

**PRIVATE PRISONS BEHIND BARS: WHY
CORRECTIONS CORPORATIONS MUST
ABIDE BY PUBLIC INFORMATION LAWS**

Comment

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I. THE VICTIM: AUTUMN MILLER’S TRAGEDY

In January 2012, Autumn Miller learned there was a warrant out for her arrest.¹ Miller turned herself in for violating the probation connected to her nonviolent drug possession charge.² She was sentenced to a year in Dawson State Jail, a correctional facility operated by Corrections Corporation of America (CCA).³ Two months later, Miller, as a mother of three, had a feeling she might be pregnant; she abided by CCA policies and requested a pregnancy test and a pap smear.⁴ She was given neither.⁵ On June 14, 2012, in the middle of the night, Miller alerted the CCA guards on duty that she thought she was in labor and needed immediate medical attention.⁶ Two hours later, three male guards accompanied Miller to the medical unit where there was no medical staff present.⁷ Contrary to CCA policy, one of the guards independently determined Miller was not in need of immediate medical attention; instead, the guards gave her a menstrual pad and locked her in a holding cell.⁸ Around 3:30 AM, Miller screamed for help and began losing a substantial amount of blood.⁹

Gracie Miller was born in a toilet at Dawson State Jail.¹⁰

Fifteen minutes passed before CCA guards entered, at which point Gracie was barely breathing.¹¹ Gracie was taken to a hospital while Miller waited, thinking that she would bleed to death before ever seeing Gracie again.¹² When Miller—a nonviolent criminal who turned herself in—finally got medical attention, her arms and feet were handcuffed while in the ambulance and at the hospital, even after a doctor requested the removal of her shackles.¹³ Gracie was born at twenty-six weeks and weighed barely more than a pound.¹⁴ She died four days after her birth.¹⁵ As for Autumn

1. Plaintiff’s Original Complaint at 3, *Miller v. Corr. Corp. of Am.*, No. 3:13-CV-01022-L (N.D. Tex. Mar. 8, 2013).

2. *Id.*

3. *Id.* at 1, 3.

4. *Id.* at 3; see Emily DePrang, *Death at Dawson: Why Is Texas’s Worst State Jail Still Open?*, TEX. OBSERVER (Feb. 26, 2013, 4:15 PM), <http://www.texasobserver.org/death-at-dawson-why-is-texas-worst-state-jail-still-open/> (examining the various deaths and injuries that have occurred at Dawson State Jail since 2008).

5. Plaintiff’s Original Complaint, *supra* note 1.

6. *Id.*

7. *Id.* at 4.

8. *Id.* at 4–5.

9. *Id.* at 5.

10. *Id.*

11. *Id.*

12. *Id.* at 6.

13. *Id.*

14. *Id.*

Miller, she was sent back to Dawson within an hour of her daughter's death, harassed by guards, and placed in solitary confinement on suicide watch.¹⁶

Why was Autumn Miller never given a pregnancy test? Why was the CCA staff so unprepared to handle a medical emergency? Why was there not a single female guard present to assist Miller in labor? Has anything like this happened before? Was Autumn Miller compensated for these egregious injuries? And if so, how much? These are just a few of the questions Autumn Miller's tragedy raises to both the press and the public, and yet the answers remain elusive because Dawson State Jail was run by a private corporation, rather than directly by the government.¹⁷

A. Allowing Private Prisons a Shield of Liability

Miller's case, along with eight other deaths at Dawson State Jail, spurred a public records request by Prison Legal News (PLN), a nonprofit organization working in various areas of prisoner advocacy.¹⁸ The requested records included settlement agreements, reports, audits, investigations regarding CCA's services, and CCA's contracts with counties and cities.¹⁹ When CCA declined the request, PLN filed a public records lawsuit.²⁰ Each of these records would generally be considered "public information" under the Texas Public Information Act (TPIA or the Act).²¹ CCA argued that it was not subject to the requirements of TPIA because it was not a "governmental body" for purposes of the Act.²² In the alternative, CCA argued that the taxpayer funds received from the state are used generally in its nationwide operations and are not specifically used for its Texas operations.²³ In other states, CCA has successfully argued that

15. *Id.*

16. *See id.* at 5 (alleging the CCA guards tried to get her to sign a statement admitting that she had sex with a guard or another prisoner while incarcerated); DePrang, *supra* note 4.

17. *See* DePrang, *supra* note 4.

18. *See Prison Legal News Files Public Records Suit Against CCA in Texas*, PRISON LEGAL NEWS (June 15, 2013), <https://www.prisonlegalnews.org/news/2013/jun/15/prison-legal-news-files-public-records-suit-against-cca-in-texas/>. *See generally* PRISON LEGAL NEWS, <https://www.prisonlegalnews.org/> (last visited Nov. 11, 2015) (describing PLN as a nonprofit organization advocating, and often litigating, to preserve prisoners' constitutional rights).

19. Plaintiff's Motion for Summary Judgment at 2, *Prison Legal News v. Corr. Corp. of Am.*, No. D-1-GN-13-001445 (353d Dist. Ct., Travis County, Tex. Sept. 15, 2014), <http://s3.documentcloud.org/documents/1094889/plnvcca.pdf>.

20. *See Prison Legal News Files Public Records Suit Against CCA in Texas*, *supra* note 18.

21. *See* TEX. GOV'T CODE ANN. § 552.022 (West 2012) (stating that settlement agreements, audits, and contracts with public agencies are generally public information).

22. *See* Press Release, Prison Legal News, *Texas Court Holds CCA Is a Governmental Body in PLN Public Records Suit* (Mar. 20, 2014), <https://www.prisonlegalnews.org/in-the-news/2014/texas-court-holds-cca-is-a-governmental-body-in-pln-public-records-suit/>.

23. *See id.*

requested information fell into one of the exceptions enumerated in public records acts, most often the trade secret exemption.²⁴

B. Texas Must Stand for Change

Autumn Miller’s tragedy is only one of the many horrifying incidents that occurred at Dawson State Jail over the past ten years.²⁵ Every day, there are more reports of human rights violations in privately run prisons across the country.²⁶ While other states have experimented with prison privatization, Texas continually renews contracts with these corporations.²⁷ In 2013, after intense lobbying by a few nonprofits, the Texas Legislature chose not to renew two contracts with CCA, including its management of Dawson State Jail in Dallas.²⁸ Although this is a national problem, Texas should stand as the leader for change in this area of law.²⁹

“Texas is the birthplace of the modern private prison industry. If we can get the Texas Legislature to agree that private facilities are not working for our state, that’s good news for the national movement against for-profit prisons.”³⁰ In March 2014, a Texas state judge finally held that CCA is a “governmental body” for purposes of the TPIA and therefore “subject to [the] Act’s obligations to disclose public information.”³¹ The judiciary has taken the first step in achieving a more transparent corrections system;

24. See Christopher Petrella, *Private Prisons Currently Exempt from Freedom of Information Act*, NATION CHANGE (Sept. 25, 2012), <http://www.nationofchange.org/private-prisons-currently-exempt-freedom-information-act-1348581256>.

25. See DePrang, *supra* note 4. Ashleigh Parks, age thirty, died of pneumonia at Dawson State Jail six weeks before being released because of the lack of medical attention given to her. *Id.* After three days of difficulty breathing, diarrhea, and no medical attention, Shebaa Green died of pneumonia at Dawson. *Id.* Wendy King bled continuously for nine months due to endometriosis and a retroverted uterus and was given a menstrual pad and antibiotics; she did not receive medical attention until she was released from Dawson. *Id.* Pamela Weatherby, age forty-five, died after only two months at Dawson from diabetes complications because her insulin injections were replaced with cheaper oral insulin. *Id.*; see also Alfano v. Corr. Corp. of Am., No. 3:11-CV-01006-P (N.D. Tex. dismissed Feb. 28, 2013), <https://assets.documentcloud.org/documents/2041381/cca-response-to-weatherby-complaint.pdf> (giving more information on the wrongful death suit filed by Weatherby’s family).

26. See Secrecy, *Sexual Assault and Hazing Plague Texas Private Prison*, GRASSROOTS LEADERSHIP (Sept. 17, 2014), <http://grassrootsleadership.org/releases/2014/09/secrecy-sexual-assault-and-hazing-plague-texas-private-prison>.

27. See *infra* Part II.A.

28. See Brandi Grissom, *In Two Cities, Opposite Reactions to the Closing of State Jails*, N.Y. TIMES (Aug. 1, 2013), http://www.nytimes.com/2013/08/02/us/in-two-cities-opposite-reactions-to-the-closing-of-state-jails.html?page-wanted=all&_r=0.

29. See Robert Wilonsky, *Dallas’ Dawson State Jail on Chopping Block, but Texas Department of Criminal Justice Has Final Say*, DALL. MORNING NEWS (May 28, 2013, 10:53 PM), <http://www.dallasnews.com/news/local-news/20130528-dawson-state-jail-on-chopping-block-but-texas-agency-has-final-say.ece>.

30. See *id.* (quoting Grassroots Leadership representative Kymberlie Quong Charles).

31. See *Prison Legal News v. Corr. Corp. of Am.*, No. D-1-GN-13-001445 (353d Dist. Ct., Travis County, Tex. May 1, 2013), <https://www.prisonlegalnews.org/media/litigation/2014-09-15%20Final%20Judgment.pdf>.

legislative action and nonrenewal of contracts must ensure this is not the last step.³²

This Comment examines how correctional corporations have avoided public information laws through extreme lobbying efforts, the Prison Litigation Reform Act, and the public's general apathy towards prisoners' rights.³³ Part II provides background on the history of private prisons in Texas, the emergence of private prisons in the United States, and the major corporations at issue today. Part III discusses some arguments for and against prison privatization and reveals how open records acts are crucial to the debate. Part IV explains why the judiciary has been the primary setting for effecting change in this area of the law, as well as some case law that laid the foundation for private prisons' liability. Part V illustrates the growing need for accountability by describing human rights violations in Texas's private prisons. Part VI analyzes how recent judicial decisions laid the groundwork for change in Texas by examining how other states have ruled on private prisons' obligations under public information laws. Finally, Part VII offers recommendations to ensure that Texas is on the right path to achieving a more transparent corrections system. These recommendations include passing legislation to hold private prisons to the same level of accountability as their public counterparts, allowing current contracts with these corporations to expire, and avoiding the privatization of other services traditionally run by the government.³⁴

II. CRIMINAL BEHAVIOR: A HISTORY OF THE PRIVATE PRISON BUSINESS

A. *The Convict Lease System in Texas*

In the late nineteenth century, an increased amount of lawlessness substantially enlarged the number of convicts in Texas for the first time in the state's history.³⁵ Although Texas previously used prisoners for labor, the augmented prison population created a unique burden for the state.³⁶ Because of that new burden, the state was forced to lease out the prisoners, and the era of the convict lease system began.³⁷

32. See *infra* Parts VI–VII.

33. See *infra* Parts III–VII.

34. See *infra* Part VII.

35. See Paul M. Lucko, *Prison System*, TEX. ST. HIST. ASS'N (June 15, 2010), <https://www.tshaonline.org/handbook/online/articles/jjp03> (stating that the number of convicts went from 146 to 264 in less than eighteen months after the Civil War).

36. See *id.* (describing the state's penological approach and noting that the state built a cotton mill, which allowed the jail to be self-sustaining).

37. See Donald R. Walker, *Convict Lease System*, TEX. ST. HIST. ASS'N (June 12, 2010), <https://www.tshaonline.org/handbook/online/articles/jnc01> (noting that the convict lease system in Texas developed for the same reasons and functioned in substantially the same way as other states in the Confederacy).

Originally, the prisoners were leased to two railroad companies for labor, but conflicting interests between the state and the private companies compelled the state to cancel the contracts.³⁸ While the private contractor's goal was simply "to get the most labor possible from the prisoners at the least cost," the state wanted "at least a minimal effort to provide adequate food, clothing, and shelter for the prisoners."³⁹ Notwithstanding the inherent conflicts with private contractors, the governor and other legislators found no alternative solution to the overcrowding and underfunding problems with state prisons.⁴⁰ Just three years after contracting out originally failed, the state once again leased the prisoners' labor—this time to three successful businessmen.⁴¹

Financial difficulties, reports of prisoner abuse, and a new governor caused this contract to last only six years before the state resumed control of the facility.⁴² The state waited less than a year before leasing the prison and the prisoners to another private operator, which sublet the labor to private farmers, railroad companies, and other small industries.⁴³ Once those men saw profit from 1877 to 1883, the legislature determined that the private operators were taking income that belonged to the state.⁴⁴ The state rescinded the contract but continued subletting the prisoners' labor to other industries, which generated a substantial portion of the state's revenue for the next thirty years.⁴⁵ Despite the income generated from the labor, reports concerning prisoner abuse, administrative corruption, and general mismanagement generated a reformist atmosphere.⁴⁶

The convict-leasing period ended in the early twentieth century, and the Texas prison system suffered financial losses in the years leading up to World War II.⁴⁷ Although various inmate programs were implemented to raise public morale concerning the prison system, stories of unsanitary living conditions, mysterious inmate deaths, and overcrowding persisted.⁴⁸ The 1960s and 1970s saw the most dramatic rise ever in the Texas prison

38. *See id.*

39. *Id.*

40. *See id.*

41. *See id.* (describing one of these men as having "particularly close ties to the administration of the Republican governor"). The contract, meant to last fifteen years, provided that the operators assume all financial responsibility for the prison, pay the state for the prisoners' labor, and give the operators full control over all prison facilities. *Id.*

42. *See id.*

43. *See id.* The private operators were two men, Ed Cunningham and L. A. Ellis, who both owned substantial agricultural property used to grow sugarcane and other grains in counties near Houston. *Id.*

44. *See id.*

45. *Id.*

46. *See id.*

47. *See Lucko, supra* note 35 (noting that World War II cut the Texas inmate population in half). After World War II, however, the population began expanding again, and although the number of prison industries increased, the state would never make incarceration as profitable as the convict lease system had allowed. *Id.*

48. *See id.*

population.⁴⁹ Then, in 1980, a federal judge found that the conditions of confinement in the Texas prison system violated the Eighth and Fourteenth Amendments of the U.S. Constitution.⁵⁰ Before that ruling was even official, private correctional corporations surfaced, allowing Texas lawmakers an alternative once again.

B. *The United States' Use of Private Prisons*

In the early 1970s, municipal and state governments began using private contractors to accommodate delinquent juveniles.⁵¹ Then, as a result of the nation's war on drugs and mandatory federal sentencing, the American prison population increased dramatically in the late 1970s.⁵² The heightened burden on state governments led to the rise of privately operated halfway houses and detention centers for undocumented immigrants in the early 1980s.⁵³ This rising burden on the prison system allowed a new market to emerge; a few key men, who were previously involved in the corrections and security industries, saw a money-making opportunity and jumped at it.⁵⁴

C. *The Suspects: CCA, GEO Group, and MTC*

In 1983, T. Don Hutto, Tom Beasley, and Robert Crants founded the Corrections Corporation of America (CCA).⁵⁵ The corporation was financed by the same venture capitalist that helped finance KFC, and founder Tom Beasley compared private prisons to selling any other

49. *Id.* While the state's population grew 19% between 1968 and 1978, the prison population increased by 101%. *Id.* Nationally, the United States was incarcerating felons at a rate of 86.9 per 100,000 people, but Texas's rate was noticeably higher at 143.7 for every 100,000 people. *Id.*

50. *See Ruiz v. Estelle*, 503 F. Supp. 1265, 1307 (S.D. Tex. 1980) (holding that the overcrowding, understaffing, and unwarranted brutality towards inmates violated the constitutional rights of the class action plaintiffs), *aff'd in part, rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982).

51. *See* SUZANNE M. KIRCHHOFF, CONG. RES. SERV., No. R41177, ECONOMIC IMPACTS OF PRISON GROWTH 23 (2010), <https://www.fas.org/sgp/crs/misc/R41177.pdf> (detailing the regular growth of the American corrections system and analyzing the relationship between high incarceration rates and economic growth or decline).

52. *See* CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 2 (Jan. 2012), http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf (providing a more in-depth analysis of the origin, reemergence, development, and growth of the private prison industry in the United States); Lucko, *supra* note 35.

53. MASON, *supra* note 52.

54. *See infra* Part II.C.

55. *The CCA Story: Our Company History*, CCA, <https://www.cca.com/our-history> (last visited Nov. 4, 2015) (describing Hutto as experienced in corrections and noting that Beasley and Crants both held law degrees from Vanderbilt and Harvard, respectively). CCA is a publicly traded corporation formed in Maryland with its headquarters in Tennessee. *See Prison Legal News v. Corr. Corp. of Am.*, No. 332-5-13, 2014 Vt. Super. LEXIS 36, at *3 (Vt. Super. Ct. Jan. 10, 2014).

commodity.⁵⁶ Just months after its incorporation, CCA received its first federal contract from the U.S. Department of Justice to run an immigration and naturalization facility in Texas.⁵⁷ By April 1984, CCA opened “the first detention center in the world designed and constructed by a [private] corrections company” in Houston, Texas.⁵⁸ CCA describes some of its functions as “protecting public safety, . . . preparing inmates for reentry, . . . and bringing innovative security to government corrections—all while consistently saving hardworking taxpayers’ dollars.”⁵⁹

In 1984, George Wackenhut and George Zoley joined the market and formed The Wackenhut Corrections Corporation (GEO Group) as a division of The Wackenhut Corporation.⁶⁰ GEO Group received its first contract with the federal government in 1987 to control 150 immigrant detainees at the Aurora Processing Center in Denver, Colorado.⁶¹ Some of the services GEO Group purports to offer are secure custody services, correctional health and mental health care, rehabilitation treatment, and facility maintenance.⁶²

Founded in 1981, Management and Training Corporation (MTC) did not get involved in the corrections industry until 1987.⁶³ MTC houses 31,000 inmates in eight different states.⁶⁴ Although MTC is a smaller player in the corrections industry compared to CCA and GEO Group, its

56. See HOLLY KIRBY ET AL., *THE DIRTY THIRTY: NOTHING TO CELEBRATE ABOUT 30 YEARS OF CORRECTIONS CORPORATION OF AMERICA 1* (June 2013), http://grassrootsleadership.org/sites/default/files/uploads/GRL_Dirty_Thirty_formatted_for_web.pdf (“According to Beasley, the company was founded on the principle that you could sell prisons ‘just like you were selling cars, or real estate, or hamburgers.’”).

57. *The CCA Story: Our Company History*, *supra* note 55.

58. *Id.*

59. *Learn About Us and Our Role in Corrections*, CCA, <http://www.cca.com/about-cca> (last visited Nov. 11, 2015). CCA now manages nearly 70,000 male and female inmates and detainees at more than sixty facilities across the nation. *Who We Are*, CORRECTIONS CORP. OF AM., <http://www.cca.com/who-we-are> (last visited Nov. 4, 2015). CCA’s net income for the second quarter of 2014 totaled \$55.7 million. *CCA Announces 2014 Second Quarter Financial Results*, CCA, <http://www.cca.com/investors/financial-information/quarterly-reports> (follow hyperlink “CCA Announces 2014 Second Quarter Financial Results”) (last visited Nov. 11, 2015).

60. *Historic Milestones*, GEO GROUP, INC., <http://geogroup.com/history> (last visited Nov. 11, 2015).

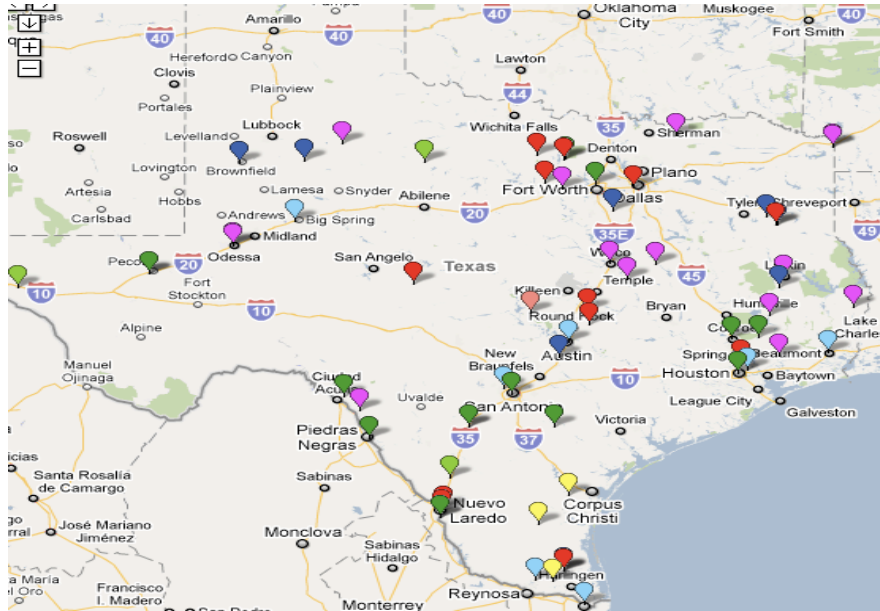
61. *Id.*

62. *U.S. Corrections*, GEO GROUP, INC., http://geogroup.com/us_corrections (last visited Nov. 11, 2015). GEO Group now manages or owns sixty-four facilities, totaling almost 72,000 beds in the United States alone. *Locations*, GEO GROUP, INC., <http://geogroup.com/locations> (last visited Nov. 11, 2015). For the second quarter of 2014, GEO Group reported a net operating income of \$119 million. *See Supplemental Financial Disclosures*, GEO GROUP, INC., <http://www.snl.com/Cache/1500065202.PDF?Y=&O+PDF&D=&fid=1500065202&T=&iid=4144107> (last visited Nov. 4, 2015).

63. *Overview & Mission*, MGMT. & TRAINING CORP., <http://www.mtctrains.com/overview-mission> (last visited Nov. 5, 2015).

64. *Id.* Although MTC houses about half the inmates of GEO Group, reports of inhumane living conditions and safety problems are just as rampant. *See Jenifer Warren, Inmates Are Moved After Riot Kills 2*, L.A. TIMES (Oct. 29, 2003), <http://articles.latimes.com/2003/oct/29/local/me-riot29> (describing a 150-inmate riot at a MTC facility in California).

connection to Texas is substantial.⁶⁵ Of the twenty-five corrections facilities operated by MTC in North America, twelve of those are in Texas.⁶⁶ MTC describes its correctional philosophy as “rehabilitation through education” and declares two of its main concerns are to provide “well-trained staff” and to maintain “safe and secure facilities.”⁶⁷



The map above illustrates the pervasiveness of private corrections facilities in Texas.⁶⁸



65. See MGMT. & TRAINING CORP., CORRECTIONS AT-A-GLANCE 1 (Dec. 2014), <http://www.mtctrains.com/sites/default/files/Corrections-At-A-Glance.pdf> (noting that MTC currently has an inmate capacity of 31,962 inmates and that 12,176 of that capacity is in Texas).

66. *Id.*

67. *Corrections Overview*, MGMT. & TRAINING CORP., <http://www.mtctrains.com/corrections/corrections-overview> (last visited Nov. 11, 2015) (describing the organization’s philosophy); *Expertise & Services*, MGMT. & TRAINING CORP., <http://www.mtctrains.com/corrections/expertise-services> (last visited Nov. 11, 2015) (describing the organization’s five main concerns). *But see* Michael Aaron & Omar Lewis, *Kyle Prisoner Found Naked in Woods Hours After Escape*, KXAN (Apr. 26, 2014, 4:35 PM), <http://kxan.com/2014/04/26/kyle-police-searching-for-jail-escapee/> (describing a recent inmate escape from a MTC facility in Texas).

68. *Texas Private Prisons Map*, TEX. PRISON BID’NESS, <http://www.texasprisonbidness.org/map> (last visited Nov. 11, 2015) (displaying the extent of Texas’s reliance on private prisons).

III. THE CRIME: HIDING PUBLIC INFORMATION BY CONTRACTING OUT

For the first twenty years of private companies operating correctional facilities, the public seemed to agree that if the private companies could incarcerate people at a lower cost, then maybe it was a good idea.⁶⁹ By the late 1990s, however, the prison privatization debate exploded.⁷⁰ Proponents of prison privatization, including state and federal governments, argued that contracting with private correctional corporations (1) reduces the cost of prison construction and operation; (2) expedites the prison-building process because of fewer bureaucratic delays; (3) positively impacts the community; and (4) allows more flexible rules for inmate care without as much governmental regulation.⁷¹ On the other side of the debate, critics made many of the classic arguments against privatizing governmental services.⁷² Opponents argued that prison privatization (1) may actually cost more than public facilities due to hidden costs; (2) leads to a decrease in the quality of prison services because private companies will focus more on profit, leading to fewer staff members with less training; (3) could negatively impact communities; and (4) allows the government to avoid accountability by essentially shielding what would otherwise be public information.⁷³

Whether contracting with private correctional corporations actually saves the government money is still widely up for debate.⁷⁴ Similarly, the research on the quality of service offered by the private versus public sector

69. See MASON, *supra* note 52, at 5–6 (describing how one former governor of New Mexico based his 1994 campaign on privatizing every prison in the state).

70. See generally Craig D. Feiser, *Protecting the Public's Right to Know: The Debate over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825 (2000) (placing thirty-four states into seven categories to determine where in the U.S. privatization is having the most drastic impact on access to public information). Feiser described Texas as a “restrictive approach” and “public funds” state, meaning that the state focuses on “one determinative issue in deciding whether or not a private entity should be subject to freedom of information laws.” *Id.* at 853. In Texas, as well as five other states, the determinative issue was the level of public funding. *Id.*

71. See Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 256 (1995).

72. *Id.*

73. See *id.* at 256–57 (noting the argument that in the event of labor strikes or other emergencies, the government’s reliance on private companies could lead to an inability to provide any services); MASON, *supra* note 52, at 7–12.

74. See Alexander Volokh, *Prison Accountability and Performance Measures*, 63 EMORY L.J. 339, 349–50 (2013). Different treatment of capital spending, dispersing costs in the public sector for private operations (like paying for contract monitoring), and assigning overhead expenditures are three of the main reasons why a direct comparison between the two sectors is almost impossible. *Id.* When cost comparisons are made without quality comparisons, the study is equally ineffective because we will not know if private prisons only cost less because they are cutting quality. *Id.* at 361; see also MASON, *supra* note 52, at 7–12 (arguing that multiple empirical studies have shown that there is little difference in cost efficiency between public and private prisons).

is hotly contested.⁷⁵ Further, whether a prison positively or negatively impacts a community varies greatly depending on a number of circumstances.⁷⁶ What is clear, however, is that most of the issues with prison privatization revolve around the need for accountability.⁷⁷ Without access to detailed information about operating costs, staff training, staff to inmate ratios, and inmate data, there is little way to determine the efficacy of private prisons in comparison to their public counterparts.⁷⁸ On the federal level, the availability of that information is governed by the Freedom of Information Act, while various state acts control the release of similar information from state facilities.⁷⁹

A. Freedom of Information Act

Government accountability to the public lies at the heart of the Freedom of Information Act (FOIA), which was originally enacted in 1967 to promote transparency in the federal government.⁸⁰ Through various amendments in the past five decades, the primary purpose of FOIA has remained substantially the same: to make federal agencies accountable to the public by requiring those agencies to provide records that are properly requested, reasonably described, and do not fall into one of the nine exceptions.⁸¹ In 2009, President Obama directed federal agencies to apply a

75. See Volokh, *supra* note 74, at 361–64. The lack of comparable facilities in a single jurisdiction and the differences in prison population are some of the issues with quality comparisons. *Id.* While recidivism reduction could be an important factor in comparing quality, those studies are equally uninformative due to variations in the definition of *recidivism*, the enforcement of parole conditions, and the underlying population. *Id.* at 357–60; see also Anita Mukherjee, *Do Private Prisons Distort Justice? Evidence on Time Served and Recidivism* 3 (Mar. 15, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2523238 (finding that private prisons give more infractions to inmates to keep them in prison longer, thereby increasing the cost of incarceration and their profit margin).

76. See Grissom, *supra* note 28; Bob, *Grasping at Straws, Littlefield Prison Seeks California Prisoner Contract?*, TEX. PRISON BID'NESS (Aug. 12, 2014, 1:36 PM), <http://www.texasprisonbidness.org/littlefield/grasping-straws-littlefield-prison-seeks-california-prisoner-contract> (demonstrating that private prisons can actually cause a significant economic downturn in a community if the corporation decides to shut down the facility).

77. Cásarez, *supra* note 71, at 257–58 (citing MARTIN P. SELLERS, *THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS* 52 (1993)).

78. See Christopher Petrella, *Re: Private Prison Information Act, an Open Letter*, TRUTHOUT (Dec. 6, 2012, 3:23 PM), <http://truth-out.org/speakout/item/13191-re-private-prison-information-act-an-open-letter> (“Disclosure statutes providing the public with access to information pertaining to the operations of private prisons is vital if reasonable comparisons are to be made between the private and public sectors.”).

79. See Matt Stroud, *Updated: Private Prisons Are Exempted from Federal Disclosure Laws; Advocates Say That Should Change*, FORBES (Feb. 7, 2013, 2:33 PM), <http://www.forbes.com/sites/mattstroud/2013/02/07/private-prisons-are-exempted-from-federal-disclosure-laws-advocates-say-that-should-change/>.

80. See 5 U.S.C.A. § 552 (West 2015); Cásarez, *supra* note 71, at 264–65.

81. Cásarez, *supra* note 71, at 264–68. The exceptions allow an entity acting as a governmental agent to withhold information related to trade secrets, national security, internal agency rules, inter- or

presumption of disclosure in all decisions regarding FOIA and to read the exceptions narrowly.⁸²

The Supreme Court has promulgated two factors to determine if FOIA applies to a specific private entity.⁸³ First, the court evaluates the federal government's level of control over the private entity's operations.⁸⁴ Second, the court considers whether the private entity would be considered an agency under the Federal Tort Claims Act.⁸⁵ The D.C. Circuit has promulgated two additional factors to determine if FOIA applies to a private entity: (1) does the entity have similar organizational characteristics to a federal agency (like a federal charter or a presidentially appointed board of directors); and (2) does the private entity have the authority to make legally binding decisions on behalf of the governmental agency?⁸⁶ In light of these court decisions, at least one scholar predicted that private prison operators would not be subject to FOIA requirements, and, if they were, they could successfully use one of the exemptions.⁸⁷ In the past, this has been true.⁸⁸ Because of state judges' recent movement in this area of the law, privately operated federal prisons may soon be subject to FOIA.⁸⁹

B. Texas Public Information Act

Following the enactment of FOIA, most states formed their own variations of public information laws to hold state agencies at the same or a higher level of accountability as federal agencies.⁹⁰ In 1973, the 63rd Texas Legislature responded to the adoption of FOIA, enacting the Texas Open

intra-agency memoranda, personnel and medical files, and records compiled for law enforcement purposes, among others. *Id.* at 251 n.9 (citing 5 U.S.C. § 552(a)(3) (1988)).

82. See Freedom of Information Act: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (Jan. 21, 2009).

83. See Cásarez, *supra* note 71, at 272–73.

84. See *Forsham v. Harris*, 445 U.S. 169, 180 & n.11, 181 (1980) (holding that a private organization using federal grants to perform medical research is not a federal agency, and is thus not subject to the requirements of FOIA).

85. See *United States v. Orleans*, 425 U.S. 807, 813–15 (1976) (holding that a community action center's receipt of federal grants, without the government's day-to-day control, is not sufficient to subject it to the Federal Tort Claims Act). "A critical element in distinguishing an agency from a contractor is the power of the Federal Government 'to control the detailed physical performance of the contractor.'" *Id.* at 814 (quoting *Logue v. United States*, 412 U.S. 521, 528 (1973)).

86. See, e.g., *Rocap v. Indiek*, 539 F.2d 174, 179–81 (D.C. Cir. 1976) (discussing whether a corporation embodied characteristics of a federal agency); *Wash. Research Project, Inc. v. Dep't of Health, Educ. & Welfare*, 504 F.2d 238, 248 (D.C. Cir. 1974) (analyzing a private entity's ability to make legally binding decisions for a government agency).

87. See Cásarez, *supra* note 71, at 279 (citing H.R. REP. NO. 93-876, at 8 (1974), as reprinted in 1974 U.S.C.C.A.N. 6267, 6274).

88. See Stroud, *supra* note 79.

89. See *infra* Part VI.

90. See Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 76 (2006) (explaining how FOIA influenced most states to develop open records laws).

Records Act and the Texas Open Meetings Act.⁹¹ Amended in 1993, the Texas Open Records Act then became the current Texas Public Information Act (TPIA or the Act).⁹² The TPIA begins with a policy statement and a declaration that the Act should be liberally construed in favor of disclosure.⁹³ The Act defines *public information* as follows:

- (a) . . . information that is . . . collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
 - (1) by a governmental body;
 - (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information⁹⁴

For purposes of the TPIA, *governmental body* is extensively defined, with the relevant definition as “the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or *that is supported in whole or in part by public funds.*”⁹⁵ Subchapter C of the TPIA lays out a longer list of exceptions than the FOIA, including exceptions for information related to contract bidding and trade secrets of certain partnerships.⁹⁶

The Fifth Circuit addressed the question of what qualifies as a governmental body under the Texas Open Records Act.⁹⁷ The court interpreted various Texas Attorney General Opinions to construct an analytical framework for determining if a private entity is a governmental body within the meaning of the Act.⁹⁸ This framework, referred to as the

91. See Alexander J. Yoakum, Comment, *Technical Problem: How City of Dallas v. Dallas Morning News, LP Exposed a Major Loophole in the Texas Public Information Act*, 42 ST. MARY’S L.J. 297, 311–14 (2010) (examining the history and modifications in the TPIA since its inception).

92. See *id.*

93. See TEX. GOV’T CODE ANN. § 552.001 (West 2012) (“[I]t is the policy of this state that each person is entitled . . . at all times to complete information about the affairs of government and the official acts of public officials and employees.”).

94. *Id.* § 552.002.

95. *Id.* § 552.003(1)(A)(xii) (emphasis added).

96. Compare 5 U.S.C. § 552(a)(3) (2009) (describing the nine exceptions to FOIA), with GOV’T CODE ANN. §§ 552.101–54 (listing more than sixty express exceptions to the TPIA).

97. See *Kneeland v. Nat’l Collegiate Athletic Ass’n*, 850 F.2d 224, 230 (5th Cir. 1988) (holding that the NCAA is not a governmental body under the Open Records Act because it receives money quid pro quo for a measurable and specific amount of services).

98. See *id.* at 228–29 (citing Tex. Att’y Gen. Op. Nos. ORD-228 (1979) (holding that “the receipt of public funds for support of the general activities of a private organization brings that organization within the definition of ‘governmental body’” under the TPIA), MW-373 (1981) (holding that records related to activities supported by public funds are subject to TPIA), ORD-343 (1982) (holding that an

Kneeland test, is a three-factor inquiry “for analyzing when a recipient of public funds should bear the obligation under the [TPIA] to answer to the public as to how those funds are spent.”⁹⁹

The first factor to consider is whether the relationship between the government and the private entity is comparable to an arms-length contract, with a measurable amount of services in exchange for a certain amount of money.¹⁰⁰ The second factor is whether the private entity has a common purpose as that of the government, which may be indicated by a contract involving public funds.¹⁰¹ Finally, the third factor is whether the private entity provides a service that has traditionally been provided by the government.¹⁰² If the first factor is met, the private entity does not need to disclose information that would otherwise be required; if the first factor is not met, however, and either the second or third factor elucidates a positive answer, then the private entity is subject to the same disclosure requirements as a governmental agency under the TPIA.

IV. THE PRELIMINARY INVESTIGATION: HOW PUBLIC INFORMATION LAWS SHIELDED CORRECTIONAL CORPORATIONS FOR SO LONG

With the *Kneeland* test promulgated in the late 1980s, and subsequent courts holding that incarcerating prisoners falls within the exclusive responsibility of the state, how have private prison corporations successfully denied access to public records?¹⁰³ Three primary causes have led to the lack of information available to the public about privately run prisons: (1) private corporations’ lobbying efforts; (2) prison litigation reformatations; and (3) the public’s general lack of interest. Because various activists continue to bring public records lawsuits against CCA and GEO Group in states across the country, each of these factors is slowly becoming obsolete.¹⁰⁴

ambulance service provided a measurable amount of services to a hospital, and was thus not considered a governmental body within the meaning of the Act)).

99. *Greater Houst. P’ship v. Abbott*, 407 S.W.3d 776, 783–86 (Tex. App.—Austin 2013), *rev’d sub. nom.* *Greater Houst. P’ship v. Paxton*, 468 S.W.3d 51, 67 (Tex. 2015) (using the *Kneeland* test to hold that a nonprofit corporation, comparable to a chamber of commerce, is a governmental body within the meaning of the TPIA).

100. *See Kneeland*, 850 F.2d at 228 (citing Tex. Att’y Gen. No. JM-821 (1987) (holding that a fire department is a governmental body within the meaning of TPIA because it is supported by public funds)).

101. *Id.*

102. *Id.* (using a volunteer fire department as an example of a private entity performing a traditionally governmental function).

103. *See Kesler v. King*, 29 F. Supp. 2d 356, 371 (S.D. Tex. 1998) (finding that incarcerating inmates “falls within the exclusive responsibility of the state”).

104. *See generally Legal Action*, PRISON LEGAL NEWS, <https://www.prisonlegalnews.org/legal-action-map/> (last visited Nov. 11, 2015) (describing the efforts of Prison Legal News in bringing lawsuits on behalf of prisoners). Other activist groups advocating alongside Prison Legal News include the Human Rights Defense Center, Grassroots Leadership, and The Sentencing Project. *See id.*; KIRBY

A. Lobbying Efforts

The correctional corporations' lobbying efforts have effectively shut down all attempts to hold them at the same level of accountability as a governmental agency.¹⁰⁵ On the national level, in 2005, 2006, 2007, 2009, and 2011, the same nonpartisan bill, entitled Private Prison Information Act, was introduced and died before reaching a subcommittee.¹⁰⁶ Each of these bills would have obligated private correctional entities to comply with the Freedom of Information Act; the last two attempts were made by a Texas congresswoman.¹⁰⁷ This is undoubtedly attributable to the massive amount of money that private corporations throw into lobbying against these specific issues.¹⁰⁸

The problem in Texas is not just that these corporations lobby for helpful bills and against potentially problematic bills, but that they are continually making exorbitant campaign contributions to state officials.¹⁰⁹ The private prison industry has its money at the top of the totem pole in Texas.¹¹⁰ While other states experience similar problems, the smell of corruption in the Texas criminal justice system permeates the air like cattle farms in West Texas.¹¹¹

ET AL., *supra* note 56; NICOLE PORTER, THE SENTENCING PROJECT, DAWSON STATE JAIL: THE CASE FOR CLOSURE, (2013), http://sentencingproject.org/doc/inc_TX_Dawson_State_Jail_The_Case_for_Closure_2013.pdf.

105. See MASON, *supra* note 52, at 7–13 (concluding that CCA's lobbying efforts have gone towards blocking bills that would subject private prisons to the requirements of FOIA).

106. See Petrella, *supra* note 24.

107. See, e.g., H.R. 74, 112th Cong. (2011) (introduced by Congresswoman Sheila Jackson Lee from Texas); H.R. 2450, 111th Cong. (2009) (same).

108. See MASON, *supra* note 52, at 7–13 (noting that CCA has spent an average of \$1.4 million per year on lobbying firms and on in-house lobbying); GEO Group, OPENSECRETS.ORG: CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/lobby/clientsum.php?id=D000022003&year=2005> (last visited Nov. 11, 2015) (summarizing GEO Group's annual lobbying from 2004 to 2014, with 2010 being the highest year at over \$650,000).

109. See Bob, *Private Prison Corporations Hiring Well-Connected Lobbyists in Texas*, TEX. PRISON BID'NESS (Dec. 2, 2010), <http://www.texasprisonbidness.org/lobbying-and-influence/private-prison-corporations-hiring-well-connected-lobbyists-texas> (identifying the company, lobbyist, and contribution amount for 2010).

110. See Tim Murphy, *Flush With Prison Industry Dollars, Rick Perry Pushed Privatized Prisoner Care*, MOTHER JONES (Sept. 1, 2011, 5:00 AM), <http://www.motherjones.com/politics/2011/09/rick-perry-prison-privatization> (noting, among other close relationships, that Rick Perry's former chief of staff now lobbies on behalf of CCA).

111. See Aaron Cantú, *America on Lockdown: Why the Private Prison Industry Is Exploding*, SALON (Apr. 15, 2014, 7:00 AM), http://www.salon.com/2014/04/15/america_on_lockdown_why_the_private_prison_industry_is_exploding_partner/ (describing the close connections between Arizona lawmakers and the prison industry).

B. Litigation Reforms

1. The Prison Litigation Reform Act of 1995

While in the past, prisoners could take their grievances to the federal courts, the passage of the Prison Litigation Reform Act (PLRA) seriously weakened the supervisory role of the federal courts over the U.S. corrections system.¹¹² The purported purposes of the PLRA are to give the corrections officials time to address complaints internally before a federal complaint is filed and to reduce the number of frivolous inmate lawsuits.¹¹³ Originally enacted in 1995, the PLRA gave the private prison industry a further advantage over its public counterparts by making it more difficult for prisoners to succeed in civil rights claims.¹¹⁴

An inmate must first exhaust all administrative remedies before filing a complaint, even if the relief sought could not be granted by an administrative remedy.¹¹⁵ It is the prisons' requirements, however, not the PLRA, that define what qualifies as total exhaustion of administrative remedies.¹¹⁶ Another notable limitation on prisoners' ability to bring a civil rights lawsuit is that no suit may be brought for a purely emotional or mental anguish injury without an accompanying physical injury or the commission of a sexual assault.¹¹⁷ The PLRA has effectively granted

112. See David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1454 (2010) (citing Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321–70 (codified at 18 U.S.C. § 3626 (2006))).

113. See *Woodford v. Ngo*, 548 U.S. 81, 94–96 (2006). “[W]ith a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population.” 141 CONG. REC. S7527 (daily ed. May 25, 1995) (statement of Sen. Kyl).

114. See Stephen Raher, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*, 13 RICH. J.L. & PUB. INT. 209, 216–17 (2010) (describing the resulting benefit from PLRA to private prison corporations as lowering litigation costs and avoiding court-ordered remedies). See generally Barbara Belbot, *Report on the Prison Litigation Reform Act: What Have the Courts Decided So Far?*, 84 PRISON J. 290, 291–306 (2004), https://www.prisonlegalnews.org/media/publications/the_prison_journal_belbot_plra_report_2004.pdf (describing how, despite some initial concerns about unconstitutionality, all provisions of the PLRA have been upheld by federal courts).

115. 42 U.S.C. § 1997e(a) (2012); see also *McCarthy v. Madigan*, 503 U.S. 140, 146–148 (1992) (describing three sets of circumstances where the exhaustion of administrative remedies would be ineffective and, thus, unnecessary), *superseded by statute*, 42 U.S.C. § 1997e(a) (2006), as recognized in *Woodford*, 548 U.S. at 103.

116. See *Burns v. Eaton*, 752 F.3d 1136 (8th Cir. 2014). This is essentially giving the corrections system total control over who may bring suit against it. See Eugene Novikov, Comment, *Stacking the Deck: Futility and the Exhaustion Provision of the Prison Litigation Reform Act*, 156 U. PA. L. REV. 817, 837 (2008) (describing this effect as “dangerously close to giving prison defendants carte blanche to keep prisoners out of court altogether”).

117. See 42 U.S.C. § 1997e(e); see also 28 U.S.C. § 1915(g) (2012) (setting out a three-strike rule for inmates bringing civil rights lawsuits *in forma pauperis*).

private prisons additional profitability and caused potentially successful inmate litigation to be even more difficult.¹¹⁸

2. *Limitations on Inmate Litigation in Texas*

The Texas statute limiting inmates' civil rights suits is arguably more restrictive than the federal approach.¹¹⁹ Texas law provides that facilities operated by or under contract with the Texas Department of Corrections must establish and maintain a grievance system.¹²⁰ Along with the administrative exhaustion requirement, the Texas statute also allows a court to dismiss the claim if it is obviously frivolous or malicious.¹²¹ Different from the federal statute, however, the Texas statute lays out four factors a court may use to determine whether a claim is frivolous: (1) does the claim have a realistic chance of success; (2) does the claim have any arguable basis in fact or law; (3) is it clear that the party will not be able to factually prove its claim; and (4) does the claim arise from the same operative facts as a previous suit filed by the same inmate?¹²²

Apart from the exhaustion requirement and the high threshold for a claim to avoid being dismissed, the main limitations under Texas law rest in the evidence available to the inmate and the immunity granted to government actors.¹²³ The statute expressly states that any report made by the defendant prison in connection with the underlying facts of the grievance is not discoverable under a concept analogous to the

118. Compare Novikov, *supra* note 116, at 817–18 (associating the 39% decrease in inmate litigation from 1995 to 2000 solely with the PLRA), with Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1633–42 (2003) (proposing that other federal acts passed almost simultaneously with the PLRA (the Antiterrorism and Effective Death Penalty Act and the Immigration Reform and Immigrant Responsibility Act) also caused a change in habeas trends, making it difficult to associate decreased inmate litigation solely with the PLRA).

119. Compare 42 U.S.C. § 1997e(c) (requiring dismissal when the lawsuit is malicious, frivolous, fails to state a claim upon which relief can be granted, or is against an immune defendant), with TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.001–.014 (West 2012) (describing various considerations a court may take to determine whether a claim is frivolous and thus broadening the scope of dismissal). This is not surprising considering Texas's inclination towards limiting civil litigation and the state's general acceptance of industry-friendly arguments. See Terry Carter, *Tort Reform Texas Style*, ABA J. (Oct. 24, 2006, 9:38 AM), http://www.abajournal.com/magazine/article/new_laws_and_med_mal_damage_caps_devastate_plaintiff_and_defense_firms_alik (describing Texas as “the most business friendly state legal environment[]” in the nation).

120. See TEX. GOV'T CODE ANN. § 501.008 (West 2012); Jeremy J. Overby, Comment, *The Texas Department of Criminal Justice—Institutional Division: Controlling and Disciplining Society's Inmate Population*, 4 TEX. TECH ADMIN L.J. 257, 275–77 (2003) (describing the two-step process an inmate must comply with before being deemed to have exhausted administrative measures).

121. See CIV. PRAC. & REM. CODE § 14.003(b).

122. See *id.* § 14.003(b)(1)–(4).

123. See GOV'T CODE § 501.008(c), (f).

work-product doctrine.¹²⁴ Without the ability to discover these reports and investigations, the inmate is essentially left with his word against the prison guard's.

Then, there is the problem of governmental immunity, which the Texas statute directly addresses.¹²⁵ While it is clear that inmates at a facility run directly by the state may not sue the Department of Corrections or the state itself, the implications of the inmate's presence at a private facility raise different issues.¹²⁶ In *Richardson v. McKnight*, the United States Supreme Court enhanced the liability of private prisons. It simultaneously created a fiscal and policy paradox.¹²⁷ Because the five-Justice majority based its decision partially on the fact that the private operator in question was not heavily supervised by the state, the decision raises questions about liability when the private operator is heavily supervised.¹²⁸ The Fifth Circuit agreed with the Supreme Court's approach in *Rosborough v. Management & Training Corp.*, in which it held that an employee guard of a private state corrections corporation could be held liable for a prisoner's § 1983 claim.¹²⁹ This additional liability means little, however, when the inmate has no chance to make it to court.

C. The Public's Apathy

Another problem in holding these corporations accountable for human rights violations is that, generally, the public does not care about prisoners.¹³⁰ "Prisoners are overwhelmingly poor and lacking in formal

124. See *id.* § 501.008(c). This is comparable to the work product doctrine because the "report, investigation, or supporting document" must be prepared by the department and "is considered to have been prepared in anticipation of litigation." *Id.*

125. *Id.* § 501.008(f) ("This section does not affect any immunity from a claim for damages that otherwise exists for the state, the department, or an employee of the department.").

126. Compare *Corr. Serv. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (holding that federal prisoners may not institute § 1983 claims against private corporations under contract with the Federal Bureau of Prisons), with *Richardson v. McKnight*, 521 U.S. 399, 413–14 (1997) (holding that the prison guards employed by a privately operated federal facility could not use qualified immunity as a defense against § 1983 claims).

127. See *Raher*, *supra* note 114, at 234–36. If the courts hold private and public operators at the same level of accountability, private operators may have no reason to improve prison conditions; on the flip side, if private operators are held at a higher level of accountability, the price for contracting out will inevitably rise. *Id.*

128. See *id.* at 235 (citing *Richardson*, 521 U.S. at 401–02).

129. See *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (basing the holding in part on the Supreme Court's previous statement that "[t]o act 'under color' of law does not require that the accused be an officer of the State" (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (internal quotation marks omitted))).

130. See PIPER KERMAN, *ORANGE IS THE NEW BLACK: MY YEAR IN A WOMEN'S PRISON* 200 (2011) ("Prison is quite literally a ghetto in the most classic sense of the world, a place where the U.S. government now puts not only the dangerous but also the inconvenient—people who are mentally ill, people who are addicts, people who are poor and uneducated and unskilled.").

education,” and, in most states, they are denied the right to vote.¹³¹ Each of these factors makes prisoners a uniquely powerless population and one for which very few outsiders are willing to fight.¹³²

One scholar that has analyzed the inherent problems of incarceration promotes what is often referred to as the “prisons are messy” argument.¹³³ The suggestion that incarceration is a fundamentally messy business implies that there should be no real difference between the conditions in a government-run prison and those in a privately operated prison.¹³⁴ Whether the conditions and costs of running a private prison are substantially similar to its public counterparts cannot be determined without access to the information that private companies refuse to produce.¹³⁵

V. THE INDICTMENT: HUMAN RIGHTS VIOLATIONS SATURATE PRIVATE PRISONS

Twenty years after the debate on prison privatization exploded, there are still not sufficient analytical studies to prove that privatizing is cheaper or more efficient.¹³⁶ Enough information does exist, however, to know that the real difference between public and private imprisonment arises when there is a grievance and, more specifically, when the victim prevails on that grievance.¹³⁷ “The legislature is able to demand immediate change from a state corrections agency. In contrast, the legislature is constitutionally prohibited from impairing an existing contract with a private operator.”¹³⁸ Previously, when the legislature was powerless to effect change in private prisons, the judiciary stepped in to stop the unconstitutional treatment of American citizens.

131. Fathi, *supra* note 112, at 1453.

132. *See id.*

133. *See* Raheer, *supra* note 114, at 232–34. The argument that the nature of the prison industry will inevitably lead to violence has historical roots and is often bolstered by the corrections profession itself. *Id.*

134. *See id.* at 229–30, nn. 157 & 160.

135. *See* Petrella, *supra* note 78; Stroud, *supra* note 79.

136. *See* Mukherjee, *supra* note 75. Compare DOUGLAS McDONALD ET AL., ABT ASSOCS. INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 33–46, app. 1 (1998), <http://www.abtassociates.com/reports/priv-report.pdf> (stating that in 1998 there was not enough information to conclusively establish that private facilities were more cost effective, but suggesting that carefully designed future studies could eliminate this debate), with Volokh, *supra* note 74 (describing how decades of comparative studies have failed to demonstrate that either the public or private sector is more cost efficient).

137. *See* Raheer, *supra* note 114, at 231.

138. *Id.*

A. The Charge: Unconstitutionality Prevails Despite Ruiz

Unsanitary living conditions was one of the original problems with the convict lease system in Texas.¹³⁹ Prisoners' rights, however, did not become a federal issue until the early 1960s when the Eighth Amendment prohibition against cruel and unusual punishment was held applicable to the states.¹⁴⁰ Soon after, the seminal case of *Ruiz v. Estelle* brought the Texas Department of Corrections (TDC) to the forefront of the prisoners' rights debate.¹⁴¹

In the 118-page memorandum opinion, the aptly named Judge Justice focused on issues of overcrowding, security, supervision, health care, discipline, and various other conditions of confinement.¹⁴² While these findings of fact did not yet represent a ruling, the memorandum operated as a warning to the TDC.¹⁴³ "When the remedial powers of a federal court are invoked to protect the constitutional rights of inmates, the court may not take a hands-off approach."¹⁴⁴ The subsequent federal injunction weakened the control of Texas wardens, incentivizing the emergence of an entity that would not be subject to the power of the judiciary or the whim of the legislature.¹⁴⁵ So it should come as no surprise that, in modern private prisons, unconstitutional conditions persist.

B. The Evidence: Hazing, Feces, and Escapes

By contracting out with a private entity, the TDC essentially condoned the previously used methods of incarceration while attempting to avoid

139. See Robert Perkinson, "Hell Exploded" *Prisoner Music and Memoir and the Fall of Convict Leasing in Texas*, 89 PRISON J. 54S, 55S–56S (2009) ("Separated by race and physical strength, convicts were chained at the neck, stuffed into boxcars, and shipped to work camps across the state's former slavery belt.").

140. See *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam) (holding that a state prisoner may bring a § 1983 action against his warden for conditions relating to his confinement).

141. See *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part, rev'd in part*, 679 F.2d 1115, 1126 (5th Cir. 1982), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982). Unlike prison lawsuits in other states, the Texas prison officials denied that any feature of incarceration under the TDC was unconstitutional; because of that refusal, "[t]he trial of this action lasted longer than any prison case—and perhaps any civil rights case—in the history of American jurisprudence." *Id.* at 1391.

142. See *id.* (noting the existence of forcible rape against new inmates and describing the proximity to other inmates as "suffocatingly packed together in a crowded dormitory" with up to three grown men in a forty-five foot cell).

143. See *id.* at 1390 ("By an order issued contemporaneously with the entry of the opinion, the parties will be given an opportunity to attempt to reach agreement on a proposed form of judgment, which should include specific plans for remedying unconstitutional and illegal conditions and practices at TDC.").

144. *Ortiz v. Meyer*, No. 88C7509, 1992 WL 80505, at *3 (N.D. Ill. Apr. 8, 1992).

145. See Dick Reavis, *How They Ruined Our Prisons*, TEX. MONTHLY (May 1985), <http://www.texasmonthly.com/articles/how-they-ruined-our-prisons/> (describing the amount of control lost after *Ruiz* and suggesting that post-*Ruiz* regulations caused the price of incarceration to rise and increased violence in Texas prisons).

legal implications.¹⁴⁶ Today the Texas prison system continues to be defined by reports of sexual assault, inadequate medical care, and repulsive conditions of confinement.¹⁴⁷ Similarly, Texas's three largest contractors, CCA, GEO Group, and MTC, continue to be plagued with controversy.¹⁴⁸

Examples of unconstitutional treatment of inmates at private Texas prisons are too many to fully enumerate here; however, a few horrific accounts deserve special attention.¹⁴⁹ One of the more recent prison scandals in Texas was brought to light when a lawsuit was filed against CCA for its complicity in allowing prisoners to be raped in a hazing ritual, commonly referred to as "ass on the glass."¹⁵⁰ The complaint notes CCA's custom of not intervening in the hazing ritual and faults this custom on the company's failure to adequately staff and train its employees.¹⁵¹

CCA is not the only offender, though, as seen by the horrific conditions of confinement found at the Coke County Juvenile Justice Center operated by GEO Group.¹⁵² The West Texas juvenile facility was shut down after the Texas Youth Commission performed an unannounced

146. See MEREDITH MARTIN ROUNTREE, AM. CIV. LIBERTIES UNION OF TEX., PRISON AND JAIL ACCOUNTABILITY PROJECT 4 (Mar. 31, 2003), <http://aclutx.org/files/ACLU%20Private%20Prisons%20White%20Paper.pdf> ("Consigning an entire division of the TDCJ to private contractors poses a clear threat [to] the progress mandated by the federal court in *Ruiz*.").

147. James Ridgeway & Jean Casella, *America's 10 Worst Prisons: Polunsky*, MOTHER JONES (May 2, 2013, 5:00 AM), <http://www.motherjones.com/politics/2013/05/10-worst-prisons-america-allan-polunsky-unit-texas-death-row>. These scholars, after three years of research, found that Texas was the only state with two prisons in the top ten list; one run by TDC and one run by GEO Group. *Id.*

148. See *CCA Rap Sheet*, PRIV. CORRECTIONS WORKING GROUP, http://www.privateci.org/rap_cca.html (last visited Nov. 11, 2015) (detailing years of news reports about CCA's correctional facilities, including problems with escapes, inmate deaths, guard deaths, lawsuits, riots, and various other issues from 2005 through 2015); *GEO Group/GEO Care Rap Sheet*, PRIV. CORRECTIONS WORKING GROUP, http://www.privateci.org/rap_geo.html (last visited Nov. 11, 2015) (describing hundreds of problems at GEO Group's correctional facilities, including escapes, deaths, lawsuits, closures, and various other crimes since 2004); *Management & Training Corp Rap Sheet*, PRIV. CORRECTIONS WORKING GROUP, http://www.privateci.org/rap_mtc.html (last visited Nov. 11, 2015) (noting problems both internationally and domestically that have occurred at MTC correctional facilities since 2006).

149. See *Lawsuits*, TEX. PRISON BID'NESS, <http://www.texasprisonbidness.org/blogging-categories/lawsuits> (last updated Apr. 9, 2015, 12:28 AM) (listing lawsuits brought in Texas against private prison companies); *supra* note 25 and accompanying text.

150. See Complaint at 2–4, *Doe v. Corr. Corp. of Am.*, No. 1:14-cv-00840 (W.D. Tex. filed Sept. 3, 2014), http://www.mysanantonio.com/file/905/905-CourtLink_Document_US-DIS-TXWD_1_14cv840_idx_1996146_9.4.2014_122712158.pdf (describing Bartlett State Jail as "a prison for low-level inmates doing short-term sentences"). Before a prisoner is released, other prisoners will forcibly pick up the victim, take off his pants, and carry him upside down to the glass divider between the inmate housing area and the guards' viewing area; then the prisoners will repeatedly slam the victim's buttocks against the glass. *Id.* at 2; see also *Ugly Allegations of Abuse, Inmate Hazing at Bartlett State Jail*, GRITS FOR BREAKFAST (Sept. 16, 2014), <http://gritsforbreakfast.blogspot.com/2014/09/ugly-allegations-of-abuse-inmate-hazing.html> (noting that the complainant was serving a 180-day sentence for possessing "less than a gram of a controlled substance").

151. See Complaint, *supra* note 150, at 6.

152. See Rania Khalek, *The Shocking Ways the Corporate Prison Industry Games the System*, ALTERNET (Nov. 29, 2011), http://www.alternet.org/story/153212/the_shocking_ways_the_corporate_prison_industry_games_the_system.

audit of the facility.¹⁵³ That audit focused on the “life safety issues relative to the physical structure of the Coke County facility.”¹⁵⁴ The report concluded that, in its present state, the facility could not meet the required standards set by the American Correctional Association.¹⁵⁵ When Senator John Whitmire learned about the conditions of confinement at Coke County, he said the youths’ civil rights had likely been violated and described one of the more horrific findings from the report: “Kids were stepping in their own feces.”¹⁵⁶

The report also included statements made by GEO Group employees that alarmed the audit team, including one employee’s comment that he “learned more about life safety equipment maintenance and checks in the two hours he had spent with TYC staff than he had in the nine months he ha[d] worked in the facility.”¹⁵⁷ The Texas Youth Commission fired the employees who were responsible for monitoring the conditions of the juvenile facility and eventually learned that those state monitors had previously been employed by GEO Group.¹⁵⁸ Such a coincidence indicates that private prisons will go to great lengths to hide information about what goes on inside their facilities.

Perhaps the public’s apathy about prison privatization is based on the belief that what happens in prisons stays in prisons. Increased escapes caused by insufficient security directly contradict that misbelief.¹⁵⁹ Located only three miles from the public high school, MTC-operated Kyle Correctional Center had an escape just last year.¹⁶⁰ The escapee, convicted

153. See DIMITRIA D. POPE & SYLVIA MARTINEZ, *TEX. YOUTH COMM’N, COKE COUNTY JUVENILE JUSTICE CENTER AUDIT* (2007), <http://www.dallasnews.com/sharedcontent/dws/img/10-07/1006tyccokeaudit.pdf>; Andrea Ball, *As East Texas Public-Private Psyche Facility Struggles, State Plans More Privatization*, STATESMAN (July 21, 2012, 9:38 PM), <http://www.statesman.com/news/news/state-regional-govt-politics/as-east-texas-public-private-psyche-facility-strugg/nRqJn>.

154. POPE & MARTINEZ, *supra* note 153, at 3 (noting, among other sanitary issues, that many cells were dirty and smelled of feces and urine). “Overall findings regarding operations and security show flagrant violation of Texas Youth Commission policy.” *Id.* at 7.

155. See *id.* at 6.

156. Bob, *Whitmire Orders Investigation of GEO Lock-Ups; GEO Sends in Lobbyists*, TEX. PRISON BID’NESS (Oct. 5, 2007, 11:52 AM), www.texasprisonbidness.org/lobbying-and-influence/whitmire-orders-investigation-geo-lock-ups-geo-sends-lobbyists.

157. POPE & MARTINEZ, *supra* note 153, at 6. “Warden Bement indicated that he was aware of many of the life safety issues identified by TYC staff. He also indicated that corporate did not respond to many of his purchasing needs due to the lack of a long-term contract.” *Id.*

158. See Khalek, *supra* note 152. Those state monitors awarded the facility a compliance score of 97.7% and praised GEO Group’s work at the facility. *Id.*

159. See Steve Benson, *Private Prisons Imperil the Public*, AZ CENTRAL (July 7, 2015, 2:11 PM), <http://www.azcentral.com/story/opinion/op-ed/steve-benson/2015/07/07/private-prisons-imperil-the-public/29815133/> (describing the recent inmate riot in Arizona and mentioning the escape of two felons from the same MTC facility that led to the deaths of a couple vacationing in New Mexico).

160. See Dawn Denny, *Private Company that Owns Correctional Facility Has History of Legal Problems*, KXAN (Apr. 28, 2014, 5:56 PM), <http://kxan.com/2014/04/28/private-company-that-owns-correctional-facility-has-history-of-legal-problems/> (noting other types of misconduct that have been reported against MTC, including three escapes in Texas).

of aggravated robbery in 1996, climbed over the facility's perimeter while in the yard for the afternoon recreation period.¹⁶¹ Two miles, six hours, and an undisclosed amount of taxpayers' dollars later, the inmate was found by state and local law enforcement agencies.¹⁶² This is one kind of cost that makes it difficult to determine whether private prisons are more cost-efficient than government-run facilities.¹⁶³

VI. THE TRIAL: TEXAS STATE JUDGE RULES THAT CCA IS A "GOVERNMENTAL BODY"

The legal landscape surrounding private prisons and public information transformed in 2014.¹⁶⁴ The closure, and surrounding press, of Dawson State Jail brought new attention to the brutal treatment of prisoners at private facilities throughout Texas.¹⁶⁵ That awareness, the movement towards change in other states, and the framework from *Kneeland* all facilitated a jurisprudential shift in the direction of greater disclosure.

A. *The Judgment: Other States Rule*

GEO Group and CCA's home states, Florida and Tennessee, first identified some accountability problems with corrections corporations.¹⁶⁶ The courts in those states concluded that such private entities were government agencies within the meaning of public information laws.¹⁶⁷ The Florida court promulgated a nine-factor test to determine if a private entity was "the functional equivalent of a government agency," which one scholar believes could be replicated in other jurisdictions.¹⁶⁸ The Tennessee court held CCA was operating as a functional equivalent of a state agency and ordered the company to release records within the scope of the state's statute.¹⁶⁹

161. *See id.*

162. *See* Aaron & Lewis, *supra* note 67.

163. *See* Volokh, *supra* note 74.

164. *See* Prison Legal News v. Corr. Corp. of Am., No. D-1-GN-13-001445 (353d Dist. Ct., Travis County, Tex. May 1, 2013).

165. *See supra* notes 25–29 and accompanying text.

166. *See* Times Publ'g Co. v. Corr. Corp. of Am., No. 91-429 CA 01, 1991 WL 384136, at *5 (Fla. Cir. Ct. Dec. 6, 1991), *aff'd*, 611 So. 2d 532 (Fla. Dist. Ct. App. 1993) (mem.); *Friedmann v. Corr. Corp. of Am.*, 310 S.W.3d 366, 375 (Tenn. Ct. App. 2009).

167. *See* Times Publ'g Co., 1991 WL 384136, at *5; *Friedmann*, 310 S.W.3d at 375.

168. *See* Mike Tartaglia, Note, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689, 1725–27 (2014) (citing *News & Sun-Sentinel Co. v. Scwhab, Twitty & Hanser Architectural Grp., Inc.*, 596 So. 2d 1029 (Fla. 1992)). Some of the factors were "the level of public funding," "the extent of the public agency's involvement with, regulation of, or control over the private entity," and "whether the private entity is performing a governmental function." *Id.* at 1725.

169. *Friedmann*, 310 S.W.3d at 375.

But even in those jurisdictions in which these private corporations have been called “governmental agencies,” the private status of the entity still allowed it to be more secretive than public agencies because those holdings are usually very narrow.¹⁷⁰ The ruling in Tennessee, for example, is limited in applicability to CCA, which “was only required to disclose certain inmate records delineated in the Tennessee Private Prison Contracting Act of 1986.”¹⁷¹ So, not only is the holding narrow, but the corporation can still contract around certain disclosures.¹⁷²

More recently, PLN brought public records lawsuits in Vermont and Kentucky.¹⁷³ In Vermont, PLN requested records related to settlement agreements under Vermont’s Access to Public Records Act.¹⁷⁴ CCA argued that certain procedural aspects of Vermont’s Act did not fit a private entity, so the legislature must not have intended the definition of *public agency* to extend to private entities.¹⁷⁵ The Vermont Superior Court did not accept this argument, partially because of the disturbing consequences that flow from it:

[I]t would enable any public agency to outsource its governmental duties to a private entity and thereby entirely avoid, intentionally or unintentionally, the fundamental interests in transparency and accountability that the Act is designed to protect and that has become a normalized quality and function of government.¹⁷⁶

In Kentucky, PLN sought to intervene in a lawsuit brought by CCA employees, who were alleging withheld overtime compensation in violation of Kentucky and federal labor laws.¹⁷⁷ When the original plaintiffs in that case reached a settlement agreement, both parties also moved to seal the terms of the agreement.¹⁷⁸ PLN wanted access to this information to report on the outcome of the case and “to determine the actual financial costs

170. See Tartaglia, *supra* note 168, at 1728–29.

171. *Id.* (noting that this ruling limited the amount of information CCA was required to disclose).

172. See *id.* at 1726.

173. See *Johnson v. Corr. Corp. of Am.*, No. 3:12-CV-00246-H, 2014 WL 3970115 (W.D. Ky. Aug. 13, 2014); *Prison Legal News v. Corr. Corp. of Am.*, No. 332-5-13, 2014 Vt. Super. LEXIS 36, at *6 (Vt. Super. Ct. Jan. 10, 2014).

174. *Prison Legal News*, 2014 Vt. Super. LEXIS 36, at *6. CCA’s contract with the Vermont Department of Corrections stipulated that both parties agreed CCA was an independent contractor and not an agent of the state. *Id.* at *5.

175. See *id.* at *9. The court responded to this argument by noting that the legislature’s failure to expressly contemplate the applicability of Vermont’s Act to private entities could be attributable to the fact that governmental outsourcing in the 1970s was in the early stages. *Id.* at *19–20.

176. *Id.* at *9–10.

177. See Memorandum in Support of Prison Legal News’ Motion to Intervene and Unseal Settlement Exhibits at 1, *Johnson*, No. 3:12-CV-00246-JGH, 2014 WL 3970115, <https://www.prisonlegalnews.org/media/litigation/Johnson%20v.%20CCA%2C%20Motoion%20to%20Intervene%20and%20to%20Unseal%20Exhibits%2C%20Louisville%2C%20Kentuck%202014.pdf>.

178. *Id.* at 2.

incurred by CCA for its Kentucky operations.”¹⁷⁹ In August 2014, a Kentucky federal judge sustained PLN’s motion to intervene and unsealed the exhibits relating to the settlement agreement.¹⁸⁰ Although the analysis for unsealing court documents is distinct from the statutory interpretation necessary in public records cases, the underlying principle is the same: “This right is based on ‘the citizen’s desire to keep a watchful eye on the workings of [a] public agenc[y]’”¹⁸¹ One Texas judge also felt that the citizen’s right to know outweighed the private entity’s desire to shield information.¹⁸²

B. *The Right Result in Texas*

In the public records lawsuit to obtain more information about Dawson State Jail, a Texas state judge ruled that CCA was a governmental body for purposes of the TPIA.¹⁸³ In a one-page order granting PLN’s motion for summary judgment, the Travis County court agreed with PLN and required CCA to disclose information that would be subject to the TPIA, despite CCA’s status as a private entity.¹⁸⁴ In its motion for summary judgment, PLN went through each factor of the *Kneeland* test to prove that CCA is a governmental body as a matter of law.¹⁸⁵

First, PLN argued that CCA did not have a typical arms-length contract with the TDCJ because the “broad mandates . . . to do ‘all things necessary’ and to be wholly responsible for physical facilities . . . are not measurable or limited in any way.”¹⁸⁶ PLN then pointed to CCA’s argument that the taxpayer funds received from the state are used generally in its nationwide operations, and are not specifically used for its Texas operations.¹⁸⁷ “This type of indirect funding is a kin to the kind of ‘general support’ that falls within the definition of a governmental body under the [TPIA].”¹⁸⁸ Because a corporation only needs to fulfill one of the *Kneeland* scenarios to be a governmental body under the TPIA, the analysis could have stopped there.¹⁸⁹

179. *Id.* at 3.

180. *See Johnson*, 2014 WL 3970115, at *5.

181. *See id.* at *3 (alterations in original) (quoting *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598 (1978)).

182. *See Prison Legal News v. Corr. Corp. of Am.*, No. D-1-GN-13-001445 (353d Dist. Ct., Travis County, Tex. Sept. 15, 2014).

183. *See id.*

184. *See id.*

185. Plaintiff’s Motion for Summary Judgment, *supra* note 19, at 5–10.

186. *Id.* at 6.

187. *See* Press Release, Prison Legal News, *supra* note 22.

188. *See* Plaintiff’s Motion for Summary Judgment, *supra* note 19, at 8.

189. *See supra* Part III.B.

PLN went on to argue, however, that CCA satisfied all three of the *Kneeland* scenarios.¹⁹⁰ If the judge determined that CCA was not receiving public funds for the general support of its operations, CCA would still be a governmental body because it has a common purpose to that of the government, and it is performing a service traditionally provided by the government.¹⁹¹ Based on the previous ruling in Tennessee, and the Fifth Circuit holding that “confinement of wrongdoers . . . is a fundamentally governmental function,” that analysis was likely an easy one.¹⁹²

The court granted summary judgment but did not say which factor of the *Kneeland* test was determinative.¹⁹³ “This was the first time a Texas court had found that a private prison company was required to comply with the state’s public records law”¹⁹⁴ The ruling in Texas, along with favorable rulings from courts in Vermont, Tennessee, and Florida, represent the beginning of a more transparent system on the state level.¹⁹⁵ But the federal system remains a dilemma.

VII. REHABILITATION: RECOMMENDATIONS FOR REFORM

The battle to obtain public information from private prisons is far from over, as seen in the many cases discussed above and the fact that most of those decisions will likely be appealed by the corporations.¹⁹⁶ Today, the problems of incarceration are exponentially increasing, while the solutions remain few and elusive. What seems certain is that privatization is not the answer.¹⁹⁷

The bottom line is simply that these corporations have more time and money to spend than the nonprofits they are often up against.¹⁹⁸ Because of

190. See Plaintiff’s Motion for Summary Judgment, *supra* note 19, at 6–10.

191. See *id.* at 5.

192. See *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003); *Friedmann v. Corr. Corp. of Am.*, 310 S.W.3d 366, 375 (Tenn. Ct. App. 2009) (“[T]his Court is at a loss as to how operating a state prison could be considered anything less than a governmental function.”).

193. See Order Granting Plaintiff’s Motion for Summary Judgment, *Prison Legal News v. Corr. Corp. of Am.* No. D-1-GN-13-001445 (353d Dist. Ct., Travis County, Tex. Sept. 15, 2015), https://www.prisonlegalnews.org/media/litigation/2014-3-19_file-stamped_Ord_P's_MSJ.PDF.

194. Press Release, Human Rights Def. Ctr., CCA Subject to Public Records Law in Texas (Sept. 18, 2014), <https://www.humanrightsdefensecenter.org/action/news/2014/cca-subject-public-records-law-texas/>.

195. See Christie Thompson, *Everything You Ever Wanted to Know About Private Prisons . . . Is None of Your Damn Business*, MARSHALL PROJECT (Dec. 18, 2014, 12:26 PM), <https://www.themarshallproject.org/2014/12/18/everything-you-ever-wanted-to-know-about-private-prisons>.

196. See Tartaglia, *supra* note 168, at 1730.

197. See Katie Hobbs, *Now Is No Time to Build More Private Prisons*, CORRECTIONS.COM (July 13, 2015), <http://www.corrections.com/news/article/40413-now-is-no-time-to-build-more-private-prisons>.

198. See Press Release, Prison Legal News, PLN Wins Florida Public Records Suit Against GEO Group (May 13, 2010), <https://www.prisonlegalnews.org/in-the-news/2010/pln-wins-florida-public-records-suit-against-geo-group/>. In Florida, for example, PLN brought a public records lawsuit against GEO Group in 2005; five years and four motions to compel later, GEO Group finally complied and was ordered to pay PLN’s attorneys’ fees. *Id.*

the time and expense associated with litigation and various prisoner litigation reforms, the judiciary may have done all it reasonably can.¹⁹⁹ Reformers must begin to look at the bigger picture by passing legislation to hold private prisons to the same level of accountability as the government, letting contracts with these corporations expire, and avoiding privatizing other government functions.

A. Accountability

Instead of requiring nonprofits to litigate in every state, legislatures should pass the Private Prison Information Act (PPIA).²⁰⁰ In December 2014, Texas Congresswoman Sheila Jackson Lee introduced this bill to Congress once again.²⁰¹ The PPIA would “require non-Federal prisons and detention facilities holding Federal prisoners under a contract with the Federal government to make available to the public the same information pertaining to facility operations and to prisoners held in such facilities that Federal prisons and detention facilities are required to make available.”²⁰² PPIA complies with the policies behind FOIA and with President Obama’s direction to apply a presumption of disclosure to FOIA requests.²⁰³ Although PPIA only applies to federal prisons, it represents the push that other states need to pass similar legislation.²⁰⁴

In the current, CCA-friendly Congress, the PPIA will likely face the same opposition it has in the past.²⁰⁵ Despite that resistance and the substantial similarities between the 2014 PPIA and the previous five attempts, the circumstances have changed significantly.²⁰⁶ Increased public records litigation resulted in progressive movement from the judiciary in the past two years.²⁰⁷ This litigation also brought attention to the issue of government secrecy, which a media-centric American society finds generally unacceptable.²⁰⁸ Litigation, public scrutiny, and the issue’s new presence in pop culture suggest progress.²⁰⁹

199. See *supra* Part IV.B.

200. See Tartaglia, *supra* note 168, at 1730.

201. See Private Prison Information Act of 2014, H.R. 5838, 113th Cong. (2014).

202. *Id.*

203. See *supra* Part III.A.

204. See Tartaglia, *supra* note 168, at 1739.

205. See Alexa Capeloto, *Let’s Bring Sunshine into Private Prisons*, CRIME REP. (Jan. 29, 2015, 10:31 AM), <http://www.thecrimereport.org/viewpoints/2015-01-lets-bring-sunshine-into-private-prisons>.

206. See *supra* Parts V–VI.

207. See *supra* Part VI.

208. See generally Joshua Kopstein, *Congress Must Fight for FOIA in 2015*, ALJAZEERA AM. (Jan. 9, 2015, 2:00 AM), <http://america.aljazeera.com/opinions/2015/1/foia-congress-leaks.html> (arguing that Americans want a more transparent government than the current regime and that the FOIA process should be reformed to make disclosure the default).

209. See *Orange is the New Black: Season 3* (Netflix June 11, 2015) (dramatizing the changes that took place at a women’s prison when taken over by an unnamed private contractor; based on true events).

Along with those judicial decisions, some states have amended their public information acts to extend to private companies contracting with the government.²¹⁰ Amending public information acts to include private entities may be the better option because this would preclude the same accountability issues arising in other contexts.²¹¹ Amending state acts instead of directing attention straight at the corrections industry could allow these corporations to continually argue an exemption applies to them.²¹² Along with passing legislation directed toward the private prison industry or amending open records acts, state and federal governments should allow contracts with these corporations to expire.

B. Allow Contracts to Expire

The first drop in the federal prison population since 1980 is expected to occur in the next two years, with a projected decline of 12,000 inmates.²¹³ Currently, 27,000 federal inmates are held at private facilities, meaning that nearly half of this population could be released in two years.²¹⁴ Because of that drop, now is the ideal time to let old contracts die out and allow the government to resume control over incarceration. When the Texas prison system had a similar drop in population, the legislature closed two privately run facilities, including Dawson, and moved the inmates to state-operated jails.²¹⁵ While this decision saved the state an estimated \$97 million, it also came with obstacles.²¹⁶

The greatest difficulty in allowing the contracts to expire is the effect the closure has on the communities that became dependent on the facilities.²¹⁷ “The absence of alternatives for the folks whose livelihood depends on prisons and the jobs they provide is going to continue to be a

210. See Capeloto, *supra* note 205 (noting that Florida, Tennessee, and Connecticut directly address private companies working with the government, while Kentucky, South Carolina, and Oklahoma bind the level of disclosure to public funding).

211. See *infra* Part VII.C.

212. See Capeloto, *supra* note 205. Even in the states that have amended their open records acts, the litigation to obtain public records from private entities contracting with government agencies continues. See *supra* Part VI.

213. See Andrew Grossman, *Federal Prison Population Drops*, WALL ST. J. (Sept. 23, 2014, 6:38 PM), <http://www.wsj.com/articles/federal-prison-population-drops-1411469837> (attributing this reduction to lower sentences for nonviolent offenders).

214. See *Statistics*, FED. BUREAU PRISONS, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Nov. 11, 2015) (noting that 13% of federal prisoners are housed in private facilities).

215. See Mike Ward, *Officials: Two Private Prisons to Close*, STATESMAN (June 11, 2013, 4:59 PM), <http://www.statesman.com/news/news/officials-two-private-prisons-to-close/nYH3w/>.

216. See *id.*

217. See Grissom, *supra* note 28.

huge roadblock to progress.”²¹⁸ Because of that community dependency, states like Florida chose to simply switch the private company it was using.²¹⁹ This is the option the federal government took recently in Ohio, and it is wrong for two reasons.²²⁰

First, the private company could very well shut itself down at the end of the contract due to a lack of profit, leaving the community in a worse situation than if the state chose to close it.²²¹ When the government is in charge of the closure, planning can be done about what positive things to do with the newly empty facility.²²² Second, there is no evidence that one of these companies operates in a more cost-effective way than another.²²³ Similarly, each company has been subjected to endless bad press over inmate treatment and staffing concerns.²²⁴ Closing private facilities will inevitably lead to some financial burden on a community, but when the government takes action before the company, the community harm can be diminished.²²⁵

C. Avoid Privatizing Other Governmental Functions

The government has used privatization to reduce costs, increase efficiency, and improve services.²²⁶ But while private companies focused on maximizing profits, and while the federal government was trying to decide if it was saving any money, efficiency and improvement never came.²²⁷ Before this problem can improve, advocates must ensure it does not worsen. Perhaps the most important step for each state and the federal government to take now is to avoid privatizing other areas that belong solely to the government, such as family detention centers.

218. Brian Sonenstein, *Federal Government Drops CCA Contract in Ohio, but Remains Committed to Private Prisons*, PRISON PROTEST (Jan. 2, 2015), <http://prisonprotest.com/2015/01/02/federal-government-drops-cca-contract-in-ohio-but-remains-committed-to-private-prisons/>.

219. See Matt Dixon, *New Contracts Give Private Prison Giant Nearly 80 Percent of Florida's Private Prison Market*, FLA. TIMES UNION (Dec. 13, 2013), <http://jacksonville.com/news/2013-12-16/story/new-contracts-give-private-prison-giant-nearly-80-percent-floridas-private>.

220. See Sonenstein, *supra* note 218.

221. See Grissom, *supra* note 28. When GEO Group closed one West Texas facility in Littlefield, the city was left with the debt it had incurred in constructing the facility. See Bob, *supra* note 76.

222. See Catherine Arnold, *Healing Dallas by Repurposing Its Abandoned Jails*, TEX. OBSERVER (Dec. 5, 2014, 12:05 PM), <http://www.texasobserver.org/healing-dallas-repurposing-abandoned-jails/>.

223. See Jerry Mitchell, *Private Prisons Face Suits, Federal Probes*, CLARION-LEDGER (Oct. 15, 2014, 9:05 PM), <http://www.clarionledger.com/story/news/2014/10/11/private-prisons-face-suits-federal-probes/17122977/>; *supra* Part V.A–B.

224. See PRIV. CORRECTIONS WORKING GROUP, <http://www.privateci.org/index.html> (follow “Rap Sheets” hyperlink) (last visited Jan. 4, 2016) (itemizing each company’s record of bad press by jurisdiction as far back as ten years); *supra* Part V.B.

225. See Arnold, *supra* note 222.

226. Mitchell, *supra* note 223.

227. See *id.*

Immigrant detention centers are the next source of major cash flow corrections corporations are looking towards.²²⁸ Just as it lobbied for longer sentencing periods, the private corrections industry is now throwing money at legislation to provide for more detention facilities.²²⁹ Construction is already underway in Dilley, Texas for a new family detention center to be run by CCA.²³⁰ Apart from the questionable way in which CCA received the contract to maintain this facility, GEO Group has proved that private companies are no more effective in running detention centers than they are at managing prisons.²³¹ In Texas and around the nation, lawsuits have already been brought against many corporations operating detention facilities.²³²

Another area that may soon be growing for private correctional companies is operating public hospitals.²³³ Less than two years after Texas awarded GEO Care, a subsidiary of GEO Group, control of a publically funded hospital, the private operator was fined “for serious shortcomings in patient care.”²³⁴ Despite those deficiencies, GEO Care is expanding quickly into the Texas hospital system with a new contract for a hospital in Terrell.²³⁵ Previous bids by GEO Care on other hospitals were denied when

228. See Sasha Chavkin, *Immigration Reform and Private Prison Cash*, COLUM. JOURNALISM REV. (Feb. 20, 2013), http://www.cjr.org/united_states_project/key_senators_on_immigration_get_campaign_cash_from_prison_companies.php.

229. Compare *id.* (noting that the lawmakers who have received large campaign contributions by private prison corporations are also those “who are now playing key roles in shaping proposed immigration reform legislation”), with Matt Clarke, *Private Prison Companies Use Political Influence to Increase Incarceration*, PRISON LEGAL NEWS (Nov. 15, 2012), <https://www.prisonlegalnews.org/news/2012/nov/15/private-prison-companies-use-political-influence-to-increase-incarceration/> (noting that private corrections companies “use political campaign donations, lobbyists and relationships with government officials to increase their profits by promoting policies that result in more people being incarcerated”).

230. See Christina Parker, *CCA’s Dilley Family Detention Center Opens Amid Criticism*, TEX. PRISON BID’NESS (Dec. 18, 2014, 2:00 AM), <http://www.texasprisonbidness.org/immigration-detention/ccas-dilley-family-detention-center-opens-amid-criticism>. The opening could still be stopped if either Congress refuses to supplement the Department of Homeland Security’s request for funding or if the American Civil Liberties Union is successful in its suit against the Obama Administration. *Id.*

231. See Emma Randles, *The Quick and Dirty Way CCA Won the Dilley Family Detention Contract*, TEX. PRISON BID’NESS (Nov. 24, 2014, 3:54 PM), <http://www.texasprisonbidness.org/immigration-detention/quick-and-dirty-way-cca-won-dilley-family-detention-contract> (noting that “the competitive bidding process, environmental impact report, and other safeguard measures were completely bypassed”); Marisa Taylor & Saila Huusko, *Immigrant Women Allege Sexual Abuse at Detention Center*, ALJAZEERA AM. (Oct. 9, 2014, 8:30 PM), <http://america.aljazeera.com/articles/2014/10/9/family-detentioncenter-abuse.html> (“The women, mainly from Central America, say guards kissed, groped and fondled them . . . sometimes in front of their children.”). Some GEO Group staff even offered to help the women with pending immigration cases in exchange for sexual favors. *Id.*

232. See Taylor & Huusko, *supra* note 231.

233. See Ball, *supra* note 153.

234. *Id.*

235. See Eshe Cole, *Meet the Controversial Private Prison Corporation, GEO Care, That May Run Terrell State Hospital*, GRASSROOTS LEADERSHIP (Oct. 23, 2014), <http://grassrootsleadership.org/blog/2014/10/meet-controversial-private-prison-corporation-geo-care-may-run-terrell-state-hospital>.

its proposal to save money resulted in huge staff reductions.²³⁶ Lawmakers should not allow history to repeat itself in the context of privately operated hospitals.

VIII. THE SENTENCE: LOCK UP PRIVATE PRISONS

Now is the time to ensure Gracie Miller's death was not in vain. It would be easy to say that her death was an anomaly, but it would also be false.²³⁷ It would be easy to think her death has little impact on the world, but it would be wrong.²³⁸ "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."²³⁹ While the face of this argument may be public-information law, the body affected is always human.²⁴⁰ If our government is ever going to be "good government," it must protect the rights of its citizens.

For too long, correctional corporations have successfully avoided public-information laws while profiting at the expense of the taxpayer.²⁴¹ In Texas, the fight for public information was just another piece of the same private corrections problem that has plagued the state's criminal justice system since the late nineteenth century. Continual reports of unconstitutional treatment, unsafe living conditions, and unnecessary deaths prompted change in 2014. The judiciary may have allowed Texas to win the battle for public information, but the war is still raging. In the federal system, CCA, GEO Group, MTC, and others continue to hide behind their status as private entities. Extreme lobbying efforts, prison litigation reforms, and public apathy prevented progress in this area of the law for three decades.

Now is the time for change.

The Supreme Court held and the Fifth Circuit repeated in *Ruiz*, "There is no iron curtain drawn between the Constitution and the prisons of this country."²⁴² Today, lawmakers must acknowledge there is also no iron curtain drawn between public information and private prisons. The law and policy dictate that private companies performing a governmental function be held to the same level of accountability as their public counterparts.

236. *See id.*

237. *See supra* Part V.

238. *See supra* Part IV.C.

239. Letter from Thomas Jefferson to the Republican Citizens of Washington County, Maryland (Mar. 31, 1809), in 8 THE WRITINGS OF THOMAS JEFFERSON 165, 165 (H.A. Washington ed., 1871).

240. *See supra* Part I.

241. *See supra* Part IV.

242. *Ruiz v. Estelle*, 679 F.2d 1115, 1126 (5th Cir. 1982), *amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974)).