¹⁵⁶ E.g., E-mail from Kindra Mulch, Director of Social Services, Kit Carson County (Colorado), to Linda Fairbairn, Administrator of Social Services, Prowers County (Colorado) (Aug. 15, 2003) (on file with author) (“I would tell you that the average salary paid @ our prison [CCA’s Kit Carson Correctional Center] qualifies most people for WIC, Family Planning and Child Health Plan Plus, and in a few cases a small food stamp and child care allotment.”).

¹⁵⁷ CCA Community, at <http://www.ccacommunities.com> (last visited Apr. 13, 2009).

¹⁵⁸ E.g., Local Community Economic Development News, available at http://www.ccacommunities.com/static/assets/EconDev_Tabloid_5.25.07.pdf, is an eight-page newsletter apparently designed for distribution in communities selected for new CCA development. The newsletter consists mostly of vague statements such as “[h]osting a CCA correctional institution can potentially mean hundreds of jobs with an annual payroll in the millions;” “CCA pays applicable property taxes on the facilities it owns” (a cleverly-worded half-truth, since it refers only to “applicable” property taxes, not addressing the numerous situations in which CCA has negotiated tax abatements with local economic development authorities, see Philip Mattera, et al., *Jail Breaks: Economic Development Subsidies Given to Private Prisons* 28-46 (2001)); and “CCA provides competitive salaries, job training that leads the industry, and excellent opportunities for rapid advancement nationwide.” The only objective

has become increasingly adept at using strategic marketing to frame such generalizations in compelling and aesthetically pleasing media, it has simultaneously prevented dissemination of the hard data that could prove or disprove the company's claims.

CCA's most common response is that operational data is available to contracting agencies.¹⁵⁹ Setting aside the issue of whether agency monitors receive accurate and complete data, this argument still misconstrues the purpose of public information laws. Because corrections departments so often depend on private prisons to provide needed bed space, agency staff are not necessarily motivated to request information such as compensation data. In fact, an agency may not even have the contractual ability to demand such data.¹⁶⁰ Public records laws are designed to counteract agency hesitancy by allowing interested parties to independently analyze government operations. Without articulating a compelling justification for secrecy, prison operators have been largely successful in their efforts to prevent or hinder release of salient operating information.

III. Contractual Issues

The government-contractor relationship is often cited as one of the chief benefits of correctional outsourcing.¹⁶¹ The problem with this argument is that effective government procurement depends on clearly defined goals which the procuring agency can verify by evaluating contractor performance. Thus, successful outsourcing depends on two requirements: clarity in the bid solicitation and response documents, and effective performance monitoring techniques.

Supporters of prison privatization have occasionally acknowledged the mixed track record regarding clearly defined procurement goals, but argue that the theory of results-oriented contracting is reason to continue the experiment.¹⁶² This argument overlooks the fact that prisons, like most government agencies, operate under legislatively imposed objectives which

pieces of operational data contained in the entire eight page newsletter are nationwide totals of inmates and employees.

¹⁵⁹ See *supra* notes 123-125, *infra* notes 244-247, and accompanying text.

¹⁶⁰ If, as is common, the contract merely specifies that the prison operator shall comply with applicable labor laws (e.g., the Fair Labor Standards Act), then precise employee-compensation data is not relevant so long as the operator is paying minimum wage.

¹⁶¹ E.g., APCTO, *supra* note 56 ("Public-Private Correctional Partnerships ensure that the private operator of a particular facility is held accountable to a much higher degree than are publicly-operated facilities."); Richard P. Seiter, Executive Vice President and Chief Corr. Officer, Corr. Corp. of Am., Address to the Corrections Section, Academy of Criminal Justice Science 4 (Mar. 2008), transcript available at http://www.ccacommunities.com/static/assets/Private_Corr_Review_of_Issues.pdf ("Private prisons almost always have extremely detailed requirements enumerated in their contracts by which accountability is easily measured and monitored); *but cf.*, *Developments in the Law – The Law of Prisons*, 115 Harv. L. Rev. 1838, 1877 (2002) ("Contracts are necessarily incomplete: because the government and the private provider can only describe a general service and cannot specify beforehand in full detail exactly how the contractor should provide that service, the contractor has wide latitude in running the prison.").

¹⁶² Thomas, *supra* note 180, at 64 ("Privatization . . . presupposes that government will identify goals with some specificity but will defer to the creativity of the private sector to devise the means and methods to achieve those goals. The vast majority of facility management contracts, however, devote virtually all of their attention to processes and methods and almost none to the setting of short- or long-term performance goals.").

are multiple, conflicting, and vague.¹⁶³ An key component of American public administration is the duty to disentangle these conflicting objectives and implement the best feasible policy given the interests of various stakeholders and available resources. This is difficult enough in a public agency, due to the well-studied inefficiencies of government bureaucracy. But the inadequacies of public bureaucracy do not disappear in the contracting state—they merely overlay a corporate bureaucracy that brings its own set of inefficiencies and an overt focus on private inurement.

Definitional problems during the early contracting phases lead to further difficulties during the implementation and monitoring stages. The stated objective of agency monitoring of private prisons is generally framed in terms of promoting public safety and ensuring compliance with contractual provisions.¹⁶⁴ The measurement frameworks that governments have developed in the context of correctional outsourcing reflect the prevailing beliefs of the 1990s, when prison privatization saw dramatic growth. In response to public perceptions of government inefficiency many executives and legislatures, including Congress, imposed new measurement and accountability systems on public agencies.¹⁶⁵ The federal approach, based on input from public administration scholars, was to require “clear and precise” strategic plans and performance goals. Congress, like many critics, expressed a preference for performance goals which measure outcomes rather than outputs.¹⁶⁶ The committee report accompanying the major federal legislation on performance monitoring used the following analogy to illustrate the difference between outcomes and outputs: “Eligible clients completing a job training program are outputs; an increase in their rate of long-term employment would be an outcome.”¹⁶⁷

The difficulty of measuring outcomes in the context of prison operation is substantial. If the goal of incarceration is simply to isolate and confine convicted offenders, then outcomes can be measured by escape statistics. If, on the other hand, incarceration presupposes some rehabilitative component, then recidivism rates become the obvious metric by which to measure outcomes. But methodological problems typically frustrate evaluators’ ability to meaningfully measure the efficacy of prisons. For example, tracking released offenders is notoriously difficult. Moreover, most inmates will reside in different prisons (both publicly and privately operated) during the course of their sentence, making it difficult to attribute success or failure to any particular facility.

Private prison supporters cite a number of positive performance evaluations as proof of success.¹⁶⁸ But the most laudatory studies have been dismissed upon closer review. A 1998

¹⁶³ Aaron Wildavsky, *Speaking Truth to Power: The Art and Craft of Policy Analysis* 30 (1979) (“Everyone knows that objectives of many public agencies are multiple, conflicting, and vague—multiple and conflicting because different people want different things with varying intensities, and vague because often people will be unable to agree about exactly what they do agree on, especially if they are forced to agree beforehand.”).

¹⁶⁴ E.g., Richard Crane, Ass’n of State Corr. Administrators, *Monitoring Correctional Services Provided by Private Firms 2* (2000), available at <http://www.asca.net/documents/monitor.pdf>.

¹⁶⁵ E.g., Sen. Rep. No. 103-58, at 2 (1993), reprinted in 1993 U.S.C.C.A.N. 327, 328 (citing one need for the Government Performance and Results Act (P.L. 103-62) as “[p]ublic confidence in the institutions of American government . . . suffering from a perception that those institutions are not working well.”).

¹⁶⁶ *Id.*, 1993 U.S.C.C.A.N. at 341.

¹⁶⁷ *Id.*

¹⁶⁸ E.g., Corrections Corporation of America – Independent Studies on Privatization, <http://www.correctionscorp.com/cca-resource-center/research-findings/independent-studies-prison-privatization/> (last visited Jan. 26, 2009). CCA’s webpage of “independent” research prominently features an abstract of a 2007 study by Vanderbilt University professors James F. Blumstein and Mark A. Cohen. It does not mention that the research project was funded by CCA and the private prison trade organization Association for Private Correctional

comprehensive review of evaluation projects noted the prevalence of “argument-without-proof” in privatization performance reviews, criticizing a recent pro-privatization literature review as containing “[a]necdote . . . combined with ‘glittering generalities’ to produce a conclusion having little or no foundation.”¹⁶⁹ Similarly, the question of whether private prisons are more cost effective than publicly operated facilities has not led to any credible evidence of cost savings through outsourcing.¹⁷⁰

Several favorable performance reviews in the 1990s were conducted by University of Florida professor Charles W. Thomas. For example, a 1993 Arizona contract with private prison operator Management and Training Corporation (MTC) contained a provision making renewal contingent upon MTC showing it operated the prison at similar or superior cost and quality compared to state prisons. Thomas was hired to conduct the cost and quality review.¹⁷¹ Despite expressly acknowledging that the operations of the private prison differed so much from state prisons as to make any comparisons unreliable, Thomas nonetheless concluded that the private prison’s operations were superior to state-operated prisons,¹⁷² but the study was later criticized by researchers as suffering from several material methodological shortcomings.¹⁷³

and Treatment Organizations. See James F. Blumstein, et. al., *Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons* (2007), available at http://www.correctionscorp.com/static/assets/Blumstein_Cohen_Study.pdf. The CCA webpage then lists seventeen additional studies purporting to present favorable evidence of correctional privatization. Two of the studies are from 1993, before meaningful performance data was available. Eight are published by conservative think-tanks which have broad pro-privatization agendas (including three publications from the Reason Public Policy Institute, two chapters from a book published by the Independent Institute, and one publication each from the Rio Grande Foundation and the Alabama Policy Institute). Three of the listed publications are not “studies,” but rather presentations made by industry advocates to various boards or legislative committees. One article is an unsigned student law review note which, although published in a prominent journal, is a discussion of legal theory, not a performance evaluation (*Developments in the Law – The Law of Prisons*, see *infra* note 310). The remaining three items consist of a 1999 report by the Florida Office of Program Analysis and Government Accountability (which has been followed by several more critical reports, see *e.g.*, *infra* note 248), a three page 1997 study of three prisons in Louisiana (William Archambeault & Donald Deis, *Cost Effectiveness Comparison of Private vs. Public Prisons in Louisiana: A Comprehensive Analysis of Allen, Avoyelles, and Winn Correctional Centers*, J. of the Okla. Criminal Justice Research Consortium, vol. 4 (1997)), and a 1996 article by privatization supporter Charles Logan (Charles H. Logan, *Public vs. Private Prison Management*, 21 *Crim. Justice Review* 62 (1996)).

¹⁶⁹ Gerald G. Gaes, Scott D. Camp & William Saylor, *The Performance of Privately Operated Prisons: A Review of Research*, in Douglas McDonald, et al., Abt Associates, *Private Prisons in the United States: An Assessment of Current Practice*, Appx. 2, at 2 (1998).

¹⁷⁰ Austin & Coventry, *supra* note 16, at 37 (“Only a few studies can be relied upon in a debate over cost efficiency of prisons. It is generally accepted that the best research conducted to date was the Tennessee study that showed no or very minimal differences with respect to costs. The remaining studies had serious methodological flaws that limit their ability to reach firm conclusions.”).

¹⁷¹ *Id.* at 12.

¹⁷² *Id.* at 13-15.

¹⁷³ *Id.* at 16 (“it is abundantly clear that [Thomas’] evaluation does not provide an apples-to-apples comparison. Thomas himself was aware of this fact, as was the Arizona Department of Corrections when they contracted for the evaluation. It seems there was no comparable facility to Marana [the privately operated prison] in the entire Arizona prison system. Still, this does not justify the strategy Thomas followed of comparing the Marana facility to the average of the other publicly operated facilities. . . . Using Thomas’ approach, the comparisons are not that informative. More informative are the comparisons made in the body of the text of Marana to individual state facilities, but these comparisons do not provide the basis for the findings presented in his 13 conclusions.”).

Thomas' most high-profile research concerned his home state of Florida, where he co-authored a 1999 study for the Florida Correctional Privatization Commission comparing recidivism rates of inmates released from public and private facilities and concluded "[t]he private prison group had lower rates of recidivism."¹⁷⁴ While the study reserved judgment on causation, it contained several aggressively pro-privatization conclusions. After the study was published, press reports revealed that Thomas' Private Corrections Project (housed at the University of Florida) was funded by corporate donations from private prison companies and Thomas himself had accepted a paid position on the board of directors of Prison Realty Trust, CCA's newly-established real estate investment trust.¹⁷⁵ After an investigation by the state's ethics commission, Thomas was fined \$20,000 for violating the Florida conflict-of-interest statute, and resigned from the University of Florida.¹⁷⁶ Certainly not every evaluation of private prison performance presents problems as clear-cut as the Thomas case. Nonetheless, operational appraisals have generally suffered from poor design and doubtful conclusions.¹⁷⁷

This section begins with a discussion of the bid solicitation and evaluation process. Next, the challenges of performance monitoring are considered. Even if effective performance monitoring was possible as a theoretical matter, there is good reason to doubt governments' ability to obtain reliable information from contractors. Finally, the section concludes with an examination of certain contract terms that tend to cause problems.

A. Starting Point: Procurement

Government procurement theory generally recognizes three reasons to contract for services, none of which clearly apply to prison outsourcing. First, governments seek private contractors for "day-to-day services to government that may or may not have ever been performed by government employees. . . . [such as] landscaping, janitorial, temporary clerical, and translation services."¹⁷⁸ The early (and troubled) history of privatized corrections notwithstanding, prisons have long since been regarded as a core governmental function and do not fit within this category. The second class of services amenable to outsourcing is when a government seeks "professional expertise for special projects or matters."¹⁷⁹ Aside from some aspects of prison construction (e.g., architectural services), this category too is inapplicable to prisons. Until the 1990s, almost *all* expertise in the correctional field was found in government agencies, since only governments operated prisons. Thus, rather than government needing to seek private sector expertise, it is generally the private sector that seeks experienced employees

¹⁷⁴ Lonan Lanza Kaduce, Karen F. Parker & Charles W. Thomas, *A Comparative Recidivism Analysis of Releasees from Private and Public Prisons*, 45 *Crime & Delinquency* 28, 28 (1999).

¹⁷⁵ Gilbert Geis, Alan Mobley & David Shichor, *Private Prisons, Criminological Research, and Conflict of Interest: A Case Study*, 45 *Crime & Delinquency* 372, 374-375 (1999).

¹⁷⁶ Dara Kam, *Ethics Board Fines UF Professor \$20,000*, Sarasota Herald-Tribune, Oct. 22, 1999, at 1B.

¹⁷⁷ See generally, Gaes, et al, *supra* note 169; General Accounting Office, *Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service*, GAO/GGD-96-158, at 3 (1996) (five post-1991 studies reviewed by GAO "offer little generalizable guidance for other jurisdictions about what to expect regarding comparative operational costs and quality of service if they were to move toward privatizing correctional facilities.").

¹⁷⁸ Nat'l. Ass'n. of State Procurement Officials (NASPO), *State & Local Government Purchasing Principles & Practices* 73 (2001).

¹⁷⁹ *Id.*

from public corrections agencies.¹⁸⁰ Finally, governments may “use contractors to implement large-scale programs, or conclude that large-scale programs may be better administered through a private contractor.”¹⁸¹ Whether prisons are properly placed in this category is the ultimate question of the policy debate examined in this section.

While private prison contracts as a species differ from most other governmental service contracts, so too are there substantial differences among private prison contracts. The greatest difference relates to ownership of the facility. Publicly owned prisons can either be owned directly by the contracting jurisdiction, or by a nominally private, government-controlled special-purpose entity.¹⁸² Privately owned prisons are typically owned by the contractor, but can be owned by a third-party private lessor.¹⁸³ When a government contracts for the management of a publicly owned facility, the procuring agency has greater ability to terminate the contract and select a new provider.¹⁸⁴ Also, such a contract is more analogous to traditional government procurement activities insofar as the government is procuring one discrete product: operation of its facility. In contrast, government use of contractor-owned-and-operated facilities presents a host of issues not contemplated by the traditional procurement framework.¹⁸⁵ Procurement statutes tend to envision contractor-owned infrastructure as excludable collective goods like public utility facilities, roads, or parking lots.¹⁸⁶ Because such infrastructure is used by private parties, government outsourcing allows the contractor to assume the risk of ownership and collect revenue from private users. The risk in such a project (i.e., insufficient revenue to cover costs) is borne solely by the contractor. While private prison contractors bear a similar risk, the government also bears a risk—namely the possibility of losing needed prison capacity if, for example, the contractor receives a more lucrative offer from another jurisdiction.

The success or failure of government contracting depends overwhelmingly on the strength of the contract, which in turn depends largely on the groundwork laid during the pre-award procurement process. Thorough and transparent negotiations allow potential problems to be addressed in the final contract, and also help prevent corruption by facilitating bona fide competition.¹⁸⁷ Even though most procurement contracts are integrated agreements, the contents

¹⁸⁰ Privatization proponent Charles Thomas has acknowledged and criticized this staff recruitment dynamic, *see*, Thomas, *supra* note 76, at 64 (“The problems posed by contracting agencies’ peculiar obsession with mandating adherence to traditional processes while being strikingly inattentive to outcomes is aggravated by the fact that private management firms have predominantly hired former government employees, who too often bring public-sector ways of thinking with them as they migrate into the private sector. Sometimes these weaknesses have been magnified by top management teams that have no correctional experience.”).

¹⁸¹ NASPO, *supra* note 178 (citing illustrative examples of “residential rehabilitation facilities for juveniles, or the management of the entity’s data center, or of a state mental health institution.”).

¹⁸² *See infra*, notes 352-356 and accompanying text.

¹⁸³ *See infra*, note 402 and accompanying text.

¹⁸⁴ Douglas McDonald & Carl Patten, Jr., Abt Associates, *Governments’ Management of Private Prisons* 11 (2003) (“If governments have the option of canceling or not renewing a contract and signing up another provider, firms will be under pressure to perform effectively or risk going out of business.”).

¹⁸⁵ *See id.* (“if monopoly conditions prevail or if a single provider is entrenched in a particular state, the government will lose freedom of action and may become excessively dependent upon the private provider.”).

¹⁸⁶ Model Procurement Code § 5-101(8) (2000).

¹⁸⁷ *See e.g.*, Model Procurement Code § 3-201, cmt. 3 (“Fair and open competition is a basic tenet of public procurement. Such competition reduces the opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically.”).

of the ultimate contract are shaped by the solicitation (issued by the contracting agency) and the responsive proposal submitted by the bidder.¹⁸⁸

There are several different methods of bid solicitation,¹⁸⁹ and the lack of uniformity in prison procurement reflects the uneasiness with which correctional privatization fits into the traditional framework of procurement. It was not until the 2000 revisions that the ABA's Model Procurement Code addressed the new breed of modern procurement activities (including private prisons) which combine infrastructure and services.¹⁹⁰ Although the Model Code's definition of "infrastructure facility" encompasses privately operated prisons,¹⁹¹ the types of procurement vehicles envisioned by the code are generally not compatible with the arrangements typically employed for private prison contracting. Private prisons that are financed by the operator resemble the Model Code's "design-build-finance-operate-maintain" category, except that the Code specifies that no state funds shall be "appropriated to pay for any part of the services provided by the contractor during the contract period."¹⁹² This reflects the traditional use of design-build-finance-operate-maintain contracts for projects that generate sufficient revenue to cover the contractors' debt service.¹⁹³ So too, the Model Code's "design-build-operate-maintain" category is somewhat analogous to prison contracts, except for the requirement that "[a]ll or a portion of the funds required to pay for the services provided by the contractor during the contract period are either appropriated by the [State] prior to award of the contract or secured by the [State] through fare, toll, or user charges."¹⁹⁴ Because prisons are not revenue-generating projects, none of the Model Code's infrastructure procurement mechanisms are well-suited to correctional outsourcing. Perhaps as a result of this uneasy fit, most private prison contracts (even those for contractor-owned facilities) are framed purely as the provision of services, thus downplaying the extent to which contractors control the government's physical carceral infrastructure.

Ultimately, the bid solicitation process is legally significant for two reasons. First, the content of the request for proposals (RFP) determines the scope and detail of the information upon which government procurement officials base their contracting decisions. Second—and of greater legal significance—the procurement documents can take on evidentiary significance in the event of a contract dispute. In a typical government procurement, the RFP and bid submission form the framework of offer and acceptance, thus defining the basis of the party's agreed-upon bargain. Private prison contracts do not fit neatly into this paradigm because they often contain extremely broad terms. Thus, a vendor accused of breach could easily raise a defense based on the ambiguity of a contractual term.¹⁹⁵

¹⁸⁸ See William Collins, Ass'n of State Corr. Administrators, *Contracting for Correctional Services Provided by Private Firms* 6 (2000), available at <http://www.asca.net/documents/contract.pdf>.

¹⁸⁹ E.g., Model Procurement Code, art 3, part A (Methods of Source Selection).

¹⁹⁰ Model Procurement Code, art. 5 (Procurement of Infrastructure Facilities and Services).

¹⁹¹ *Id.* § 5-101(8) ("Infrastructure facility means a building; structure; or networks of buildings, structures, pipes, controls, and equipment that provide . . . [*inter alia*] public safety services. *Included are . . . jails [and] prisons.*" (emphasis added)).

¹⁹² *Id.* § 5-101(4)

¹⁹³ *Id.* cmt. 2.

¹⁹⁴ *Id.* § 5-101(5) (brackets in original).

¹⁹⁵ See, e.g., *M.J. Paquet, Inc. v. New Jersey Dept. of Transp.*, 794 A.2d 141, 153 (N.J. 2002) ("Where a court determines that an ambiguity exists in a government contract, the writing is to be strictly construed against the draftsman, the government entity."); *but see, e.g., Cook v. Okla. Bd. of Pub. Affairs*, 736 P.2d 140, 145, n.7 (Okla. 1987) (if ambiguity is found in public contract and cannot be resolved by standard rules of construction, "the

One infrequently discussed aspect of prison outsourcing's awkward fit with public procurement is the ways in which prison contracts in some ways resemble government grants. While there is no evidence that anyone has seriously argued that prison contracts are government grants (in fact, CCA has relied on its non-grantee status in court¹⁹⁶), it is useful to compare prison contracts to the Model Code's definition of grants: "the furnishing by the [State] of assistance, whether financial or otherwise, to any person to support a program authorized by law."¹⁹⁷ This definition does not easily fit prison contracts where the private operator is compensated on a per-inmate, per-day basis, but it could arguably apply to those contracts which guarantee a fixed minimum compensation regardless of occupancy. Perhaps cognizant of the ambiguity in the aforementioned definition, the drafters of the Model Code added the following description of activities that are *not* government grants: "an award whose primary purpose is to procure an end product, whether in the form of supplies, services, or construction."¹⁹⁸ Private prison operators would doubtlessly argue that their contracts are for the procurement of services. Such an argument would almost certainly prevail in most courts. Nonetheless, it is worth noting that the Model Code's reference to an "end product" is not easily applied to privately operated prisons, given the difficulty in defining what such outsourcing is designed to accomplish.

Correctional professionals have begun to realize the importance of drafting meaningful RFPs.¹⁹⁹ Many professional debates have focused on how detailed the solicitation document should be.²⁰⁰ RFPs fall along a spectrum, ranging from terse, open-ended lists of questions to lengthy documents with many complex and detailed requirements. Ultimately, neither end of the spectrum can address the inadequacies of the prison outsourcing process.

One example of the less detailed, open-ended approach can be found in Colorado. Although Colorado has six private prisons, the statutory RFP framework²⁰¹ was not employed when the first five facilities were constructed.²⁰² When the Colorado Department of Corrections (DOC) issued its first private prison RFP in 2001 (at the direction of the legislature), the statement of work consisted of many vague and open-ended provisions. Typical among them was the "Self Monitoring" provision, directing bidders to "describe the process for self-monitoring the facility operations to ensure compliance with all applicable ACA standards, DOC

uncertainty is presumed to have been caused by the private party; thus, the ambiguous contract provision will be interpreted most strongly against the private party.").

¹⁹⁶ See *supra* note 137 and accompanying text.

¹⁹⁷ Model Procurement Code § 1-301(13).

¹⁹⁸ *Id.*

¹⁹⁹ Collins, *supra* note 188, 9-16.

²⁰⁰ See *e.g.*, Collins, *supra* note 188, at 9-10 (characterizing bid solicitations as falling into the requirements-based (detailed) or performance-based (flexible) categories).

²⁰¹ Colo. Rev. Stat. §§ 17-1-201 – 17-1-207 (2008)

²⁰² State of Colorado, Office of the State Auditor, *Private Prison Procurement: Department of Corrections Performance Audit* 7-8 (2006). Instead of issuing contracts through the statutory RFP process, the Department of Corrections chose to execute inter-governmental agreements (IGAs) under Colo. Rev. Stat. § 17-1-105(1)(f) (authorizing contracts with political subdivisions of the state), wherein the county or city in which the prison is located acts as the contractor, in turn subcontracting with the prison owner/operator for actual operation. See State of Colorado, Office of the State Auditor, *Private Prisons: Department of Corrections Performance Audit* 13-14 (2005) for an explanation of the IGA system.

Administrative Regulations, state and federal laws, and all applicable health and safety standards.”²⁰³

GEO/Wackenhut was one of the vendors which submitted a proposal in response to the 2001 Colorado RFP.²⁰⁴ The section of its proposal which addresses self-monitoring is a study in tautology. For example, the proposal boasts of Wackenhut’s “unique” use of contract compliance officers. In order for the Colorado procurement staff to make a meaningful decision, the proposal would hopefully describe the track record of the contract compliance officer program and list specific job duties. Instead, the proposal recites vague job duties which are essentially implied by the job title—duties such as “develop[ing] quality control programs for self-monitoring and corporate monitoring,” “conduct[ing] or oversee[ing] audits of the facility” and “respond[ing] to audits of the facility conducted by the client.”²⁰⁵ Other descriptions of Wackenhut’s self-monitoring techniques are similarly so vague as to be virtually useless to a proposal evaluator.²⁰⁶ The self-monitoring plan predictably relies on procedurally-focused mechanisms such as document reviews and ACA accreditation. In the subsection that most directly responds to the RFP’s request for a description of self-monitoring plans, Wackenhut lists seven goals purportedly designed “to provide direction [to staff members] and to provide a clear view of expectations”—unfortunately every one of the seven goals is either a repackaging of the RFP’s language or is so laden with undefined terms as to be meaningless.²⁰⁷ Thus, while Wackenhut responded to the RFP’s question, the content of the response is so vague as to preclude any meaningful evaluation by procurement officials.

Illustrative of the other end of the RFP spectrum is Florida’s recent invitation to negotiate (ITN) for the design, construction, and operation of a two-thousand bed prison. Instead of using open-ended requests for information, the Florida ITN contains eighteen pages of detailed contract conditions, and ninety-three pages of technical specifications.²⁰⁸ In lieu of requesting details on how the bidder will operate the prison, the ITN requests information on the bidder’s

²⁰³ Colo. Dept. of Corr., Pre-Parole and Parole Revocation Center, Request for Proposal #6187 (2001), § A.2, at 12 (on file with author).

²⁰⁴ Wackenhut Corr. Corp., Proposal Submitted to Colorado Department of Corrections, § 5.d (Sept. 2, 2002).

²⁰⁵ *Id.* at 1.

²⁰⁶ *Id.* at 2 (“corporate staff maintain daily, weekly and monthly contact with Facility Administrators and Wardens to gather the information necessary to monitor performance. . . . [Site visits] will include either informal auditing or the formal use of audit instruments.”).

²⁰⁷ *Id.* at 3 (the seven goals are:

- Achieve the optimum performance in pursuit of contract objectives and goals
- Achieve the most favorable degree of performance obtainable considering the achievement of contract objective in light of WCC’s [Wackenhut Corrections Corporation] most effective utilization of available resources
- Exceed minimum performance standards and equate this level of performance with a fair performance rating
- Strive to attain and document the highest standards of excellence in executing our responsibilities under the contract
- Achieve performance excellence measurable against standards consistent with the contract, applicable client directives, ACA Standards, and other applicable industry standards
- Take every step to ensure the services provided are commensurate with the interest of the client and provide effective safeguards and security in support of the contract’s mission
- Achieve favorable ratings for identifying problems to the client and developing and implementing corrective actions).

²⁰⁸ Florida Dept. of Management Servs., Invitation to Negotiate DMS 08/09-026 (2008), §§ 5 and 6.

qualifications to operate the prison. While the Florida format seems to have some advantages insofar as the contracting terms are spelled out with specificity, the focus on bidder qualifications raises the recurring question of whether the state receives adequate information upon which to make an informed decision. For example, the proposal from GEO/Wackenhut contains a thirty-two page introductory section on “corporate qualifications,” of which twenty-nine pages have been redacted from the publicly available version at the bidder’s request.²⁰⁹ The non-redacted portions contain questionable statements such as “GEO has consistently met contractual obligations on all company contracts. To date we have never had a contract terminated due to default. GEO strives to ensure high quality contract compliance through vigilant internal and external monitoring.”²¹⁰ While it may be technically true that GEO has never had a contract “terminated due to default,” its annual filings with the Securities and Exchange Commission are filled with references to contracts which were not renewed. Poor performance is often a contributing factor behind non-renewal, but with so many contracts using one-year renewal options, states are far more likely to exercise the option not to renew (without cause) than to invoke the formal default procedure to terminate a contract mid-year.

In its proposal, GEO lists Colorado among ten states with which the company has a “strong professional relationship . . . [that] has helped to ensure that our mission . . . is to safely, securely, and humanely confine inmates in a secure criminal justice facility.”²¹¹ Aside from the overwhelming banality of the assertion, it is wildly inaccurate for GEO to say that it has a “strong” relationship with the state of Colorado, since it has been awarded two contracts by Colorado, both of which were subsequently rescinded for non-performance.²¹² Thus, while Florida’s bid solicitation is more specific than Colorado’s, the inaccuracies and vague content of the bid responses raise the same concerns regarding inadequacies of the evaluation process.

B. Performance Monitoring

Once a government contract has been awarded, compliance is ensured via the procuring agency’s monitoring of contractor performance. The monitoring of private prison contracts raises two concerns, which this section addresses in sequence. First, the solicitation-phase difficulties in precisely defining satisfactory performance (discussed in the prior section) present ongoing problems during the monitoring phase. Without a clearly articulated set of contract objectives, it is difficult if not impossible for contractors to be held accountable for their performance. Second, recent events in the industry raise serious questions about the government’s ability to obtain reliable information from prison operators.

One result of the difficulty in meaningfully gauging outcomes has been an increased reliance on procedures as a proxy for performance evaluation. Many procurement documents contain statement-of-work provisions such as “[t]he facility shall have formal, written facility

²⁰⁹ GEO Group, Inc., Response to Florida ITN DMS 08/09-026, § 1-A.B (“Corporate Qualifications”) (2008).

²¹⁰ *Id.* at 1.

²¹¹ *Id.*, § 1-A.B.2 (“Minimum Required Data”), at 6.

²¹² See Letter from Aristedes W. Zavaras, Executive Director, Colo. Dept. of Corr. to Wayne H. Calabrese, GEO Group (f.k.a. Wackenhut Corr. Corp.) (Apr. 24, 2007) (on file with author) (rescinding offer to enter into an implementation agreement after GEO demanded a bed guarantee, contrary to the terms of the parties’ original negotiations); R. Scott Rappold, *State Kills Plan for Pueblo Prison*, Colorado Springs Gazette (Dec. 16, 2006) (reporting a similar disagreement with GEO over another proposed prison).

rules, and an offender discipline system.”²¹³ Similarly, many contracts rely on facility accreditation by the American Correctional Association (ACA) as a means of ensuring desirable outcomes.²¹⁴ The role of ACA accreditation in diffusing accountability is significant. As a 2003 government-funded study noted:

the goal of achieving ACA accreditation of detention facilities is not an outcomes-based performance goal. Rather . . . ACA standards primarily prescribe *procedures*. The great majority of ACA standards are written in this form: “The facility shall have written policies and procedures on” The standards emphasize the important benefits of procedural regularity and effective administrative control that flow from written procedures, careful documentation of practices and events, etc. But, for the most part, the standards prescribe neither the goals that ought to be achieved nor the indicators that would let officials know if they are making progress toward those goals over time.²¹⁵

The only studies to have addressed the results of ACA accreditation questioned whether conformance with ACA standards results in better conditions.²¹⁶ Also, the more emphasis a contract places on ACA-type procedures, the more difficult it is for the contracting agency to assert remedies for breach of contract when the operator promulgates policies that it does not follow. Contractual provisions typically emphasize the *adoption* of procedures—a meaningless requirement if the operator then ignores those same procedures.²¹⁷

One example of monitoring difficulties can be found in the experience of the Colorado Department of Corrections (DOC). Since the advent of private prisons in Colorado, facility monitoring has been the responsibility of the DOC’s Private Prison Monitoring Unit (PPMU). The DOC has long touted the efficacy of the PPMU, including in the aftermath of a 2004 riot at CCA’s facility in Crowley County, when the DOC assured the Denver Post editorial board that private prisons were “inspected weekly” and subject to “full-scale audits.”²¹⁸ A subsequent review by the state auditor, however, discovered numerous deficiencies in the PPMU, including findings that 16 percent of weekly visits had not been performed, monitors were typically on-site at each prison less than ten hours a week, and required reports had been completed for only 63

²¹³ Colo. Dept. of Corr., Pre-Parole and Parole Revocation Center RFP, *supra* note 203, § C.2, at 17

²¹⁴ *E.g.*, Correctional Services Contract between Corr. Corp. of Am. and the State of Oklahoma Dept. of Corr., May 2004, § 5.2, at 14 (“The Contractor shall maintain ACA accreditation of the Facility for the term of this Contract.”).

²¹⁵ McDonald and Patten, *supra* note 184, at 26 (emphasis and second omission in original, footnote omitted).

²¹⁶ *Id.*; cf. Jerome G. Miller, *Last One over the Wall: The Massachusetts Experiment in Closing Reform Schools* 90 (2d ed., 1998) (in criticizing late twentieth-century changes in correctional management, Miller singles out the “control model” of the 1960s Texas prison system, describing it as “[a]n efficiently run system of minute rules, unbending regulations, and obsessive accountability, it was violent to its core. The values which countenanced depersonalization and chronic abuse of inmates were left untouched. Things were simply managed better. This seems to be the goal of contemporary corrections.”).

²¹⁷ See *supra* note 86 and *infra* note 230.

²¹⁸ Editorial, *Keep Close Eye on Private Prisons*, Denver Post, Oct. 19, 2004, at B-06 (quoting DOC spokeswoman Alison Morgan).

percent of site visits.²¹⁹ In addition to the quantitative shortcomings of the PPMU, the auditor's report also questioned the qualitative value of the monitoring activities.²²⁰

The most substantial findings in the auditor's report dealt with inadequate performance by Colorado's private prison contractor (at the time of the report, CCA operated all private prisons in Colorado). Not only did the report identify many contractual and statutory violations of which the DOC was unaware,²²¹ it also identified twenty-one known issues which the PPMU itself considered "to be significant and ongoing violations of the contracts," but which the DOC had not acted to correct.²²² While it is perhaps surprising at first glance that the DOC would not invoke its contractual remedies for inadequate performance, the auditor's report touches on the likely cause of the agency's lax monitoring when it notes that one company (CCA) owned all four private prisons under contract with the state, housing 40 percent of the state's male prison population.²²³ Thus, strict enforcement of contractual remedies could possibly lead to contract termination by the contractor, leaving Colorado with a 40 percent drop in prison capacity. The report recommends that the DOC enhance its competitive procurement operations—a suggestion the Department acted on, but which in turn led to another investigation by the auditor's office when a senior-level DOC employee took paid sick-leave in order to assist a prospective bidder prepare its proposal.²²⁴

Inadequate performance procedures are only part of larger structural deficiency preventing effective contract evaluation. Sometimes the monitoring process itself can lead to unintended consequences. Several examples have come to light in current litigation concerning the CCA-operated Metro Detention Facility in Nashville, Tennessee.²²⁵ The management contract tersely requires CCA to "report all incidents in accordance with designated Sheriff's Office policy regarding the reporting of incidents."²²⁶ Such a provision is standard in all private prison contracts and is seemingly unremarkable; yet, the incident reporting function was apparently a contributing factor in the mistreatment of Metro inmate Frank Horton. On January 31, 2008, Captain Patrick Perry, a shift supervisor at the Metro jail, visited the Metro Public Health Department to report that Mr. Horton, a mentally ill inmate, had been held in isolation since March 2007 without having left his cell, during which time his mental health deteriorated sharply.²²⁷ A health department employee visited Mr. Horton that day but "could not adequately

²¹⁹ State of Colorado, Office of the State Auditor, *Private Prisons: Department of Corrections Performance Audit* 60 (2005).

²²⁰ *Id.* at 62 ("[T]he weekly inspection reports typically do not contain measurable results or data that can be used to evaluate contract compliance or compare the service levels at private and state-run prisons. The results from the reports we reviewed were often vague and of limited value in assessing contract compliance at private prisons. For example, one report we reviewed stated 'Staff morale is positive. They [the private prison] continue to have a real emphasis on staff fitness.' Although staff morale may contribute to the overall operations of the private prisons, such statements do not provide an objective basis for evaluating contract compliance.") (alteration in original).

²²¹ *Id.* at 19-29.

²²² *Id.* at 67-68 ("We found that although the Department has documented continued contract violations on the part of the private prisons, it has failed to take action to enforce the terms of the contracts.").

²²³ *Id.* at 71.

²²⁴ See Office of the State Auditor, *Private Prison Procurement*, *supra* note 202.

²²⁵ The facility is operated under contract with the Metropolitan Government of Nashville and Davidson County, a consolidated city/county government operating pursuant to Tenn. Code Ann. § 7-1-103 (2005).

²²⁶ Management Services Contract between Corrections Corporation of America and the Metropolitan Government of Nashville and Davidson County ("Metro Contract"), § 3.8 at 14 (Mar. 25, 2004) (on file with author).

²²⁷ Memorandum from Catherine Seigenthaler, Metro Public Health Department, to Stan Romine and Jim Diamond (Jan. 31, 2008) (on file with author).

assess his orientation due to his inability to speak coherently.”²²⁸ When Perry later testified in a civil suit by Horton’s guardian, he said that as Horton’s mental illness intensified, he refused to leave his cell.²²⁹ Even though leaving Horton in his cell for months at a time violated CCA’s own operating procedures, the facility’s management allowed the situation to escalate because involuntarily extracting Horton from his cell would constitute a “use of force,” necessitating an incident report to the sheriff’s office.²³⁰ According to Perry, CCA management was displeased that the Metro facility had the highest use-of-force statistics in the region. To bring down the numbers, management issued blanket directives discouraging use of force²³¹ and tied employee bonuses to statistical data, including incident reports.²³² Reducing incidents is a commendable goal from a management, business, and humanitarian standpoint. However, the Horton incident shows how an intense focus on quantitative evaluations can lead to counter-productive results.

The deposition of Captain Perry also sheds light on the inadequacies of a formalistic reliance on procedures.²³³ When asked about CCA’s policy for handling inmate grievances, Perry testified that the written grievance policy was supplemented by an “informal” policy requiring inmates to submit a written “information request form” to receive a grievance form.²³⁴ According to Perry, this requirement was part of CCA’s efforts to resolve inmate grievances informally. Given the adversarial nature of the prison system, informal dispute resolution is a respectable goal. However, Perry describes a Kafka-esque system wherein officers could not distribute grievance forms because the unit had run out of information request forms.²³⁵ More disturbingly, corporate impediments to inmate grievances may be a self-serving legal defense tactic, since prisoners are legally required to exhaust administrative remedies before filing suit under 42 U.S.C. § 1983.²³⁶ Regardless of the intent underlying CCA’s policy of informal grievance resolution, the outcome as told by Perry is a predictable result in a system that singularly relies on procedural regularity as a proxy for meaningful operational objectives.

Even if monitoring systems could overcome the difficulties of defining performance criteria, contractor control over evidence and possible manipulation of data raises further concerns about the ability of governments to effectively oversee private prisons. When CCA chief counsel Gustavus Puryear was nominated for a federal judgeship in 2007, the Senate Judiciary Committee questioned his handling of CCA quality assurance data. These questions arose when former CCA employee Ronald T. Jones accused Puryear of overseeing a reporting

²²⁸ *Id.*

²²⁹ Deposition Transcript of Patrick Perry, Sept. 17, 2008 (“Perry Deposition”) at 15:6-19:4, *Braswell ex rel. Horton v. Corr. Corp. of Am.*, Civil Action No. 3:08-0691 (M.D. Tenn. filed Jul. 16, 2008).

²³⁰ *Id.* at 22:22-23:3.

²³¹ *See e.g., id.* at 87:16-20 (“[Assistant Warden] Corlew put the word out that we would not be using force under any, under any—unless it was an emergency, and then if the emergency occurred, it was still our fault and we’d still catch an ass chewing from it.”).

²³² *Id.* at 25:25-26:7 (“there is what’s called zero tolerances at the facility . . . rape, riots, or disturbances they like to call them, escapes, hostage situations and unnatural deaths, those things right there count against you majorly. They can be the difference between getting an \$80 bonus check and a \$500 bonus check.”).

²³³ *See supra* notes 213-216 and accompanying text.

²³⁴ *Id.* at 50:8-14.

²³⁵ *Id.* at 52:19-25 (“If you don’t have any information request forms in the unit, how can you give an inmate a grievance? An inmate can’t ask for a grievance without an information request form. If you don’t have any information request forms in the unit, how can the inmate get a grievance?”).

²³⁶ *Porter v. Nussle*, 534 U.S. 516, 525-527 (2002).

system that tracked serious incidents but withheld particularly damaging information from contracting agencies.²³⁷ Specifically, Jones wrote to the Judiciary Committee that Puryear

directed me, and other quality assurance department staff who process audit report findings, to create two reports for distribution of audit findings. I would prepare one report with all of the audit findings and auditor comments in it for “internal purposes only” and a separate more generic report that contained only general information about audit results as a whole. . . . I was instructed to put language at the bottom of the detailed report that indicated to recipients of that report that it was internal privileged information and was not to be distributed unless authorized by Mr. Puryear.²³⁸

Jones also alleged that Puryear used attorney-client privilege to shield information²³⁹ and directed that certain serious events be reclassified as less serious incidents.²⁴⁰

Puryear expressly denied any wrongdoing and contradicted some of Jones’s factual assertions. But CCA’s corporate response to the allegations was more revealing. CCA responded with a publicized letter to its contracting agencies which denied Jones’ account of data manipulation.²⁴¹ Although CCA accuses Jones of “paint[ing] a misleading and inaccurate picture of CCA’s quality assurance process,”²⁴² the specific counter-arguments illustrate the difficulties plaguing oversight of privately operated facilities. In addition to some vague tautologies,²⁴³ CCA’s letter raises several specific defenses of its monitoring and reporting activities.

First, CCA states that contracting agencies have “full access to facility reports, and . . . [conduct their] own audits.”²⁴⁴ Due to variations across contracts, such a blanket assertion is problematic, especially given the weaknesses of many contracts. Most contracts contain detailed regulations concerning *inmate* records, but these provisions do not extend to the *facility* records that are the subject of Jones’ allegations. For example, Colorado’s contract for the CCA-operated Crowley County Correctional Facility contains a provision requiring state access to records regarding the contractor’s performance, but specifically excludes “documents protected by attorney/client privilege or the attorney work product doctrine.”²⁴⁵ Thus, under the very terms

²³⁷ Gethan Ward and Bill Theobald, *Ex-CCA Official: Puryear Mislead Clients*, The (Nashville) Tennessean, Mar. 14, 2008, online edition; Adam Zagorin, *Scrutiny for a Bush Judicial Nominee*, Time.com, Mar. 13, 2008, <http://www.time.com/time/printout/0,8816,1722065,00.html> (last visited Nov. 13, 2008).

²³⁸ Letter from Ronald T. Jones (Feb. 24, 2008) (on file with author).

²³⁹ Zagorin, *supra* note 237 (“Puryear mandated that detailed, raw reports on prison shortcomings carry a blanket assertion of ‘attorney-client privilege,’ thus forbidding their release without his written consent. From then on, Jones says, the audits delivered to agencies were filled with increasingly vague performance measures.”).

²⁴⁰ *Id.* (“In 2006, for example, Jones says CCA had to lock down a prison in Texas to control rioting by as many as 60 inmates. Despite clear internal guidelines defining the incident as [a zero tolerance event], Jones says he was ordered not to label it that way. Instead it was logged as, ‘Altered facility schedule due to inmate action.’”). Notably, Jones’ states that Puryear was particularly concerned about “zero tolerance” events, an allegation that corroborates the testimony given by former CCA supervisor Patrick Perry, *see supra* note 232.

²⁴¹ Corr. Corp. of Am., Letter to Customers (Form 8-K), Exhibit 99.1 (Mar. 17, 2008).

²⁴² *Id.*

²⁴³ *E.g.*, “CCA remains committed to openness and transparency with our customers and the greater public. . . . We believe in the accuracy of our records, the professionalism of our employees and the quality of services we provide in partnership with our customers.”

²⁴⁴ *Id.*

²⁴⁵ State of Colorado Contract 09-CAA-00003, § 13.11(1) at 45 (May 2008) (on file with author).

of the contract, Colorado's monitors cannot examine the allegedly falsified data without litigating the propriety of CCA's claim of attorney-client privilege. The State of Idaho's most recent contract with CCA (for housing inmates in out-of-state facilities) is not governed by a standard contract, but instead by the terms contained in the state's RFP and CCA's proposal. Notably, the CCA-drafted proposal (which governs Idaho's access to information) allows for state access to contractor records, but expressly excludes "proprietary corporate information."²⁴⁶ Indeed, CCA's assertion that contracting agencies had "full access" to data is seemingly contradicted by Puryear's own written response to the Judiciary Committee, in which he admitted that CCA did not inform customers that the information even existed.²⁴⁷

Additionally, CCA's citation of agency audits is of dubious value. Florida, for example, conducts routine audits of private prisons, yet a recent legislative investigation discovered that the Department of Corrections (DOC) had cited "repeated and substantive problems" including "violations of security requirements that could endanger the public, correctional officers, and inmates, including inoperable alarms, spotlights, and escape sensors; buildings not checked for tunneling; and missing tools that could be crafted by inmates into weapons."²⁴⁸ Despite these findings by DOC auditors, the Department of Management Services (the contracting agency in Florida) admitted to not taking corrective action "because neither its headquarters staff nor its contract monitors stationed at the private prisons are subject matter experts in corrections."²⁴⁹

CCA's letter to customers also remarks that the company "responds directly according to the terms of our contract, which generally mandate notification to the contract monitor as well as detailed record-keeping through established facility incident reporting mechanisms."²⁵⁰ Of course, responding to allegations of contract malfeasance by claiming contractual compliance is an exercise in ipse dixit. Nonetheless, some contracting agencies have recently enhanced incident reporting requirements. After the 2004 Crowley County Correctional Facility (CCCF) riot and subsequent legislative audit,²⁵¹ Colorado's Department of Corrections dramatically revised its contractual provisions for incident reporting. The old standard form contract required immediate reporting only of escapes and inmate deaths.²⁵² The current Colorado contract, on the other hand, specifically lists forty-five types of incidents which require immediate reporting to state monitors.²⁵³ This change in Colorado's reporting requirements is likely attributable to the findings of an after-action report on the CCCF riot. Investigators found pre-riot warning signs had been reported, but could not determine whether CCA employees took any action to follow-

²⁴⁶ Corr. Corp. of Am., State of Idaho RFP for Inmate Housing, § 3.29.2 at 74 (May 1, 2007) (on file with author).

²⁴⁷ Responses of Gustavus Adolphus Puryear IV, Nominee to the U.S. District Court for Middle District of Tennessee, to Additional Written Questions of Senator Diane Feinstein, at 6 (n.d.) ("Because the intent was to use such documents for internal purposes only, so that auditors would feel free to make candid observations to help protect the health and safety of CCA's employees and inmates, we did not make customers aware of these documents.").

²⁴⁸ Florida Office of Program Policy Analysis & Gov't. Accountability, *While DMS Has Improved Monitoring, It Needs to Strengthen Private Prison Oversight and Contracts* (Report No. 08-71), 3 (Dec. 2008).

²⁴⁹ *Id.* at 4.

²⁵⁰ CCA Letter to Customers, *supra* note 241.

²⁵¹ See *supra*, notes 218-220 and accompanying text.

²⁵² Colo. Dept. of Corr., Pre-Parole and Parole Revocation Center RFP, *supra* note 203, §§ 9.J and K, at 10.

²⁵³ Colorado Contract 09-CAA-0003, *supra* note 245, § 5.13 and Ex. K (listing 46 reportable incidents, 45 of which require immediate reporting).

up on these reports.²⁵⁴ Although Oklahoma’s current contractual language requires reporting of all incidents,²⁵⁵ it requires *immediate* reporting only of enumerated “serious incidents.”²⁵⁶ While this is a step in the right direction, the definition of “serious incidents” is limited to offender incidents, thus excluding problems such as major staff misconduct, critical equipment malfunction, or even attempted riots or escapes. Idaho, however, has the most vulnerable incident reporting requirement, since its out-of-state contract is governed by CCA’s proposal, which only requires reporting pursuant to CCA’s own system of incident classification.²⁵⁷ Since CCA’s self-imposed reporting system requires immediate reporting only of certain incidents, facility management can potentially control the number of reported incidents by manipulating the incident classification.²⁵⁸

Another informative response to allegations of CCA data manipulation came from Mr. Puryear himself. During his confirmation hearing, Puryear was asked about CCA’s refusal to release an after-action report on a 2004 hostage-taking incident at its facility in Bay County, Florida. Puryear explained that there was no report to release because the after-action investigation had been conducted by outside counsel which merely “provided an oral report based on the notes and documents prepared in his investigation, and . . . shared his understanding of what had transpired and his mental impressions surrounding the defenses CCA could make in the litigation likely to result.”²⁵⁹ Such wording, used by an attorney, suggests a conscious corporate effort to invoke the work product doctrine.²⁶⁰ CCA’s use of outside counsel to investigate facility incidents was also mentioned by former CCA warden Brian Gardner in a recent deposition—when asked about a particular incident at his facility, Gardner stated “we were stopped before we started our investigations of it, we only had the initial . . . paperwork done. And then the investigation was completed by an outside investigator, and then I did not have privy [sic] to that information.”²⁶¹ Of course, there is nothing inherently wrong with CCA invoking the work product doctrine—if it anticipates litigation (from an injured inmate or employee, for example), CCA is legally entitled to prepare a defense under the protections of the

²⁵⁴ CCCF After-Action Report, *supra* note 146, at 14 (in addition to a litany of inmate complaints voiced to monitoring staff, “three CCCF staff members submitted reports to CCCF Supervisory Staff noting possible trouble forthcoming from inmates. . . . It is unknown what action was taken by CCA to follow-up on any of these reports.”).

²⁵⁵ State of Oklahoma, FY 2009 Renewal of the Correctional Services Contract between Corrections Corporation of America and Oklahoma Department of Corrections, § 5.18(A), at 3 (on file with author) (incorporating by reference Okla. Dept. of Corr. Policy No. 050109, § I.A, which defines “incident” as “any occurrence, which appears out of the ordinary, is suspect, is a rule violation, has serious impact on the security of the institution or provides the sharing of information”).

²⁵⁶ *Id.* (requiring contractor compliance with DOC’s serious incident reporting policy); Okla. Dept. of Corr. Policy No. 050108, § XI.A.1, available at <http://www.doc.state.ok.us/Offtech/op050108.htm> (defining six “serious incidents”).

²⁵⁷ Corr. Corp. of Am., Idaho Proposal, *supra* note 246, § 3.29.3, at 74-77.

²⁵⁸ *Id.* The incident classification can often vary based on management response. For example, an inmate fight can be “Priority I” (most serious) if it results in hospital admission, “Priority II” if it results in “outside medical treatment,” or Priority III (least serious) if it does not result in medical treatment.

²⁵⁹ Letter from Gustavus Puryear, to Sen. Dianne Feinstein, Senate Judiciary Committee (Mar. 5, 2008) at 7 (on file with author).

²⁶⁰ *See e.g., Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

²⁶¹ Deposition Transcript of Brian Gardner, Sept. 18, 2008, at 27:23-28:3, *Braswell ex rel. Horton v. Corr. Corp. of Am.*, Civil Action No. 3:08-0691 (M.D. Tenn. filed Jul. 16, 2008); *accord* Deposition of Patrick Perry, *supra* note 229, at 80:1-4 (CCA employee testified the first person he met with after inmate death was “a lawyer that CCA had that was . . . conducting what they call an after-action review of the things that were going on.”).

doctrine. The problem, however, comes from the fact that practically any internal oversight activity carried out in the management of a prison can be claimed to be in anticipation of litigation. Because the work product privilege endures even if anticipated legislation does not occur,²⁶² CCA can essentially shield any internal investigations under the doctrine. Even this state of affairs could possibly be tolerable if there was a mechanism for access to privileged information by a contracting agency exercising its oversight function. Unfortunately, because such disclosure would almost certainly vitiate CCA's privilege against third parties,²⁶³ such information-sharing is unlikely to happen and contracting agencies cannot compel disclosure of materials in which CCA asserts a work product interest.

Finally, on a practical level, private prisons maintain physical control over most relevant evidence of their performance. Several incidents have suggested that prison operators will act improperly to prevent such evidence from coming to light. For example, when the family of murdered Wackenhut inmate Gregorio de la Rosa filed suit, they requested the facility's video tapes of the incident. Testimony at trial revealed that stationary video cameras were trained on the location of de la Rosa's beating and that the video tapes were taken daily to the warden's office.²⁶⁴ The prison warden testified in his deposition that he had seen the videotape of the beating and proceeded to "describe[] the video and the beating in detail." Shortly after the deposition, however, the warden changed his testimony, "claiming that the video never existed" and saying his testimony was based on "his 'own little movie' in his mind."²⁶⁵ Similar evidentiary problems occurred in connection with the death of Estelle Richardson, an inmate at the CCA-operated Metro Detention Facility in Nashville, Tennessee. Richardson died (from traumatic injuries) approximately twenty-four hours after a "use of force" incident.²⁶⁶ The officers who used force told investigators from the Davidson County Sheriff's Office that they did not videotape the incident because the unit's video recorder was broken. During the same interview, the sheriff's investigator inspected the video camera and found it in working order.²⁶⁷ One of the officers involved in the use of force incident also claimed to have forgotten to change the tape for the wall-mounted surveillance camera.²⁶⁸ The de la Rosa and Richardson incidents both illustrate the probable futility of depending on contractors to provide evidence of their own shortcomings.

C. Contractual Provisions

Because private prison contracts vary across (and sometimes within) jurisdictions, a detailed analysis of typical terms is difficult. Some types of provisions surface frequently in agency/vendor disputes—terms such as liquidated damages clauses, auditing requirements, and procedures for remedial action. When analyzing contracts for potential government risk, however, two subjects emerge as particularly salient. First, contract duration determines how long the contracting agency can enforce the contractor's obligations. This is particularly

²⁶² *E.g.*, *Jackson v. U.S. Attorneys Office*, 293 F.Supp.2d 34 (D.D.C. 2003) (attorney materials prepared in anticipation of prosecution which did not occur held exempt under FOIA's work product exemption).

²⁶³ *See e.g.*, *U.S. v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997).

²⁶⁴ *Wackenhut v. de la Rosa*, *supra* note 55, at *6-7.

²⁶⁵ *Id.* at *6.

²⁶⁶ Memorandum from Investigator Chelle Knight, to Davidson County Sheriff Daron Hall (Aug. 5, 2005).

²⁶⁷ *Id.* at 9-10.

²⁶⁸ *Id.* at 10.

important in cases of contractor-owned facilities, where the duration establishes the minimum time period during which the state can depend on privately-owned infrastructure to supplement state-owned prison capacity. The discussion of duration necessarily includes provisions relating to contract termination. Second, pricing structure determines the fiscal impact of privatization on public budgets. As discussed in Section III.C.2, different methods of pricing can dramatically change risk allocation between governments and contractors.

1. Duration

Durational provisions, including termination procedures, carry different significance depending on the type of contract. Most notably, facility ownership (a topic considered in Section IV.A) largely determines the potential effects of abrupt contract termination. If a prison is owned outright by the contracting government, then termination of a management-only contract will present moderate, but manageable, disruption. The contracting agency can seek a new operator. Alternatively, it can assume operation of the facility, retaining some contractor staff during a transition period. Considerations regarding contractor-owned facilities are entirely different. If a prison operator is able to terminate a contract on short notice, the contracting jurisdiction may be faced with an imminent lack of prison capacity. If the contract allows the operator to terminate without cause, it could conceivably terminate simply to enter into a new contract with a higher-paying jurisdiction. Even protective measures, such as state purchase options, are often inadequate to foreclose significant government risk in certain circumstances.

There are two durational structures—finite and indefinite. Finite-period contracts are used by most state governments. Often, such contracts are for a base period with multiple renewal options. Under the Federal Acquisition Regulations (FAR), the federal government similarly must use fixed time periods when using indefinite delivery/indefinite quantity (ID/IQ) contracts (most private prison contracts are classified as ID/IQ).²⁶⁹ Federal ID/IQ contracts allow cancellation if the contracting agency does not receive adequate appropriations. Such cancellations are governed by the Federal Acquisition Regulations, which require payment of a cancellation fee.²⁷⁰ Although the objective of the cancellation fee is to cover contractor costs,²⁷¹ the Bureau of Prisons sets the cancellation fee at a fixed percentage of the annual anticipated contract price—an arbitrary amount that does not necessarily correlate with actual costs incurred upon termination.²⁷² While many federal agencies (such as the Bureau of Prisons) use finite-period contracts as contemplated by the FAR, the Department of Homeland Security (DHS) received procurement flexibility as part of its authorizing legislation.²⁷³ Accordingly, DHS

²⁶⁹ Federal Acquisition Regulations § 16.504(a)(4)(i) (ID/IQ solicitations must “[s]pecify the period of the contract, including the number of options and the period for which the Government may extend the contract under each option.”).

²⁷⁰ Federal Acquisition Regulations § 52.217-2; *see e.g.*, Federal Bureau of Prisons, Solicitation RFP-PCC-00010 (“CAR-6 RFP”), § I.B, at 2 (May 26, 2007) (incorporating FAR cancellation provision).

²⁷¹ Federal Acquisition Regulations § 5-217-2(d).

²⁷² *E.g.*, CAR-6 RFP, *supra* note 270, § I.B, at 2 (in four-year contract, cancellation fee in second year is 30% of base period price, third year is 15%, and fourth year is 7.5%).

²⁷³ Homeland Security Act of 2002, Pub. L. No. 107-296 §§ 831-834 (codified at 6 U.S.C. §§ 391-394).

agency Immigration and Customs Enforcement has issued several “perpetual duration” contracts.²⁷⁴

State contracts generally have more flexible termination procedures, which entail potential benefits and risks for contracting governments. Some of Oklahoma’s contracts, for example, allow either party to terminate the contract for convenience, upon a minimum of 180-days’ notice.²⁷⁵ If parties wish to seek damages arising from a breach, they must follow a different termination-for-cause provision, which requires ninety days’ notice to the breaching party, and requires the state (if it is the party invoking the termination clause) to mitigate its damages.²⁷⁶

At first glance, the State of Oklahoma’s major protection in the event of termination appears to be the statutorily mandated option to purchase.²⁷⁷ On closer examination, however, the mandatory purchase option leaves the state vulnerable in some circumstances. Oklahoma law requires any contract for a privately owned prison to include a provision giving the state “the option at the beginning of each fiscal year . . . to purchase any such facility.”²⁷⁸ Because the option must be exercised at the “beginning” of the fiscal year (an undefined term), presumably a contractor could terminate for convenience in the middle of the fiscal year, thus depriving the state of the ability to timely exercise the purchase option. Despite the weaknesses of Oklahoma’s contractual protections, the state’s biggest vulnerability may be political, not legal. Even though Oklahoma is heavily dependent on privately-owned beds (the state houses twenty-three percent of its prisoners in private facilities²⁷⁹), Sen. Glenn Coffee, the president pro tem of the state senate, recently proposed closing several state facilities and shifting even more prisoners to private beds.²⁸⁰ Incidentally, CCA’s political action committee made over \$17,000 in state campaign contributions during the 2006-07 reporting cycle.²⁸¹ Following mixed public reaction to Coffee’s proposal to increase reliance on private prisons, Sen. Coffee introduced legislation to abolish the independent Board of Corrections—a move that would bring the Department of Corrections under more direct political control.²⁸²

Colorado’s contracts allow either party to terminate upon sixty days’ notice.²⁸³ Although the contractual termination clause seems to imply that the state may take temporary control of the facility in the event of a termination,²⁸⁴ the statute upon which this provision is based is

²⁷⁴ See Corr. Corp. of Am., Form 10-K, *supra* note 153, at 10-12 (listing four ICE contracts with “indefinite” duration) and GEO Group, Form 10-K, *supra* note 153, at 10 (listing three ICE contracts with “perpetual” duration).

²⁷⁵ *E.g.*, Correctional Services Contract, *supra* note 214, § 2.4(A), at 11 (“Either party may terminate this Contract whenever, for any reason, it determines that it is in its best interest to do so.”); see also FY 2009 Renewal of the Correctional Services Contract between Corr. Corp. of Am. and Okla. Dept. of Corr., at 1-2 (Jul. 1, 2008) (on file with author) (retaining termination for convenience clause); *but see* Correctional Services Contract between GEO Group, Inc., Lawton Corr. Fac., and the State of Oklahoma Dept. of Corr. (July 2008) (on file with author) (five-year contract with four one-year renewal options, no termination for convenience provision).

²⁷⁶ *E.g.*, Correctional Services Contract, *supra* note 214, § 10.4, at 43-44.

²⁷⁷ See *id.* § 2.3, at 10 (state has annual option to purchase the facility, at appraised fair market value).

²⁷⁸ Okla. Stat. tit. 57, § 561.1(B)(4) (2009).

²⁷⁹ West & Sabol, *supra* note 63, at 23, app. tbl. 13.

²⁸⁰ Barbara Hancock, *Use Private Prison Beds More, Lawmaker Urges*, Tulsa World, Jan. 28, 2009, at A11.

²⁸¹ Oklahoma Ethics Commission, Disclosure Reports for Corrections Corporation of America Political Action Committee (ID #504015), available at <http://www.ok.gov/ethics> (last visited Apr. 23, 2009).

²⁸² Barbara Hoberock, “Vindictiveness” Alleged in DOC Amendment, Tulsa World, Apr. 11, 2009, at A1.

²⁸³ *E.g.*, Colorado Contract 09-CAA-00003, *supra* note 245, § 3.10, at 17.

²⁸⁴ *Id.* (“Within 60 days (or less, if any event occurs involving the noncompliance with or violation of contract terms and which presents a serious threat to the safety, health, or security of the inmates, employees, or the public) after

clearly limited to events “involving the noncompliance with or violation of contract terms *and* [which] present[] a serious threat” to public safety.²⁸⁵ Thus, if a contractor wanted to invoke the sixty day termination clause and the state had not identified any material non-compliance, the state-control statute would appear to be non-applicable. Even if Colorado argued that the sudden loss of inmate beds constituted a public safety threat, the statute is conjunctive, requiring both nonperformance *and* a safety threat. Such a contractor termination is not merely a theoretical prospect, given recent threats by CCA to convert Colorado prisons to facilities for higher-paying jurisdictions.²⁸⁶

The most ubiquitous contractual protection for states is the appropriations clause, which appears in virtually every private prison contract. Such provisions allow the state to terminate the contract upon non-appropriation of funds.²⁸⁷ The fact that appropriations clauses arguably give the state unilateral ability to terminate may explain why private prison operators are frequently given comparable powers under termination-for-convenience provisions. While such bilateral arrangements may appeal to general concepts of equity, the equal division of termination powers does not lead to an equitable allocation of risk. The state’s power under an appropriations clause is arguably limited to instances of bona fide fiscal shortfalls.²⁸⁸ Although termination-for-convenience clauses are typically bilateral, such a provision only serves to benefit a prison operator. Unless the state is obligated to pay for a minimum number of beds, it is unlikely to invoke a convenience termination provision. Instead, a convenience termination is most likely to be sought by a prison operator who wishes to end the contract to use a given facility for inmates from a jurisdiction willing to pay more than the current contract rate.

2. Pricing

The manner in which private prison contracts structure compensation is ultimately an issue of risk allocation. Contracting governments typically desire flexibility in the number of

the delivery of said [termination] notice, the DOC may exercise its right pursuant to C.R.S. § 17-1-205 and under the circumstances identified in this statute, to temporarily take physical custody of the Facility”).

²⁸⁵ Colo. Rev. Stat. § 17-1-205 (2008). The contractual termination provision obliquely acknowledges this limitation by the phrase “and under the circumstances identified in this statute,” *see supra* note 284.

²⁸⁶ Corr. Corp. of Am., 2007 4th Quarter Earnings Conference Call (Feb. 7, 2008) (CCA President and CEO John D. Ferguson explained “We have said that without an adequate increase in per diem that we will want to market some of those beds . . . to other jurisdictions and customers.”).

²⁸⁷ *E.g.*, Correctional Services Contract, *supra* note 214, § 10.5, at 44 (“The payment of money by the State under any provisions hereto is contingent upon the availability of funds appropriated annually in sufficient amounts for contractual services to pay for correctional services pursuant to this Contract.”); Colorado Contract CAA-09-00003, *supra* note 245, at 49 (“Financial obligations of the State of Colorado payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.”); Contract Agreement between State of Idaho and The City of Littlefield, Texas and The GEO Group, Inc., § 8.6, at 23 (Jun. 20, 2006) (on file with author) (“It is understood and agreed to that IDOC is a governmental entity, and this Contract shall in no way or manner be construed so as to bind or obligate the IDOC or the State of Idaho beyond the term of any particular appropriation of funds by the State Legislature as may exist from time to time.”).

²⁸⁸ *See* Restatement (Second) of Contracts § 230 (1979) (Even if a contract terminates an obligor’s duty of performance upon the occurrence of a certain event, such performance is *not* discharged “if the occurrence of the event . . . is the result of a breach by the obligor of his duty of good faith and fair dealing.” Thus, arguably, a state agency that seeks non-appropriation of funds in order to invoke the contractual appropriations clause would be vulnerable to a claim for breach of the duty of fair dealing.).

inmates housed in a contract facility, whereas operators often want a guaranteed amount of revenue.

Fixed-price contracts provide the most stability to private prison operators. To provide this stability to the contractor, the contracting agency assumes the risk that it might pay for unused beds. As a result, fixed-price contracts are rare outside of the federal government. Under the approach most frequently used by the Federal Bureau of Prisons (BOP), the contractor is paid a reduced “ramp up” price at the beginning of the contract—this fixed monthly rate applies from the start date until the facility reaches 50 percent capacity.²⁸⁹ Once the inmate population exceeds 50 percent of the contract capacity, the BOP pays a fixed monthly operating price for the remainder of the term, regardless of actual inmate population.²⁹⁰ While fixed-price contracts can sometimes protect governments that expect high levels of use,²⁹¹ the BOP contract structure does not allow for this benefit, since prison operators are paid an *additional* “fixed incremental unit price” when inmate population exceeds 90 percent of the contracted capacity.²⁹²

Most state contracts, on the other hand, pay operators a designated amount per-inmate, per-day. While this structure gives agencies the flexibility to respond to fluctuating inmate populations, it is a frequently-cited complaint by private operators.²⁹³ One method contractors sometimes propose to mitigate their risk of low populations is a guaranteed minimum facility population. One of the most noteworthy examples of the minimum-occupancy guarantee occurred in 2001 in Mississippi. At the time, there were four privately operated adult prisons in Mississippi,²⁹⁴ none of which had minimum-occupancy guarantees. Two of the facilities—the CCA-operated Delta Correctional Facility and the Wackenhut-owned-and-operated Marshall County Correctional Facility—received guarantees under which each contractor would receive payments for nine hundred inmates, regardless of actual occupancy.²⁹⁵ This was not a contractual guarantee; rather, it appeared as a provision in the corrections appropriations bill. The Mississippi legislature passed the bill, despite the corrections commissioner’s warning that

²⁸⁹ *E.g.*, CAR-6 RFP, *supra* note 270, § I.B, at 3.

²⁹⁰ *Id.* at 3-4.

²⁹¹ *See* McDonald and Patten, *supra* note 184, at 16 (“The contractor will not be able to be reimbursed for any marginal costs associated with high levels of use, but will be able to keep revenues and profit from lower-than-expected levels of use.”).

²⁹² *E.g.*, CAR-6 RFP, *supra* note 270, § I.B, at 4.

²⁹³ *E.g.*, Corr. Corp. of Am., Form 10-K, *supra* note 153, at 26 (“We cannot control occupancy levels at our managed facilities. Under a per diem rate structure, a decrease in our occupancy rates could cause a decrease in revenues and profitability.”). The per diem payment structure is a prominent cause for investor concern. This dynamic presents a conflict of interest for prison operators insofar as otherwise socially beneficial occurrences, such as falling crime rates, constitute financial risks to the industry. *See e.g., id.* at 24 (“[A]ny changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them. . . . Similarly, reductions in crime rates could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities.”); GEO Group, Form 10-K, *supra* note 153, at 23 (“the demand for our correctional and detention facilities and services could be adversely affected by changes in existing criminal or immigration laws, crime rates in jurisdictions in which we operate, the relaxation of criminal or immigration enforcement efforts, leniency in conviction, sentencing or deportation practices, and the decriminalization of certain activities that are currently proscribed by criminal laws or the loosening of immigration laws.”).

²⁹⁴ *The 2002 Corrections Yearbook*, *supra* note 148, at 116.

²⁹⁵ S.B. 3123, 2001 Reg. Sess. (Miss. 2001), § 10, at 6 (“the Commissioner of the MDOC shall make payments for housing . . . not less than nine hundred (900) state inmates at the Delta Correctional Facility and not less than nine hundred (900) state inmates at the Marshall County Correctional Facility.”).

there were not enough inmates to fill the guaranteed beds.²⁹⁶ Despite the absence of a contractual occupancy guarantee, Wackenhut president Wayne Calabrese defended the legislative guarantee, telling a newspaper “I think it’s fair to say the state invited private companies into the state of Mississippi to design, build, and operate facilities to the state’s specifications and size. We want to make sure the price we gave to the state, which was based on full or nearly full occupancy, is in fact what we receive.”²⁹⁷ Of course, this statement flatly contradicts the notion that private operators are held accountable through contracts. Under Calabrese’s logic, operators can simply remove objectionable contract terms through the post-hoc exercise of political power. In 2001, Governor Ronnie Musgrove vetoed the appropriations bill²⁹⁸ but his veto was overridden the next day.²⁹⁹

The following year, the corrections appropriations bill did not include a minimum bed guarantee, but it did contain a provision preventing the governor from reducing the amount appropriated for private prison payments.³⁰⁰ This time, the governor exercised Mississippi’s partial veto procedure, striking the offending provision.³⁰¹ Despite the fact that the partial veto was ultimately ruled unconstitutional,³⁰² the governor used the veto as an opportunity to renegotiate the state’s private prison contracts. Under the renegotiated deals, the state cancelled its contract with the CCA-managed Delta prison, while channeling more inmates to the CCA-managed Wilkinson County prison, and Wackenhut’s prisons in Meridian and Marshall County.³⁰³

The Mississippi experience illustrates the potentially drastic consequences that can arise from using improvident pricing structures. On at least two occasions, Wackenhut has defaulted on preliminary procurement agreements by demanding a post-hoc bed guarantee.³⁰⁴ Such minimum occupancy provisions are attractive to prison operators because they minimize the risk of insufficient inmate populations. Because of publicized cases such as the Mississippi experience, most states do not guarantee minimum facility occupancy. But the federal government does use bed guarantees. Accordingly, federal customers have become much more desirable—giving prison companies one more reason to prefer federal contracts to the detriment of states.

²⁹⁶ Patrice Sawyer, *Legislature 2001: MDOC Gets ‘Ghost Inmates,’* Clarion-Ledger (Jackson, Miss.), Mar. 27, 2001, at 1A.

²⁹⁷ Patrice Sawyer, *Legislature 2001: Prisons Want Full Funding; Company Wants State to Honor Price for 1,000 Beds,* Clarion-Ledger (Jackson, Miss.), Mar 28, 2001, at 1A.

²⁹⁸ Governor’s Veto Message for Senate Bill 3123 (Mar. 30, 2001).

²⁹⁹ SB 3123 – History of Actions/Background, <http://billstatus.ls.state.ms.us/2001/pdf/history/SB/SB3123.htm>.

³⁰⁰ S.B. 3163, 2002 Reg. Sess. (Miss. 2002), § 3, at 5-6 (“Any transfers or escalations shall be made in accordance with the terms, conditions and procedures established by law, except that no transfers shall be made which reduce funds allocated in Section 3 to . . . Private Prisons.”).

³⁰¹ Governor’s Transmittal Message for Senate Bill 3163 (Apr. 9, 2002) (“[F]ull funding for the Private Prisons is integrated . . . with a protective provision against any transfer of any of the funds. This restriction against transfer joined with full funding serves to insulate the Private Prison industry from the cold budgetary winds that affect all other operations of the Department of Corrections. . . . This full appropriation and unusual restriction locks away money for Private Prisons whether there are sufficient inmates to justify the allocation or not.”).

³⁰² *Barbour v. Delta Corr. Facility Auth.*, 871 So.2d 703 (Miss. 2004).

³⁰³ Clay Harden, *Governor: New Prison Deals to Save \$9M,* Clarion-Ledger (Jackson, Miss.), Jul. 27, 2002, at 1A.

³⁰⁴ See *supra*, note 212.

IV. Fiscal Policy

After an initial period of keen investor interest and rising stock prices, the private prison industry began financing operations and expansion through substantial borrowing. Today, the publicly traded operators remain highly leveraged. Some may argue that financial leverage is a benefit of privatization—instead of public debt, prison expansion is financed by private firms which bear the associated risks.³⁰⁵ In reality, however, the risks of financial failure are ultimately borne by any jurisdiction which depends on private facilities to house a substantial portion of its prison population. Once a state becomes dependent on privately owned infrastructure, its ability to maintain its carceral capacity is inextricably linked to the health of the private owner. There is one notable protection that some states have taken advantage of—public ownership of facilities; however, this too has its own downsides.

Of course, defining “dependence” on private capacity is not a precise matter. In 2007, thirty-two states kept at least some inmates in private prisons.³⁰⁶ One could categorize “high-privatizing” states as those that keep at least 10 percent of their prisoners in private facilities (sixteen states³⁰⁷), but even this discounts the disruption that could result in a “low-privatizing” state that suddenly loses beds for a thousand or more prisoners.³⁰⁸

To fully appreciate the danger posed by the industry’s financial structure, this section begins by considering how facility ownership impacts government risk. Privately operated facilities can be owned either by the contractor or the government, but each model entails risks. The section concludes with an examination of the financing strategies used by the industry, and the related problems. Given the complexity and detail of the industry’s financial structure, it is doubtful that financial risk is fully contemplated by the procurement officials who negotiate prison contracts. Accordingly, most policymakers who support privatization are probably unaware of the risks that contracting jurisdictions assume by relying on the industry’s financial engineering.

A. Prison Capacity and Facility Ownership

As discussed in previous sections, contracts for prison operation are often based on inadequate procurement processes and typically have weak enforcement provisions. Accountability is further inhibited by the oft-cited argument that prisons are difficult institutions to manage, thus performance failures at private institutions are unavoidable events for which the contractor cannot reasonably be held responsible.³⁰⁹ As a result, the primary remedy for contracting agencies who are dissatisfied with a private operator’s performance is termination of

³⁰⁵ *E.g.*, Thomas, *supra* note 180, at 87 (“many government agencies define the private sector’s ability and willingness to commit large amounts of private capital to the construction of new facilities as a significant advantage of privatization.”).

³⁰⁶ West & Sabol, *supra* note 63, at 23, app. tbl. 13 (2008) (on a regional level, southern and western states housed 8.8% and 9.2% of total prison populations in private facilities during 2007, compared to 2.4% and 1.9% in the Northeast and Midwest, respectively).

³⁰⁷ *Id.* (New Jersey, Vermont, Minnesota, Kentucky, Mississippi, Oklahoma, Tennessee, Texas, Alaska, Arizona, Colorado, Hawaii, Idaho, Montana, New Mexico, and Wyoming).

³⁰⁸ For example, Pennsylvania houses only 2.2% of its total prison population in private facilities, but this nonetheless amounts to 2,686 inmates.

³⁰⁹ *See supra* note 83 and accompanying text.

the contract—in fact some supporters of privatization argue that the termination option makes private prisons *more* accountable than public facilities.³¹⁰ Although termination is often a simple legal matter,³¹¹ in reality the “remedy” of termination is illusory if the contracting jurisdiction does not have adequate infrastructure to house the prisoners who will be displaced.³¹²

At first glance, public ownership of privately operated prisons sounds like an effective tool to avoid contractor entrenchment and lack of government control.³¹³ In reality, many government-owned, privately operated prisons have been built on a speculative basis, for use in the national bed market. This structure allows the operator to reap the benefits of operating contracts when prison populations are sufficient, while government owners bear the risk of an empty facility. One such example can be found in the Mississippi bed-guarantee dispute of 2001 and 2002.³¹⁴ Following the 2002 budget dispute, the Mississippi governor cancelled the state’s contract with the CCA-operated Delta Correctional Facility.³¹⁵ CCA, however, suffered little economic consequence because the state simultaneously increased the number of inmates housed at the CCA-operated Wilkinson County Correctional Facility. Thanks to the offsetting increase in Wilkinson County, CCA reported that there was essentially no net impact to corporate revenues.³¹⁶

The risk of financial loss upon termination of the Delta contract was borne by the quasi-public Delta Correctional Facility Authority, which had issued \$24 million in revenue bonds to construct the prison.³¹⁷ The Authority, typical of many such entities throughout the country, is a single-purpose entity created by the County Board of LeFlore County (where the Delta facility is located).³¹⁸ Upon completion, the prison was to be leased to the State of Mississippi and operated by a CCA subsidiary.³¹⁹ While the Authority is obligated to make regular payments to

³¹⁰ See e.g., *Developments in the Law – The Law of Prisons*, *supra* note 161, at 1883.

³¹¹ See *supra* notes 275-276 and accompanying text.

³¹² This very problem was acknowledged by privatization supporter Charles Thomas in his 2003 examination of privatization. Thomas, *supra* note 180, at 88 (“Government agencies too often have exposed themselves to unnecessary risks by failing to protect their own legitimate interests when the ownership of important infrastructure assets is private rather than public. This is most particularly the case when the private management firm that operates the facility is the same as the private entity that owns the facility. Such an arrangement easily can place the public interest at risk if the caliber of services being provided fails to meet expectations. If such a circumstance were encountered, then a contract termination would be impossible unless the government agency involved has sufficient excess capacity and thus can absorb the increased prisoner population.”). Thomas then argues that the proper solution to this situation is a government purchase option, a proposal which overlooks the valuation difficulties, and the fact that such an option would essentially constitute an off-balance sheet contingent liability of the contracting government.

³¹³ Approximately half of privately operated prisons are owned by government agencies. A 1998 survey of 84 privately operated prisons found that 34 were owned by governments, and another seven were owned by nominally private entities controlled by governments. McDonald & Patten, *supra* note 184, at 13.

³¹⁴ See *supra*, notes 294-303 and accompanying text.

³¹⁵ *Supra*, note 303 and accompanying text.

³¹⁶ Corr. Corp. of Am., Annual Report (Form 10-K) 63 (Mar. 28, 2003) (as a result of increased occupancy at Wilkinson County facility, “[t]hese events are not expected to have a material impact on our financial statements.”).

³¹⁷ See generally, Delta Corr. Facility Auth., Offering Statement: Mortgage Revenue Bonds, Series 1995 (Jul. 17, 1995) (on file with author).

³¹⁸ *Id.* at 1.

³¹⁹ *Id.* at 35-37 (describing lease) and 46-53 (describing management agreement with Corrections Partners, Inc., a CCA subsidiary which was subsequently folded into CCA’s management corporation as part of the 1998 merger, see Prison Realty Corp., Inc, Registration Statement Under the Securities Act of 1933 (Form S-4), Contribution Form, Ex. 10.10 (Oct. 16, 1998)).

bondholders, the bonds themselves are secured only by a trust deed on the prison and a security interest in the lease payments from the state of Mississippi (or any other lessor).³²⁰ Because the state's lease was terminable upon non-appropriation of funds,³²¹ the security in lease revenues became worthless upon termination. The only remedy bondholders could invoke upon the lease termination was to foreclose on the facility.³²² Of course, without a jurisdiction willing to lease the prison, bondholders are left with collateral worth very little. Although the Authority is obligated to "use its best efforts to continue to operate the Project in order to generate revenues" in the event of a lease termination,³²³ the offering statement for the bonds also discloses that the Authority "has no employees and has no experience in the operation of correctional facilities."³²⁴ Furthermore, CCA's only contractual obligation is to "operate, maintain and manage" the facility,³²⁵ which becomes an illusory obligation if there are no inmates in the prison. Thus, while CCA was discharged of its contractual obligations, the Delta Authority remained obligated on the prison bonds.

Yet even the previous paragraph does not paint a complete picture of the risks entailed in public-sector ownership. The bond offering statement for the Delta prison explicitly provides that the Delta Authority has no taxing power and the bonds are secured only by the lease revenues and property.³²⁶ Despite the seemingly straightforward language of the bond documents, economic reality is quite different. While revenue-backed securities (such as certificates of participation and revenue bonds) are not legally backed by the taxing authority of the issuing government (or indeed, may be issued by a quasi-governmental entity such as the Delta Correctional Facility Authority), market participants essentially expect the government issuer to make payments in lieu of allowing a default. Accordingly, while bondholders may lack legal recourse to a government's general funds, it is well established that upon a revenue bond default, ratings agencies will downgrade *all* of the government's debt instruments, thus prohibitively increasing the future cost of borrowing.³²⁷ Thus, if there is any potential of a

³²⁰ *Id.* at 7-10 (describing security for the bonds).

³²¹ *Id.* at 35.

³²² *Id.* at 40-41 (describing remedies upon default).

³²³ *Id.* at 3.

³²⁴ *Id.* at 21.

³²⁵ *Id.* at 50.

³²⁶ *E.g.*, Delta Offering Statement, *supra* note 317, at 8 ("The obligation of the Authority to pay principal of and interest on the Series 1995 bonds does not constitute an obligation of the Authority for which the Authority is obligated to levy or pledge any form of taxation or for which the authority has levied or pledged any form of taxation. The Authority has no taxing power. The Series 1995 bonds are limited, special obligations payable by the Authority solely from revenues derived by the Authority from the Project, including lease payments made by the Mississippi Department of Corrections pursuant to the Lease.") (emphasis omitted).

³²⁷ *See, e.g.*, Patrice Hill, *S&P Says Trend of Lease Defaults May Lead to More Rating Downgrades*, The Bond Buyer, Oct. 28, 1991, at 1 ("Failure to appropriate on one lease . . . might lead to a rating downgrade on other lease obligations. And ratings on other forms of the issuer's tax-backed debt might be affected, as could the issuer's [general obligation bond] rating.") (internal quotation marks omitted); Kent John Chabotar, *Financing Alternatives for Prison and Jail Construction*, Government Finance Review, Aug. 1985, at 7, 12 ("Even if the government is not technically liable for the debts of the independent entity that issued the bonds or certificates and built the prison, a default by the entity on its obligations would discredit the government and might shake investor confidence in the creditworthiness of future bond issues."); Letter from Richard Marks, Partner, Piper Rudnick LLP, to Hon. Mitch Landrieu, Chairman, Louisiana Juvenile Justice Comm'n. (Apr. 18, 2003) (on file with author) (addressing State of Louisiana's liabilities under lease of juvenile prison from single-purpose non-governmental entity which had financed construction through bonds secured solely by real property and lease revenues; concluding that although

facility becoming vacant, the true risk in a publicly-owned/privately-operated facility is borne by the public owner.

The disproportionate risk allocation is especially true in the case of speculative prisons—facilities built without a guaranteed source of inmates. An early round of speculative prison building in Texas led to disastrous results, with nine jail leases (representing over \$100 million in underlying securities) defaulting between 1990 and late 1993.³²⁸ Although the speculative market has not returned to the same magnitude and risk level seen in the early 1990s Texas debacle, there has been enough activity that in 2001 Standard & Poor's issued a special statement on bond rating criteria for publicly-financed prisons.³²⁹ Although it acknowledged the increased risk entailed in privately operated prisons, S&P also stated that “not all private prison projects are the same,” stressing that “the riskiest financings involve projects with no firm commitment from any governmental entity.” Accordingly, the first criteria listed for rating prison bonds was the presence of an executed contract for placement of inmates in the facility.³³⁰

Despite the warnings over the years concerning the myriad dangers accompanying speculative prison building, the practice has continued, albeit on a reduced scale. Currently, the city of Hardin, Montana is faced with an empty 464-bed speculative prison which the city financed through a local port authority.³³¹ The prison, if activated during the first two years of its existence, would be operated by Community Education Centers, a privately-held prison operator headquartered in New Jersey.³³² The offering statement for the \$27 million bond issue acknowledges that repayment is contingent on obtaining a contract to house prisoners in the facility and that “[t]he continuing demand for the beds in the Project [i.e., the prison] is predicated on the assumption that demand for jail space, in the aggregate, will continue to exceed the supply of available space. However, due to economic social, and political factors, it is impossible to predict whether this assumption will hold true.”³³³ To address this risk factor, the bond issuer commissioned a feasibility study which concluded that the prison could be marketed to the Montana DOC, federal, tribal, and local governments.³³⁴ The feasibility study bases its

“[n]either the State nor the Department [of Public Safety and Corrections] is directly obligated to pay” the bonds,” Standard & Poor's was prepared to downgrade the state's credit rating if the state invoked its ability to terminate the lease; and, noting that “[B]ecause of the significant involvement of the Department in the issuance of the 1998 Bonds, the Standard & Poor's position is based on a belief that the 1998 Bonds represent obligations of the Department and the State similar to appropriation backed bonds issued by the State.”)

³²⁸ Patrice Hill, *Private Prisons Are Riskiest COP Deals Going: “Fundamentally Flawed,” Nuveen Report Says*, *The Bond Buyer*, Nov. 2, 2003, at 1.

³²⁹ Richard J. Marino, Colleen Woodell & James Penrose, *Standard & Poor's Public Finance Criteria: Prison Financings* (Jun. 15, 2001) (on file with author).

³³⁰ *Id.*

³³¹ Two Rivers Auth., Inc., Offering Statement: Senior Lien Project Revenue Bonds, Series 2006, at 14 (Apr. 24, 2006) (on file with author) (“The Issuer is a local port authority created by the City to promote, stimulate, develop and advance the general welfare, commerce, economic development and prosperity of the area, the State of Montana, and its citizens. The issuer currently has no assets other than its interest in [the prison].”).

³³² The Hardin prison was planned under an operating agreement with CiviGenics, Inc. (another privately-held company), which was acquired by Community Education Centers in 2007. See *Id.*, at 16; Community Education Centers, *Inside CEC* (Spring 2007) (company newsletter describing acquisition of CiviGenics), available at http://www.cecintl.com/UploadedFiles/86997_CECnwsltr.pdf.

³³³ *Id.* at 2-3.

³³⁴ *Id.*, app. B (A Feasibility Analysis for a Federal and State Detention Support Center), at B-11.

conclusions on privatization trends at the agencies the authors anticipated would contract with the Hardin prison. But the lack of any commitment from these agencies makes the study nothing more than guesswork. For example, the study postulates that the U.S. Marshals Service and Immigration and Customs Enforcement (ICE) are likely customers, noting that “[although] the magnitude of their need in Montana . . . is low[, it is] of sufficient magnitude to suggest that the agencies are potential users of the proposed Center.”³³⁵ This recommendation is somewhat perplexing given that the report admits that ICE detains extremely few individuals in Montana.³³⁶ The report also notes that the U.S. Marshals Service holds individuals for appearance in U.S. District Court, but does not mention that four of the five District Court offices in the state are over 270 miles from Hardin.³³⁷

The Hardin feasibility study placed great emphasis on the possibility of a contract with the Montana Department of Corrections, while also acknowledging that no agreement had been reached.³³⁸ After construction was complete, the Montana DOC declined to contract for beds in the facility. Officials from the city and the Two Rivers Authority complained to the legislature that they had made an “informal agreement” with the DOC, a claim that the corrections department denied.³³⁹ Although the feasibility study did not consider the possibility of housing out-of-state inmates, the offering document did claim that out-of-state agencies were potential clients,³⁴⁰ while also noting that state law may not permit such arrangements.³⁴¹ In December 2007, the Montana Attorney General issued an opinion concluding that the Hardin facility was prohibited by statute from housing inmates from other states and the federal government except for certain narrow categories.³⁴² Hardin then filed suit in state court, asking for a declaratory

³³⁵ *Id.* at B-11.

³³⁶ *Id.* at B-18 (“Current bed need of this agency in the area is relatively low based on the pattern of use in the Big Horn and Yellowstone jails. Yellowstone typically holds two to four individuals while Big Horn will hold that number on occasion and has reached a one day high of ten. The use is not consistent and many days will see no use. . . . the Hardin Center could, at best, expect use as overnight holding of individuals in transit.”).

³³⁷ Other than the Billings office (46 miles from Hardin), the U.S. District Court for the District of Montana has division offices in Butte, Great Falls, Helena, and Missoula, which are 273, 275, 285, and 391 miles driving distance, respectively. See <http://www.mtd.uscourts.gov/court.htm>.

³³⁸ Two Rivers Auth., Offering Statement, *supra* note 331, at B-11 (“The Montana Department of Corrections (MDC) represents a logical client based on proximity and the potential for long-term stable contract use. Two requests for proposals have been issued by that agency and when combined represent an interest of the MDC in obtaining [a]t least 376 contract beds.”).

³³⁹ Jennifer McKee, *Hardin Officials Say They Expected Inmates*, Billings Gazette, Feb. 13, 2007, available at <http://www.billingsgazette.net/articles/2008/02/13/news/state/25-hardinjail.prt> (“Paul Green, a Hardin businessman who worked at the city’s economic development branch several years ago when the prison was in the planning stage, said he met with [DOC Director Bill] Slaughter then and walked away feeling that the state would fill the prison if the city built it.”).

³⁴⁰ Two Rivers Auth., Offering Statement, *supra* note 331, at 2 (“Individuals in the custody of . . . other state and local governmental entities that are allowed by law to transfer their inmates to the Project (the ‘Transferring Entities’) may also be held at the Project.”).

³⁴¹ *Id.* at 4 (“Huges & Luce, LLP, Special Counsel to the Underwriters, has issued an opinion that State law permits the incarceration in the Project of inmates from the Transferring Entities. If State law should be amended so as to prohibit bed space in the Project from being occupied by inmates from such other governmental entities . . . the Project may not be able to generate sufficient Project Revenues to pay principal of and interest on the Bonds by housing only legally available prisoners.”).

³⁴² 52 Mont. Op. Att’y Gen., No. 4, ¶¶ 27, 31 (Dec. 3, 2007) (“Section 7-32-2203 of the Montana Code Annotated specifies who may be confined in a detention center, and does not authorize the long-term confinement of out-of-state or federal inmates for purpose of serving a felony sentence imposed in another jurisdiction. . . . [T]he only

judgment ruling that the prison could house out-of-state prisoners. Agreeing with the City's proposed construction of the relevant statutes, the court issued the requested declaration, effectively overruling the Attorney General's opinion.³⁴³ Notwithstanding the legal victory, the Hardin facility has not been able to enter a contract for placement of out-of-state inmates, despite efforts to do so.³⁴⁴ Hardin also submitted a bid to house Montana prisoners, but in December 2008 the DOC awarded a contract to another bidder, saying the Hardin application was incomplete.³⁴⁵

B. Prison Financing

The private prison industry is heavily dependent on corporate debt. This is, of course, not unique in the contemporary American business world; however, the implications of high leverage are different in an industry whose only customers are governmental entities. A background discussion of public finance is helpful to fully comprehend the current fiscal dynamics of prison privatization. As discussed in this section, for most of the twentieth century prison construction was funded through normal government appropriations processes. But at the same time the dynamics of anti-crime politics led to the call for more prisons, government spending and borrowing became increasingly difficult. Initially, many governments turned to revenue-bond financing, a move that necessitated the creation of essentially fictitious prison revenue streams. At roughly the same time, private operators decided to use a similar model for their own financing—by borrowing against government lease or contract payments, the private sector promises greater access to capital with which to fund prison expansion.³⁴⁶

The problem with the industry's claims is the precarious nature of the collateral. The only assets of any material value that prison companies can pledge as security are accounts receivable (i.e., anticipated government payments) and the prison facilities themselves. The value of receivables depends on long-term stability or growth in private prison contracts. Thus far, the gamble has generally worked, with a few notable difficulties along the way. But as states are increasingly compelled to reconsider policies that created unsustainable prison populations, creditors of private prison companies could find their primary security drying up. If such a scenario led to a borrower default, lenders would presumably seek to recover by repossessing

federal or out-of-state inmates allowed by Mont. Code Ann. § 7-32-2203 would be those whose confinement is authorized by subsections (1) to (3) (persons committed in order to secure their attendance as witnesses in criminal trial; persons charged with crime and committed for trial; and persons committed for contempt or upon civil process or by other authority of law).”).

³⁴³ *City of Hardin v. Montana ex rel. Hardin*, No. BDV-2007-955, 2008 Mont. Dist. LEXIS 171 (1st Dist. Mont. Jun. 5, 2008). The state subsequently announced it would not appeal the district court's ruling. Jennifer McKee, *State Won't Fight Decision on Hardin Jail*, Billings Gazette, Jun. 28, 2008, available at http://www.billingsgazette.net/articles/2008/06/28/news/state/18-hardinjail_s.prt.

³⁴⁴ Jennifer McKee, *Wyoming Won't Put Prisoners in Hardin Jail*, Billings Gazette, May 29, 2008, available at <http://www.billingsgazette.net/articles/2008/05/29/news/state/30-hardin.prt> (after considering the Hardin facility, Wyoming Department of Corrections decided not to enter a contract, citing concerns about the prison's design, specifically security and recreation issues).

³⁴⁵ Jennifer McKee, *Corrections Contract Awarded*, Billings Gazette, Dec. 31, 2008, available at <http://www.billingsgazette.net/articles/2008/12/31/news/state/44-corrections.prt>.

³⁴⁶ Seiter, *supra* 161, at 4.

real estate assets, leaving those jurisdictions still reliant on private prison capacity with a fairly meaningless claim against an insolvent prison operator.

This section first considers the modern evolution of U.S. prison financing. It then undertakes a review of financing strategies employed by the leading private prison companies.

1. Municipal Finance

Historically, state and local governments built prisons either by paying for construction out of current revenues (“pay-as-you-go financing”) or by issuing general obligation (GO) bonds.³⁴⁷ During the 1980s and ‘90s, however, political demand for stricter sentencing policies led to a sustained wave of new prison construction that coincided with a period of intense public opposition to government borrowing and spending.³⁴⁸ As states began cutting taxes, revenues were often insufficient to support pay-as-you-go financing of prison construction. At the same time, GO bonds became increasingly difficult to issue given the fact that many states require voter approval of GO debt. Not only did voter approval of state debt become more difficult as a general matter during the late-twentieth century, but prisons have always fared particularly poorly at the polls,³⁴⁹ making GO debt for prison expansion especially difficult.

As GO bonds and pay-as-you-go financing became less practical, states began exploring revenue-backed securities as a means of prison borrowing. The two primary such mechanisms for prison financing have been revenue bonds and certificates of participation. By 1997, revenue bonds accounted for 50 percent of all publicly-issued debt, and were increasingly popular in the context of prison construction.³⁵⁰ Revenue bonds are not backed by the issuer’s full faith and credit, but instead rely on a stream of revenue generated by the financed project. Accordingly, revenue bonds have long been used to pay for toll roads, utility infrastructure, parking lots, and other revenue-generating items.³⁵¹ Because prisons do not generate material revenues, governments must use financial sleight of hand to fit prison construction within the revenue bond framework. Using a structure pioneered in New York and California, states form a special-purpose agency for the purpose of issuing revenue bonds.³⁵² The bond proceeds are then used to construct the facility, which is typically owned by the special agency. Debt service can be made in one of two ways. First, the legislature can make annual appropriations to cover bond payments. Alternatively, in the case of lease revenue bonds, the special agency will lease the prison to the state department of corrections, pledging the lease payments as security for the

³⁴⁷ Chabotar, *supra* note 327, at 7.

³⁴⁸ See *supra* notes 29-31 and accompanying text.

³⁴⁹ *Id.* (“In the November 1983 elections, 72 percent of all bond proposals passed; for jails only 40 percent passed.”); Jedidiah Horne & Kaia Dekker, Money Votes and Steel: The Use of Lease Revenue Bonds for Prison Construction (2003) (unpublished research paper) (on file with author) (analyzing public opinion polling regarding voter attitudes toward prison bonding; although methodological difficulties prevented a statistically significant finding, the authors found some indications that voter skepticism of GO bond-financing for new prisons may have led to increased use of revenue bonds).

³⁵⁰ Ass’n. of State Corr. Administrators, *Alternatives for Financing Prison Facilities*, at 2 (1999) available at http://www.asca.net/documents/alt_main_000.pdf.

³⁵¹ See Standard & Poor’s, *Public Finance Criteria*, at 106 (2000).

³⁵² See *Alternatives for Financing*, *supra* note 350, at 3-5. The special entity might be limited solely to one project, or may issue bonds for many state projects. New York, for example, issues prison bonds through the multi-purpose Empire State Development Corporation (f.k.a. New York State Urban Development Corporation), while California does so through the State Public Works Board.

bonds.³⁵³ Because the state's obligation on the bonds is indirect, revenue bonds usually avoid state law requirements for voter approval of public debt. Even if a state is contractually obligated to make lease payments sufficient to cover annual debt service, such a commitment generally does not qualify as public debt so long as the lease contains an annual appropriations clause.³⁵⁴ But the real-world likelihood of a state debt downgrade in the event of a lease termination essentially makes the appropriations clause a legal fiction.³⁵⁵

Certificates of participation (COPs) take the legal fiction of revenue-backed municipal securities one step further. Prison COPs generally involve a lease-sublease or lease-purchase agreement, as do revenue bonds. However, in the case of COPs, the securities are issued by a nominally private third party, and paid through government lease payments.³⁵⁶ Despite the additional (and highly theoretical) level of separation between the government and the COP issuer, the same prospect of ratings downgrades remains, and ratings agencies still consider COP debt to be state debt for purposes of rating future debt issuances.³⁵⁷ Even Colorado, which constitutionally requires voter approval of revenue bonds, has judicially exempted COPs from the public-vote requirement.³⁵⁸

Revenue bonds and COPs are politically popular because they avoid the need for voter approval. But the political advantage comes at a cost. As mentioned above, revenue-backed debt is still considered state debt for purposes of future bond ratings. Additionally, notwithstanding the prospect of ratings downgrades, because revenue-backed securities are not legally backed by the issuer's full faith and credit, they usually receive lower credit ratings, thus making debt service more expensive than for GO bonds.³⁵⁹

States' expanded borrowing ability attributable to revenue-backed securities was still not sufficient to keep pace with rapidly expanding prison populations. Thus, the private sector stepped in to provide new access to capital.³⁶⁰ Even if private operators borrow money to finance their facility construction and operations, many policymakers see this as preferable to government borrowing because private investors, rather than taxpayers, are supposedly taking on the risk. This logic, however, fails to take into account the ultimate effect of corporate debt. In the early days of prison privatization, shifting borrowing to the private sector may have produced advantages for contracting governments. Consider a hypothetical Company X which receives a

³⁵³ *Id.* at 3.

³⁵⁴ *E.g., Rider v. City of San Diego*, 959 P.2d 347, 352-353 (Cal. 1998).

³⁵⁵ *See supra* notes 287-288 and accompanying text.

³⁵⁶ *See e.g., Colo. Rev. Stat. § 24-82-703* (2008) (the lessor under all state lease-purchase agreements must be a "nonprofit corporation organized for the purpose of becoming a lessor pursuant to the provisions of [the authorizing statute]. The controller, the director of the office of state planning and budgeting, and the director of research of the legislative council shall serve ex officio as directors of such nonprofit corporation.").

³⁵⁷ *See*, Standard & Poor's, General Description of Corporate & Government Ratings Credit: Rating Methodology, at 3 (Jun. 26, 2007), available at <http://www2.standardandpoors.com/portal/site/sp/en/us/page.article/2,1,1,4,1148445596596.html> (off-balance sheet obligations are recognized during ratings process).

³⁵⁸ *Colo. Criminal Justice Reform Coal. v. Ortiz*, 121 P.3d 288 (Colo. App. 2005) (holding that COPs are not subject to voter approval, despite Colo. Const., art. X, § 20(4)(b), which requires voter approval for "creation of any multiple-fiscal year direct or indirect [government] debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments." (emphasis added)).

³⁵⁹ *See e.g., Moody's Public Finance Department, Moody's on Municipals: An Introduction to Issuing Debt*, at 25 (1987) ("The starting point for debt analysis is the pledged legal security and other bondholder protections, and it is the task of the bond analyst to determine whether the borrower will meet these commitments.").

³⁶⁰ *See e.g., McDonald & Patten, supra* note 184, at 3-5 (listing "reducing overcrowding" as leading objective behind prison privatization, based on survey of state correctional administrators).

state contract to build and operate a five-hundred-bed prison. If Company X becomes insolvent,³⁶¹ its creditors would presumably foreclose on the prison, thus forcing the state to negotiate a solution with the lenders. But given the fact that lenders generally have no interest in operating prisons, and correctional facilities are notoriously ill-suited for adaptation to other uses, the creditors in this hypothetical may have no other alternative than to sell the prison to the state. Given the state's bargaining advantage, it may well be able to demand a reasonable price. The problem, however, is that this hypothetical does not account for the new "national market" in prison beds.³⁶² Today, a foreclosing creditor does have other options. If creditors seek to reduce their losses by leasing the facility (under management by another operator) to a higher-paying jurisdiction, the contracting state may be forced to satisfy the debt secured by the prison (regardless of its relation to fair market value).

2. Corporate Borrowing

Having established the potential result of high private prison debt, an overview of corporate borrowing is in order. The private prison industry experienced a period of great growth between 1986 and 1996.³⁶³ A series of highly-publicized operating failures in the mid-1990s caused widespread speculation as to the sustainability of private corrections.³⁶⁴ But while the markets were still processing the publicized failures, two major pieces of Congressional legislation reinvigorated the industry. First, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) dramatically increased the number of incarcerated immigrants.³⁶⁵ IIRAIRA does not mention private prisons; in fact, the statute merely authorizes (but does not fund) additional detention beds.³⁶⁶ Financial markets, however, correctly anticipated that the new immigration law would result in substantially increased revenue for private prison operators, given the Immigration and Naturalization Service's historical preference for contract detention facilities.

The other Congressional action that gave investors hope was the National Capital Revitalization and Self-Government Improvement Act of 1997 (NCRSGIA), which passed as a rider to the Balanced Budget Act of 1997.³⁶⁷ The NCRSGIA was a wide-ranging legislative response to the fiscal problems plaguing the District of Columbia. Acknowledging the difficulty that D.C. faced as the only U.S. city required to run a prison (as opposed to jail) system, Congress dissolved the D.C. prison system and transferred all sentenced felons to the custody of the federal Bureau of Prisons (BOP).³⁶⁸ Instead of leaving implementation details to the BOP, the NCRSGIA directed the BOP to house at least two thousand inmates in private facilities by

³⁶¹ For simplicity's sake, this hypothetical does not consider aspects of the bankruptcy, such as the automatic stay, which could potentially introduce additional complications for the contracting government.

³⁶² See *supra* note 42 and accompanying text.

³⁶³ Douglas McDonald, et al., *Private Prisons in the United States: An Assessment of Current Practice*, at 6 (1998) (NCJRS 179708).

³⁶⁴ See *supra* notes 33-34 and accompanying text.

³⁶⁵ Pub. L. No. 104-208, div. C, 110 Stat. 3009, at §§ 303 (codified as amended at 8 U.S.C. § 1226) (creating restrictions for release of apprehended aliens), 305(a)(3) (codified as amended at 8 U.S.C. § 1231(a)(2)) (prohibiting release of aliens pending execution of a deportation order).

³⁶⁶ *Id.*, § 386 (codified as 8 U.S.C. § 1368).

³⁶⁷ Pub. L. 105-33, 111 Stat. 251, 712-787.

³⁶⁸ *Id.* § 11201(b).

year-end 1999 and at least half of all D.C. inmates in private facilities by 2003.³⁶⁹ Although the statutory privatization requirement generated optimism among private prison supporters, the BOP failed to meet the 1999 benchmark, citing delays in the contracting process due to environmental review procedures and litigation.³⁷⁰ BOP's subsequent compliance with NCRSGIA's privatization provision is unknown.³⁷¹

Despite the potential for growth in the late 1990s,³⁷² the two industry leaders (CCA and Wackenhut) saw their stock prices decline markedly. On August 5, 1997 (the date NCRSGIA was enacted), CCA and Wackenhut shares closed at \$104.22 and \$9.63, respectively. By December of 2000, both companies saw lows of 94¢ and \$2.00, respectively. Wackenhut's decline was less dramatic and was eventually followed by a substantial recovery. CCA, on the other hand, has never attained share prices comparable to what it saw in the mid-1990s. As equity became a less viable option for financing expansion, both companies began increasing their reliance on borrowing. The fiscal practices of the industry leaders, particularly CCA, can only be thoroughly understood after a brief review of the real estate investment trust (REIT) experiment of the late 1990s.

In April 1997, CCA made headlines by placing nine of its facilities in the first prison-based REIT, named Prison Realty Trust.³⁷³ REITs are special-purpose entities that benefit from favorable tax treatment. In return for their favored treatment, the Internal Revenue Code imposes significant operating restrictions on REITs.³⁷⁴ One year after CCA formed Prison Realty Trust, it proposed converting the entire company into a REIT, while simultaneously spinning off several operating subsidiaries. CEO Doctor Crants³⁷⁵ called the restructuring “a

³⁶⁹ *Id.* § 11201(c)(1).

³⁷⁰ General Accounting Office, *District of Columbia: Issues Related to the Youngstown Prison and Lorton Closure Process* (GAO/GGD-00-86), at 10-12 (as of December 31, 1999 no D.C. inmates were housed in private facilities). In response to the GAO report, the BOP wrote “we have modified our contracting procedures, and are confident that these revisions are the best method for preventing the recurrence of issues experienced during the first phase of contracting bed space for District of Columbia (DC) sentenced felons.” Although neither the BOP nor the GAO elaborates on what these modifications entail, the environmental delays may explain the subsequent use of pre-existing facility requirements in the series of CAR solicitations.

³⁷¹ The Deputy Attorney General (DAG) is statutorily required to submit annual progress reports to Congress, detailing the BOP's compliance with the privatization requirement. When the author requested these reports under the Freedom of Information Act (FOIA), the DAG's FOIA liaison responded that the documents were not in its possession and the office was unsure when the reports could be obtained. See Letter from Carmen L. Mallon, Chief of Staff, Office of Information and Privacy, to Stephen Raher (Apr. 8, 2009) (on file with author).

³⁷² CCA began its 1997 annual report with the declaration “The Company believes the United States private corrections industry is in a period of significant growth. . . . Since correctional and detention facilities are viewed as an essential service, fiscal pressures have caused governments to seek to deliver these services more cost effectively. Further, as a result of the number of crimes committed each year and the corresponding number of arrests, incarceration costs generally grow faster than any other part of a government's budget. In an attempt to address these pressures, government agencies responsible for correctional and detention facilities are increasingly privatizing facilities.” *Corr. Corp. of Am., Annual Report* (Form 10-K), 5 (Mar. 30, 1998).

³⁷³ *Corrections Corp. of America: Nine Facilities to be Sold to the First Prison REIT*, *Wall Street Journal*, Apr. 25, 1997, at B4. Under the terms of the transaction, CCA transferred nine prisons to Prison Realty Trust (a publicly-traded REIT) for \$308,000. CCA then leased the prisons from the REIT under long term (10-12 years) non-cancelable, triple-net leases. *Corr. Corp. of Am., Form 10-K, supra* note 372, at F-17.

³⁷⁴ See 26 U.S.C. § 857

³⁷⁵ Crants' is not a doctor. Rather, his parents gave him the first name “Doctor” in hopes he would be successful.

terrific formula for rapid growth.”³⁷⁶ In recommending that its shareholders approve the merger, CCA predicted that the new REIT structure would “enhance the surviving company’s ability to obtain financing for the ownership of correctional facilities.”³⁷⁷

Although the restructuring was motivated largely by anticipated tax benefits, the tax provisions applicable to REITs were cited as one substantial factor in the relatively quick failure of the new Prison Realty Trust. At the time of the restructuring, the Internal Revenue Code required REITs to pay out at least 95 percent of taxable income as shareholder dividends.³⁷⁸ In paying the required dividends, Prison Realty Trust was legally unable to amass cash reserves to pay for facility expansion. The company’s original strategy was to fund new construction through borrowing and sales of corporate stock.³⁷⁹ After the merger, however, the REIT’s stock price declined precipitously due to a combination of shareholder litigation and growing market disfavor of REITs in general. At the same time that Prison Realty was faced with increased constraints on raising equity capital, it was unable to obtain sufficient debt financing to fund its expansion plans and the required dividend payments.³⁸⁰ One shareholder attributed the failure to “[a] number of factors . . . [including] overleverage, and longer time to fill available space in speculative facilities.”³⁸¹ CCA’s speculative prison building was also cited as a material factor by an investment analyst who remarked of the restructuring:

There was a whole lot of financial engineering going on which did not work out. The other thing was, the company basically continued to build prison beds essentially on speculation, believing that the market was so strong, and they weren’t able to fill them. So now they’re trying to unwind the financial engineering and they’re trying to deal with the fact that they’ve got 12,000 empty beds.³⁸²

³⁷⁶ David D. Kirkpatrick, *Corrections Corp. Agrees to be Acquired by CCA for About \$3 Billion in Stock*, Wall Street Journal, Apr. 21, 1998, at A3. The restructuring, which was approved by shareholders, entailed the nascent Prison Realty Trust acquiring CCA in a creeping multi-step merger. See Prison Realty Corp., Registration Statement under the Securities Act of 1933 (Form S-4), at 43 (Oct. 16, 1998) (describing structure of the merger). The transaction involved the creation of several operating entities—immediately prior to the merger, CCA transferred all its non-real-property assets to a management company and two “service companies.” *Id.* at 5. The management company then leased the facilities from the REIT and performed certain administrative functions. The service companies (operating under the CCA name, pursuant to a licensing agreement) held the facility contracts and were required to pay 95% of net income to the REIT. *Id.* at 85-98.

³⁷⁷ *Id.* at 53 (the CCA board based this prediction on anticipated “increased market capitalization of the surviving company following the Merger, the increased shareholders’ equity for the surviving company resulting from the Merger and the establishment of the surviving company’s proposed credit facility”).

³⁷⁸ 26 U.S.C. § 857(a)(1) (1998).

³⁷⁹ Prison Realty Corp., Form S-4, *supra* note 376, at 72-73

³⁸⁰ Corr. Corp. of Am., Annual Report (Form 10-K), at 14 (Apr. 17, 2001) (“During this time New Prison Realty was trying to raise approximately \$300.0 million of debt financing through an offering of high-yield notes. Because of these events and the conditions of the capital markets generally, New Prison Realty was only able to raise \$100.0 million in this financing, and the notes bore interest at a much higher rate than was expected.”).

³⁸¹ *After Three Years, Prison Realty Throws of Shackles of REIT Status*, Nat’l. Mortgage News, Oct. 2, 2000, at 16 (quoting a spokesperson for Gotham Partners Management, NY, a shareholder of Prison Realty Corporation) (internal quotation marks omitted).

³⁸² *Id.* (quoting an investment analyst who requested to remain anonymous) (internal quotation marks omitted). Another facet of the restructuring that was the target of investor criticism was the relationship between the REIT and the privately-held operating companies. The 1997 merger was premised on the assumption that the operating companies would make relatively high lease payments to the REIT, which in turn would increase shareholder dividends. The amount of the lease payments was such that the operating companies were projected to lose money

While investors and analysis articulated numerous theories to explain the restructuring's failure, others began to wonder whether the company could remain financially viable.

As the new REIT structure began to unravel, CCA increased its credit facility with Lehman Commercial Paper from \$650 million to \$1 billion.³⁸³ Shortly thereafter, Prison Realty and the operating companies agreed to a proposed restructuring wherein a consortium of lenders, led by Fortress Investment Group and the Blackstone Group, would provide a new \$1.2 billion credit facility. Under the terms of the plan, CEO Doctor Crants would resign and CCA would restructure as a subchapter C corporation while raising \$350 million in new equity.³⁸⁴ By year-end 1999, CCA's position had become dire. As of December 31, CCA was in default on three financial covenants contained in its new credit facility.³⁸⁵ In addition, CCA had defaulted on the provisions of a purchase agreement concerning \$40 million in convertible subordinated notes.³⁸⁶ The combination of CCA's operating losses and the prospect of creditors accelerating corporate debt led the company's independent auditors to include a note in the 1999 financial statements expressing "substantial doubt about the Company's ability to continue as a going concern."³⁸⁷

A few months after the Fortress/Blackstone restructuring plan was announced, CCA agreed to an alternate restructuring plan proposed by Pacific Life Insurance Company.³⁸⁸ Under the Pacific Life plan, CCA would still restructure as a C-corporation, but it would refinance or renew its existing \$1 billion bank credit facility. It would also raise \$200 million through an offering of common stock, but Pacific Life agreed to serve as a backstop purchaser, buying convertible preferred stock to make up any difference between the \$200 million target and proceeds actually raised through the offering.³⁸⁹

for the first several years following the merger, a deficit which was anticipated to be funded through borrowing. However, when borrowing proved to be impractical and the operating companies were obligated to make lease payments on empty speculative facilities, the new structure became unsustainable. Corr. Corp. of Am., Form 10-K, *supra* note 380, at 13-14.

³⁸³ The original, \$650 million, post-merger credit facility was arranged by Nationsbank, Lehman Brothers, and the Bank of Nova Scotia. Credit Agreement Dated January 1, 1999, available as Exhibit 10.33 to Prison Realty Corp., Registration of Securities of Successor Interests (Form 8-K12G3) (Jan. 6, 1999). The new \$1 billion credit facility was lead and managed by Lehman Commercial Paper. Amended and Restated Credit Agreement Dated August 4, 1999, available as Exhibit 10.1 to Prison Realty Trust, Inc., Quarterly Report (Form 10-Q) (Aug. 17, 1999)

³⁸⁴ Corr. Corp. of Am., Form 10-K, *supra* note 380, at 15; *see also* Robert D. Hershey, Jr., *Prison Realty Trust, Once a High-Flying REIT, is Plagued by a Bad Market and Management Woes*, New York Times, Dec. 28, 1999, at C-6.

³⁸⁵ Prison Realty Trust, Inc., Form 10-K, *supra* note 36, at 13 (CCA, then operating as Prison Realty Trust, was in violation of the interest coverage ratio, leverage ratio, and net worth covenants of its \$1.2 billion credit facility).

³⁸⁶ *Id.*

³⁸⁷ *Id.* at F-16 ("Continued operating losses by New CCA, declarations of events of default and acceleration actions by the Company's and New CCA's creditors, the continued inability of New CCA to make contractual payments to the Company, and the Company's limited resources currently available to meet its operating, capital expenditure and debt service requirements will have a material adverse impact on the Company's consolidated financial position, results of operations and cash flows. In addition, these matters concerning the Company and New CCA raise substantial doubt about the Company's ability to continue as a going concern.").

³⁸⁸ Corr. Corp. of Am., Form 10-K, *supra* note 380, at 15. The Fortress/Blackstone consortium sued for breach of contract, with both sides settling in August 2001. Corr. Corp. of Am., Annual Report (Form 10-K), at 39 (Mar. 22, 2002).

³⁸⁹ Corr. Corp. of Am., Form 10-K, *supra* note 380, at 16.

In furtherance of the Pacific Life proposal, CCA negotiated a waiver and amendment to its Lehman Commercial Paper credit facility.³⁹⁰ Pacific Life, however, was not convinced that the modified credit facility satisfied the terms of its agreement with CCA.³⁹¹ In response, CCA exercised its right to terminate the Pacific Life agreement, instead going forward with the terms of the renegotiated credit facility with Lehman Commercial Paper. Under this agreement, CCA terminated its REIT status, reacquired the operating and service companies it had spun off in the 1997 transaction, and made several management changes.³⁹² Despite CCA's original predictions of enhanced equity financing via the restructuring, it emerged from REIT status in December 2000 with \$972 million due under its credit facility, \$7.6 million due under the operating company's credit facility, and \$171 million in various notes, bearing interest of eight to twelve per cent.³⁹³ For the same year (2000), CCA produced a \$731 million loss (following a \$73 million loss in 1999).³⁹⁴ Shortly before shareholders approved the restructuring, CCA officials admitted that company leaders had considered filing bankruptcy as an alternative to the second restructuring.³⁹⁵

Although CCA's REIT experiment has received substantial attention, it is not the only instance of private prison financial trouble. Cornell Companies, arguably the most financially insecure of the publicly traded prison operators, has not formed a REIT, but has twice used lease-based financing in an effort to raise capital. In December 1998, Cornell entered into a \$60 million synthetic lease credit facility with a consortium of lenders lead by ING Capital Corporation.³⁹⁶ In June 2000, Cornell and the lenders increased the total amount of the facility to \$75 million.³⁹⁷ Cornell used the loan proceeds to fund construction of new facilities, yet treated its lease obligations as an off-balance-sheet liability.³⁹⁸ A few years later Cornell's corporate auditor, Arthur Anderson, came under increased scrutiny in the wake of the Enron scandal. In response, a special committee of the Cornell board investigated the synthetic leases and determined that they had not been properly reported, necessitating a restatement of the company's financial statements.³⁹⁹

Shortly before Cornell's synthetic lease troubles became public, it entered another complicated financing agreement, this time a sale-leaseback transaction.⁴⁰⁰ Under the sale-leaseback (for which Cornell paid \$3.65 million in financial advisor fees⁴⁰¹) Cornell transferred

³⁹⁰ Waiver and Amendment Dated June 9, 2000, available as Exhibit 10.1 to Prison Realty Trust, Inc., Current Report (Form 8-K) (Jun. 13, 2000).

³⁹¹ Corr. Corp. of Am., Form 10-K, *supra* note 380, at 16 (Pacific Life announced it "had significant concerns with respect to a number of terms" in the amended credit facility and requested additional information from CCA).

³⁹² *Id.* at 17-21. It was during this management restructuring that CCA hired the politically well-connected Gustavus Puryear who came to the company from a staff position in Sen. Bill Frist's office. *Id.* at 21.

³⁹³ *Id.* at 22.

³⁹⁴ *Id.* at F-4.

³⁹⁵ Gethan Ward, *Prison Firm Won't File Bankruptcy to Bail Out*, *The Tennessean*, Aug. 17, 2000, at 1E.

³⁹⁶ See Third Amended and Restated Credit Agreement (Dec. 3, 1998), available as Exhibit 10.23 to Cornell Companies, Inc., Annual Report (Form 10-K) (Apr. 1, 1999).

³⁹⁷ Fourth Amended and Restated Credit Agreement (Jul. 21, 2000), available as Exhibit 10.1 to Cornell Companies, Inc., Quarterly Report (Form 10-Q) (Aug. 14, 2000).

³⁹⁸ Cornell Companies, Inc., Annual Report (Form 10-K), at 46 (Apr. 16, 2002).

³⁹⁹ *Id.* at 46-48, 64-66; David Ivanovich, *The Fall of Enron: Investors' Distrust Propels Firms to Issue Restatements*, *Houston Chronicle*, Feb. 14, 2002, at A-15.

⁴⁰⁰ Premises Transfer Agreement (Aug. 14, 2001) and; Master Lease Agreement (Aug. 14, 2001), available as Exhibits 10.1 and 10.2, respectively, to Cornell Companies, Inc., Current Report (Form 8-K) (Aug. 28, 2001).

⁴⁰¹ Cornell Companies, Inc., Form 10-K, *supra* note 398, at 47.

eleven of its prisons for \$173 million to the unaffiliated Municipal Corrections Finance, LP (MCF). At the same time, Cornell entered a twenty-year lease of the same facilities, with twenty-five years of renewal options.⁴⁰² Although the sale-leaseback was also implicated in Cornell's 2002 accounting restatements,⁴⁰³ the largest potential impact could lie in the future. Although there is no current indication that Cornell is considering bankruptcy, it is the most precarious of the publicly trade prison companies, thus the implications of a Cornell bankruptcy filing are not purely theoretical. Moreover, when MCF issued bonds to raise the purchase price for the eleven facilities, it established a reserve fund to make lease payments in the event of a Cornell bankruptcy.⁴⁰⁴ Even in the event that a Cornell bankruptcy estate were able to successfully claim the reserve fund as an asset of the estate, MCF has guaranteed the reserve fund,⁴⁰⁵ in an apparent attempt to avoid default on the bonds and keep the prisons out of a bankruptcy estate. If Cornell were to file bankruptcy, it or a trustee could terminate unfavorable operating contracts while either assuming or assigning its obligations under the MCF lease in connection with more lucrative federal contracts.⁴⁰⁶ As a result, states with Cornell contracts would be forced to find new prison beds or match the more desirable federal rates.

All three major private prison companies (CCA, GEO/Wackenhut, and Cornell) make heavy use of bank credit facilities. The risk of the prison operators' leverage is not lost on the companies themselves. The annual Securities and Exchange Commission filings by the leading publicly-traded private prison companies⁴⁰⁷ feature quite sober discussions of the potential downsides of debt financing. CCA admits that it has "a significant amount of indebtedness" which could "require us to dedicate a substantial portion of our cash flow from operations to payments on our indebtedness, thereby reducing the availability of our cash flow to fund working capital, capital expenditures, and other general corporate purposes."⁴⁰⁸ While CCA's disclosure of financing risks is terse and somewhat vague, GEO/Wackenhut provides much greater detail regarding the risks its investors face. For example, GEO details some of the restrictive covenants imposed on the company under its bank credit facility, noting

our Senior Credit Facility requires us to maintain specified financial ratios and satisfy certain financial covenants, including maintaining maximum senior and total leverage ratios, a minimum fixed charge coverage ratio, a minimum net worth and a limit on the amount of our annual capital expenditures. Some of these financial ratios become more restrictive over the life of the Senior Credit Facility. We may be required to take action to reduce our indebtedness or to act in a manner contrary to our business objectives to meet these ratios and satisfy these covenants.⁴⁰⁹

⁴⁰² Premises Transfer Agreement and Master Lease Agreement, *supra* note 400.

⁴⁰³ Cornell Companies, Inc., Form 10-K, *supra* note 398, at 47.

⁴⁰⁴ Cornell Companies, Inc., Annual Report (Form 10-K), at 76 (Mar. 14, 2008).

⁴⁰⁵ *Id.*

⁴⁰⁶ See 11 U.S.C. § 365 (2008).

⁴⁰⁷ Notably, despite the fact that Cornell Companies is arguably the most financially precarious of the publicly-traded operators, it's Annual Report contains the most summary disclosure of financing risk. Devoting a mere two sentences to the issue, Cornell concludes "[t]o the extent our cash and current financing arrangements do not provide sufficient financing to fund these [expansion] projects, financing may not be available or may only be available on terms that are unfavorable to us." Cornell Companies, Inc., Annual Report (Form 10-K), at 18 (Mar. 14, 2008).

⁴⁰⁸ Corr. Corp. of Am., Form 10-K, *supra* note 153, at 29-30.

⁴⁰⁹ GEO Group, Inc., Form 10-K, *supra* note 153, at 20.

GEO also admits to the risk posed by interest rates. Not only is the company exposed to interest risk on its credit facility (which contains a variable interest rate), but it also entered into an interest rate swap agreement in September 2003 which leaves it vulnerable to unfavorable changes in the London Interbank Offered Rate.⁴¹⁰

The bank credit facilities are secured by all of the borrower's assets and frequently contain covenants preventing asset sales without consent of the lenders. For example, CCA's current credit agreement prevents facility sales outside of three scenarios.⁴¹¹ First, CCA can sell unoccupied prisons for a minimum price of \$25,000 per bed.⁴¹² Second, it can sell any facilities for cash, at fair market value, so long as aggregate sales do not exceed \$45 million in any fiscal year.⁴¹³ Finally, CCA can sell a facility for cash to a government corrections agency so long as the sale is for fair market value and in connection with a CCA management contract for the facility.⁴¹⁴ GEO/Wackenhut's credit facility contains similar restrictions, except there is no provision for vacant facilities and the aggregate-annual-value limit is \$5 million.⁴¹⁵

The impact of these restrictive covenants is intimately tied to the federal government and the national market in private prison contracts. If the borrowing company defaults on a credit agreement, the lender's most meaningful recourse is against the borrower's real property assets (i.e., prisons). Because the lenders do not have expertise in operating prisons, the most likely scenario is that foreclosing creditors will seek to lease the facilities in connection with lucrative federal contracts unless the current state government user agrees to meet the price demanded by the lenders. Moreover, this price would be presumably be based on the amount outstanding on the borrower's credit facility. Because of this dynamic, corporate borrowing by private prison companies has a direct relationship to the contingent liabilities a state would face in the event of a contractor debt default. This fact contradicts the claims of privatization proponents who claim private risk as a benefit of correctional outsourcing.

V. Conclusion

The history of U.S. correctional policy is decidedly cyclical. Reforms are followed by dissatisfaction, followed by inaction, followed by more reforms. Historically, most prison reform movements have been motivated, at least initially, by ideals of rehabilitation and society's responsibilities to wayward individuals. Twentieth century private prisons can be viewed as a reform movement, but the motivations were not benevolent. Rather, the primary objective underlying the modern private prison industry was rapid expansion of the nation's prison system. Private prisons did deliver on the promise of quick expansion. But carceral growth came at a cost. Most obviously, states are now struggling under the fiscal impact of large prison populations. And, as shown throughout this paper, private operation of prisons presents substantial operational challenges to contracting agencies.

⁴¹⁰ *Id.* at 21.

⁴¹¹ Credit Agreement (Dec. 21, 2007), available as Exhibit 10.1 to Corr. Corp. of Am., Current Report (Form 8-K) (Dec. 21, 2007).

⁴¹² *Id.* § 10.4(g), at 80.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ Third Amended and Restated Credit Agreement (Jan. 24, 2007), available as Exhibit 10.1 to GEO Group, Inc., Current Report (Form 8-K), § 11.5, at 74-75 (Jan. 30, 2007).

Privatization depends on the existence of a strong contractual relationship between the government and the vendor. But strong, healthy relationships in the context of private prisons are hindered by ill-defined objectives and ineffective monitoring systems. While private operators relentlessly claim that their services are beneficial and efficient, they prevent public access to information which could substantiate or refute these claims. Meanwhile, many contracting agencies have little interest in seriously analyzing the efficacy of privatization because they are dependent on contractor-owned infrastructure. In the early days of contemporary prison privatization, states had some bargaining leverage since prison operators were fledgling entities which would be financially harmed by a contract cancellation. But the end of the twentieth century witnessed the explosive growth of the secretive and lucrative immigrant detention sector. Along with other components of the national prison-bed market, immigrant detention has changed the landscape of prison outsourcing. States that depend on privately owned prison capacity are increasingly vulnerable as prison operators can now shop for customers.

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

Since the federal government is largely responsible for the emergence of the national prison market, it must provide the solution to the nation’s current private prison problem. A federal solution must begin with immigration policy, which has been the primary driver behind the private prison industry in recent years. But immigrant detention policy cannot be addressed in a vacuum. Although a rapid draw-down in immigrant detention populations is desirable from a practical and humanitarian perspective, it would likely wreak havoc on the private prison industry. As the industry destabilized, state correctional systems would be beset by uncertainty and many local governments would be forced to service debt on empty detention facilities. Accordingly, immigration policy reform must be integrated with a specific “private prison fix.” There are many potential policy approaches. The federal government could provide funding for states to acquire private facilities (hopefully tied to prison population reduction goals). Alternatively, Congress could develop a specialized bankruptcy or receivership process for the industry. Yet another possibility is a federal “deprivatization” process, modeled after the creation of Amtrak.

Whatever specific form the federal response to the private prison industry takes, now is the ideal time to undertake the challenge. President Obama recently issued a memorandum instructing all federal agencies to thoroughly reexamine outsourcing practices and procedures.⁴¹⁶ The directive emphasizes the need to appropriately monitor contractors and ensure that the federal government maximizes value. When applying this process to prison contracting, the federal agencies would be well-advised to take a broad, inter-governmental view of the problem. If the federal government extricates itself from the private prison industry (as it should), the negative impacts will be felt by the states.

⁴¹⁶ Memorandum on Government Contracting, 74 Fed. Reg. 9,755 (Mar. 6, 2009).

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