

AMERICAN BAR ASSOCIATION

**CRIMINAL JUSTICE SECTION
CORRECTIONS AND SENTENCING DIVISION**

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 IT IS HEREBY RESOLVED, That the American Bar Association opposes the existence
2 of private prisons, jails, and juvenile detention centers in the United States and calls for
3 their abolition nationwide.

4 FURTHER RESOLVED, That the American Bar Association urges Congress, state,
5 local, and tribal legislators to end the practice of for-profit incarceration by repealing 18
6 U.S.C. § 4003 and similar state, local, and tribal laws.

7 FURTHER RESOLVED, That the American Bar Association urges Congress, state,
8 local, and tribal legislators to:

- 9 a. Not enter into any further contracts with private, for-profit corporations for
10 incarceration, jailing, or juvenile detention;
- 11 b. Require the closure of any existing private prisons, jails, and juvenile
12 detention facilities as soon as practicable;
- 13 c. Enjoin the continued construction of any project that is to be used as a
14 private prison, jail, or juvenile detention center.

I. INTRODUCTION¹

President Richard Nixon declared a “War on Drugs” in 1971.² President Ronald Reagan federalized and militarized this “war” in the 1980s.³ Shortly after the War on Drugs was declared, federalized, and militarized, a private for-profit company in Tennessee sprang up calling itself the Corrections Corporations of America (CCA).⁴ The creation of this private prison corporation ushered in a new carceral era where the traditional government function of adjudicating crime, punishment, and imprisonment became intertwined with the corporate governance principles and goals of profit maximization for shareholders; executive compensation based on profits and share price; forward-looking statements forecasting more robust prison populations; and increased profit levels built almost solely on human misery and degradation.⁵

In 1985, Professor Ira Robbins testified to the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice that U.S. jurisdictions considering contracting with private entities for incarceration services should proceed cautiously because there may be serious constitutional and pragmatic concerns with such an arrangement.⁶ He penned a law review article further delineating reasons to approach private incarceration with caution⁷ and served as the reporter for the American Bar Association’s (ABA) Task Force on Privatization of Corrections.⁸ That Resolution was adopted at the February 1990 Midyear Meeting as 115B and “urg[ed] that jurisdictions considering authorization of contracts with private corporations or other private entities . . . do so with extreme caution”⁹ The Resolution further recognized that “the imposition and implementation of a sentence of incarceration for a criminal offense is a core function of government . . . and there is a strong public interest in having prison and jail systems in which lines of accountability are clear.”¹⁰

¹ This Report draws significantly from Robert Craig & andré douglas pond cummings, *Abolishing Private Prisons: A Moral and Constitutional Imperative*, 49 BALTIMORE L. REV. 261 (2020).

² See Ed Vulliamy, *Nixon’s ‘War on Drugs’ Began 40 Years Ago, and the Battle Is Still Raging*, GUARDIAN (July 23, 2011, 7:07 PM), <https://www.theguardian.com/society/2011/jul/24/war-on-drugs-40-years> [https://perma.cc/S4QN-6TBW] (“Four decades ago, on 17 July 1971, President Richard Nixon declared what has come to be called the ‘war on drugs.’ Nixon told Congress that drug addiction had ‘assumed the dimensions of a national emergency,’ and asked Capitol Hill for an initial \$84m (£52m) for ‘emergency measures.’ Drug abuse, said the President, was ‘public enemy number one.’”).

³ See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 48–49, 69, 73 (2010).

⁴ See andré douglas pond cummings, “All Eyez on Me”: America’s War on Drugs and the Prison-Industrial Complex, 15 IOWA J. GENDER, RACE & JUST. 417, 419 (2012); see generally Tom Beasley, *A New Industry Emerges to Meet a Very Real Need*, CORECIVIC, <http://www.corecivic.com/about/history> [https://perma.cc/T2BS-JEKQ] (last visited Apr. 1, 2020) (CCA recently changed its name to CoreCivic; this article will, hereinafter, use the current name even when referring to the company’s actions taken under the prior name).

⁵ See cummings, *supra* note 4, at 419–20; see generally SHANE BAUER, *AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* 45, 206, 229 (2018) (describing the human misery and general debasement of prisoners at private prison facilities run by CoreCivic in Oklahoma and Louisiana).

⁶ Privatization of Corrections: Hearing Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary, 99th Cong. 69–107 (1985–1986) (statement of Ira P. Robbins, Professor of Law, Washington College of Law).

⁷ See Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 69 JUDICATURE 324, 325, 331 (1987).

⁸ *Ira P. Robbins Biography*, AM. U. WASH. C. L., <https://www.wcl.american.edu/community/faculty/profile/robbins/bio> [https://perma.cc/7HET-WNYT] (last visited Apr. 1, 2020).

⁹ *Index to ABA Criminal Justice Policies: 115B (CJS)*, A.B.A. (1990), https://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting/ [https://perma.cc/9VAJ-W35R].

¹⁰ *Id.*

Despite passage of Resolution 115B in 1990, government reliance on private incarceration has since increased approximately sixteen-fold.¹¹ Private prison corporation directors, executives, managers, and their hired lobbyists currently work doggedly to increase shareholder profits by: (1) influencing carceral policy so that larger numbers of U.S. residents face incarceration;¹² (2) exploiting individuals locked up through private prison labor contracts;¹³ (3) lobbying elected government officials to privatize entire state and federal prison systems and increase prison populations;¹⁴ (4) diminishing the quality of food and degree of safety for prisoners in order to cut costs at privately run facilities;¹⁵ (5) drafting legislation and lobbying elected legislators for passage of draconian sentencing guidelines including three-strikes and you're out, truth in sentencing, mandatory minimums, and illegal immigration detention legislation;¹⁶ (6) bribing judges to fill private prison facilities with children on questionable charges;¹⁷ (7) requiring governments and municipalities that contract for their services to maintain capacity in their private prison facilities at 90% or in some contracts 100%;¹⁸ and (8) building new prisons despite no government contract or inmates to fill them.¹⁹

Despite Professor Robbins's and the ABA's warning to proceed into prison privatization with extreme caution, what seems undeniable now is that the warning went unheeded and today private prison corporations are driven by perverse and immoral incentives whereby an increase in crime and an increase in the number of human beings placed into America's brutal prisons is good business news for that industry.²⁰ In reflecting on the fact that United States prison conditions are cruel and dehumanizing,²¹ and that "[t]oday, there are more people behind bars for a drug offense than the number of people who were in prison or jail for any crime in 1980..."²²

¹¹ DAVID SHAPIRO, AM. CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 5 (Nov. 2, 2011) (citing to a United States Department of Justice report), https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf [<https://perma.cc/2DXZ-NHUA>].

¹² See cummings, *supra* note 4, at 439–40.

¹³ See Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. CIV. RTS. & ECON. DEV. 679, 682 (2015); see Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589, 592, 600, 611 (2012) (discussing the exploitation of prisoners within the prison industrial complex).

¹⁴ Chris Kirkham, *Private Prison Corporation Offers Cash in Exchange for State Prisons*, HUFFPOST (Feb. 14, 2012, 9:37 AM), https://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons_n_1272143.html [<https://perma.cc/68SA-KEKG>]. CoreCivic offered to purchase state-owned prison facilities from forty-eight cash-strapped states, so long as the state contractually agreed to keep the prisons occupied at 90% capacity. *Id.*

¹⁵ GREGORY GEISLER, CORRECTION INSTITUTION INSPECTION COMMITTEE, LAKE ERIE CORRECTIONAL INSTITUTION 3–5, 13, 39 (2013); see also BAUER, *supra* note 4, at 39–40, 91, 142–44 (detailing the unsafe and foolhardy cost cutting measures CoreCivic engaged in at a private prison in Louisiana).

¹⁶ See cummings, *supra* note 4, at 438–39.

¹⁷ Ian Urbina, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, N.Y. TIMES (Mar. 27, 2009), <http://www.nytimes.com/2009/03/28/us/28judges.html> [<https://perma.cc/UL3K-A6KK>].

¹⁸ Kevin Johnson, *Private Purchasing of Prisons Locks in Occupancy Rates*, USA TODAY (Mar. 8, 2012, 12:37 PM), <http://www.usatoday.com/news/nation/story/2012-03-01/buying-prisons-require-high-occupancy/53402894/1> [<https://perma.cc/2W54-Y4U5>]; Chris Kirkham, *Prison Quotas Push Lawmakers to Fill Beds, Derail Reform*, HUFFPOST (Sept. 20, 2013), https://www.huffpost.com/entry/private-prison-quotas_n_3953483 [<https://perma.cc/LV4S-66D2>].

¹⁹ Matthew Mulch, *Crime and Punishment in Private Prisons*, 66 NAT'L LAW. GUILD REV. 70, 74–75 (2009) (remarking that private prison companies, like CoreCivic, are “building prisons on spec, with no contract to build and no prisoners to house”).

²⁰ See *infra* notes 44–54 and accompanying text.

²¹ See generally BAUER, *supra* note 4, at 45, 66, 206, 227 (describing the brutal and dehumanizing conditions present in the CoreCivic-run private prison in Louisiana and detailing the history of brutality that private profit incarceration has foisted upon inmates, often imprisoned for dubious reasons).

²² *Criminal Justice Facts*, THE SENTENCING PROJECT, available at <https://www.sentencingproject.org/criminal-justice-facts/>.

the question as to why we as a nation stand for private corporate profit in the realm of human imprisonment must be addressed and resolved.²³ The perverse incentives that drive corporate profit are revealed when a growing population of imprisoned U.S. residents energizes corporate interests.²⁴ A private prison analyst recently stated that the consistent yearly increase in the prison population “from a business model perspective[] [is] clearly good news.”²⁵

Private prison executives and lobbyists seek to increase privatization of the industry by promising that their prisons are run more efficiently at lower costs, with greater safety records, improved facilities, and with greater outcomes for prisoners.²⁶ However, studies and reports now show that these declarations by private prison executives and lobbyists are misleading.²⁷ Private prisons are increasingly being shown to cost contracting governments’ more to produce less safe conditions.²⁸ The exchange of taxpayer funds from governments and municipalities into the hands of corporate shareholders and executives is nothing more than an unabashed transfer of taxpayer monies into the personal accounts of those with a stake in private prisons—which are being shown to provide no real benefit in return.²⁹ Private incarceration makes no sense morally,³⁰ and it is increasingly apparent that the industry makes no sense economically,³¹ does not help (and probably exacerbates recidivism), and, in fact, is likely unconstitutional.³²

In 2005, Professor Robbins again addressed the issue of prison privatization.³³ His conclusions have been updated, including that private prisons are a “lamentable experiment” and “that the concept . . . is bad policy . . . based on a tenuous legal foundation . . . [with] profound moral implications.”³⁴ Robbins notes the many “routine, quasi-judicial decisions” private vendors make that affect prisoners’ welfare and legal status; the daily operations of private prisons that are conducted outside of public supervision; and the financial bias injected into circumstances where private corporations and key employees make more money when more people are imprisoned for longer periods are each lamentable outcomes of a failed experiment.³⁵ Over the past few decades the United States has seen: the rapid, profitable growth and political influence of the private prison industry;³⁶ how incarceration-for-profit ensures more

²³ See cummings, *supra* note 4, at 433–34.

²⁴ andré douglas pond cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL’Y 407, 413 (2016); see cummings, *supra* note 4, at 421–22.

²⁵ JeeYeon Park, *Lock Up Profits — in Prison Stocks: Analyst*, CNBC (Nov. 1, 2010, 11:48 AM), <https://www.cnbc.com/id/39949086> [<https://perma.cc/3SUC-G6BB>].

²⁶ cummings & Lamparello, *supra* note 24, at 413; see also Christopher Hartney & Caroline Glessman, *Prison Bed Profiteers: How Corporations Are Reshaping Criminal Justice in the U.S.* 2 (May 2012), http://nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profiteers.pdf [<https://perma.cc/3TCM-T5M3>].

²⁷ cummings & Lamparello, *supra* note 24, at 413; see also dré cummings, *Private Prison Industry Shenanigans in Florida*, CORP. JUST. BLOG (Oct. 26, 2012, 9:30 AM), <http://corporatejusticeblog.blogspot.com/2012/10/private-prison-industry-shenanigans-in.html> [<https://perma.cc/WZN7-VGD4>].

²⁸ cummings & Lamparello, *supra* note 24, at 413.

²⁹ *Id.* at 413–14; see also David M. Reutter, *Florida Provides Lesson in How Not to Privatize State Prisons*, PRISON LEGAL NEWS (Feb. 15, 2012), <https://www.prisonlegalnews.org/news/2012/feb/15/florida-provides-lesson-in-how-not-to-privatize-state-prisons/> [<https://perma.cc/UJ6W-62BV>].

³⁰ cummings & Lamparello, *supra* note 24, at 414.

³¹ *Id.*

³² See *infra* Part IV.

³³ Ira P. Robbins, *Privatization of Corrections: A Violation of U.S. Domestic Law, International Human Rights, and Good Sense*, 13 HUM. RTS. BRIEF 12, 12 (2006).

³⁴ *Id.* at 12, 16.

³⁵ See *id.* at 12.

³⁶ See, e.g., CAROLINE ISAACS, *PRIVATE PRISONS: THE PUBLIC’S PROBLEM*, at i–ii (Feb. 2012), https://www.afsc.org/sites/default/files/documents/Arizona_Prison_Report_Executive_Summary.pdf [<https://perma.cc/AD6R-ESA6>] (tracing the path between donations from private prison lobbyists in Arizona to the passage of a bill authorizing privatization of almost the entire state correctional system).

incarceration, quashes alternatives to incarceration, and creates a financial bias in jailers against the release of prisoners;³⁷ and, how mainstream religions have criticized private, for-profit prisons as immoral.³⁸ There is increasing reason for concern that these private prison corporations will become even more involved at the front end of law enforcement by working with police agencies to make sure their facilities stay filled.³⁹

This Report will show: first, that mixing profit with the core governmental function of incarceration leads to damaging consequences for prisoners, employees (of both private and public prisons), and the public at large while benefiting a small group of executives and shareholders;⁴⁰ and second, that the implementation of for-profit incarceration in the United States hampers access to justice, particularly for already marginalized groups.⁴¹

II. INHERENT CONSEQUENCES OF LINKING PROFIT AND INCARCERATION

Privatization of incarceration introduces serious perverse incentives created by government and financial bias throughout the criminal justice process,⁴² and contracting a core government function to private entities undermines the legitimacy of the justice system at large.⁴³ “Perhaps the most perverse incentive in the private prison industry is that shareholder and executive profit are intimately tied to the number of prisoners that enter the private prison facility.”⁴⁴ When a profit motive is attached to human misery and bondage such as incarceration, the evidence shows that the depths to which profit seekers will sink to earn revenues knows no bounds, and the effects reverberate through the justice system.⁴⁵

Private prison companies, while forcefully disclaiming such action,⁴⁶ aggressively lobby for harsher prison sentences such as mandatory-minimums and three-strikes laws;⁴⁷ for legislation that creates new crimes requiring incarceration, such as criminalization of illegal

³⁷ See SHAPIRO, *supra* note 11, at 12.

³⁸ See generally *Join the Movement!*, ABOLISH PRIV. PRISONS, <https://www.abolishprivateprisons.org/resolutions> [<https://perma.cc/CT87-H6HH>] (last visited Apr. 1, 2020) (providing an up-to-date list of religious organizations criticizing the industry).

³⁹ See Beau Hodai, *Private Prison Company Used in Drug Raids at Public High School*, COMMON DREAMS (Nov. 27, 2012), <https://www.commondreams.org/news/2012/11/27/private-prison-company-used-drug-raids-public-high-school> [<https://perma.cc/92YM-2ADP>]; see also P. Smith, *In Profit-Sharing Scheme, Oklahoma DA Used Contractor for Highway Drug Stops*, STOP DRUG WAR (July 22, 2013, 6:05 PM), https://stopthedrugwar.org/chronicle/2013/jul/22/profitsharing_scheme_oklahoma_da [<https://perma.cc/ASL3-H6TN>] (“[T]he contract . . . gave Desert Snow 25% of all assets seized during training days and 10% of all assets seized even on days the contractors were not present.”).

⁴⁰ See *infra* Part II.

⁴¹ See *infra* Part III.

⁴² See *infra* notes 46–66 and accompanying text.

⁴³ See *infra* notes 46–71 and accompanying text.

⁴⁴ cummings & Lamparello, *supra* note 24, at 429; see also cummings, *supra* note 4, at 436–38.

⁴⁵ See BAUER, *supra* note 5, at 39, 49–50 (highlighting one way in which private prisons choose to cut costs in order to ensure the maximization of profits).

⁴⁶ See Richard P. Seiter, *Private Corrections: A Review of the Issues*, CORRECTIONS CORP. AM. (Mar. 2008), https://ccamericastorage.blob.core.windows.net/media/Default/documents/CCA-Resource-Center/Private_Corr_Review.pdf [<https://perma.cc/3NSR-524W>]. According to CoreCivic, it is a myth that they promote longer and tougher sentences. Corr. Corp. of Am., *Myths v. Reality in Private Corrections: The Truth Behind the Criticism*, PRISON LEGAL NEWS, https://www.prisonlegalnews.org/media/publications/cca_myth_vs_reality_in_corrections_promotional_sheet.pdf [<https://perma.cc/V5TH-6P67>] (last visited Apr. 1, 2020). But see Lee Fang, *Disclosure Shows Private Prison Company Misled on Immigration Lobbying*, NATION (June 4, 2013), <https://www.thenation.com/article/disclosure-shows-private-prison-company-misled-immigration-lobbying/> [<https://perma.cc/9BPE-MTYQ>] (“A new disclosure shows that . . . Geo Group, has in fact paid an ‘elite team of federal lobbyists’ to influence the comprehensive immigration reform legislation making its way through Congress.”).

⁴⁷ cummings, *supra* note 4, at 438–39, 438 n.102.

immigration or active detention of schoolchildren;⁴⁸ and against decriminalization.⁴⁹ In fact, these actions have been generously rewarded as of late; reports reveal that the two largest private prison companies, CoreCivic and GEO Group, together generated more than \$2.9 billion in revenue in 2010, with revenues ever increasing through 2019.⁵⁰ To increase revenue at the rate indicated, private prison corporations, as mentioned above, hire lobbyists to increase prison populations and prison construction.⁵¹ We argue that lobbying to increase the stream of prisoners and lobbying for harsher sentencing regimes is not just unseemly but inhumane,⁵² which leads to another aberrant incentive of prison privatization: to increase profit, a private prison CEO is not selling more shoes (like Nike) or making additional motion pictures (like Disney), but is instead seeking to increase the flow of clients—prisoners—into the prison system.⁵³ Or stated another way, the private prison corporation is seeking to profit off of increasing the number of U.S. bodies that can be locked in cages.⁵⁴

The amount of private prison company dollars spent on lobbying efforts is substantial.⁵⁵ CoreCivic spent more than \$3 million on federal lobbying in 2005 and more than \$1.2 million in 2019.⁵⁶ The largest U.S. private prison companies together have spent dozens of millions of dollars lobbying both state and federal elected officials since the founding of the U.S. private

⁴⁸ See, e.g., Nicole Flatow, *Mississippi County Jails Kids for School Dress Code Violations, Tardiness, DOJ Alleges*, THINKPROGRESS (Nov. 27, 2012, 2:00 PM), <https://thinkprogress.org/mississippi-county-jails-kids-for-school-dress-code-violations-tardiness-doj-alleges-1fa9a26ae83b/> [<https://perma.cc/4GXN-JLXQ>] (describing how the police are a “taxi-service” for shuttling students to jail for class misbehavior).

⁴⁹ See, e.g., Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/> [<https://perma.cc/D55R-Q85G>] (“The two largest for-profit prison companies in the United States . . . have funneled more than \$10 million to candidates since 1989 and have spent nearly \$25 million on lobbying efforts.”). In a recent telling example, private prison companies donated heavily to Donald Trump’s campaign, and their stocks sharply increased after he was elected President. *Under Mr. Trump, Private Prisons Thrive Again*, N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/opinion/under-mr-trump-private-prisons-thrive-again.html> [<https://perma.cc/V3K7-KVMU>].

⁵⁰ cummings, *supra* note 4, at 436–37; see also Andrea Nill Sanchez, *Private Prisons Spend Millions on Lobbying to Put More People in Jail*, THINKPROGRESS (June 23, 2011, 4:00 PM), <https://thinkprogress.org/private-prisons-spend-millions-on-lobbying-to-put-more-people-in-jail-58e048bb37dd/> [<https://perma.cc/4AE5-HQWF>]. These profits have continued to grow in the past decade, as GEO Group alone reported bringing in \$2.47 billion in revenue for 2019. See Renae Merle & Tracy Jan, *Wall Street Pulled Its Financing. Stocks Have Plummeted. But Private Prisons Still Thrive*, WASH. POST (Oct. 3, 2019, 12:37 PM), <https://www.washingtonpost.com/business/2019/10/03/wall-street-pulled-its-financing-stocks-have-plummeted-private-prisons-still-thrive/> [<https://perma.cc/9D9L-2TWJ>].

⁵¹ Lee Fang, *Prison Industry Funnels Donations to State Lawmakers Introducing SB1070-Like Bills Around the Country*, THINKPROGRESS (Sept. 16, 2010), <https://thinkprogress.org/prison-industry-funnels-donations-to-state-lawmakers-introducing-sb1070-like-bills-around-the-afd16ced43b6/> [<https://perma.cc/4AE5-HQWF>].

⁵² See *infra* notes 72–80 and accompanying text.

⁵³ cummings, *supra* note 4, at 437; see also Paul Ashton & Amanda Petteruti, Justice Policy Inst., *Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies* 22, (June 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf [<https://perma.cc/X2G9-PD4U>] (explaining that private prison companies have hired thirty lobbyists in Florida to promote their prison interests). Furthermore, CoreCivic has given over \$900,000 annually to federal candidates since 2003, and the prison companies have given more than \$16 million to state and federal legislators since 2000, providing additional evidence that states are some of the private prison companies’ most important clients. *Id.* at 22, 24.

⁵⁴ See Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 23, 2012), <https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america> [<https://perma.cc/F44Q-AGXU>].

⁵⁵ See ASHTON & PETTERUTI, *supra* note 53, at 17 (showing that in state campaign contributions from 2003 to 2010, CoreCivic has spent over \$1.5 million in twenty-seven states, GEO has spent \$2.4 million in twenty-three states, and from 2006 to 2009, Cornell Companies has spent \$72,000 in six states).

⁵⁶ *Id.* at 24; see also *Client Profile: CoreCivic Inc.*, OPENSECRETS, <http://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2019&id=D000021940> [<https://perma.cc/VX78-UVT7>] (last visited Apr. 1, 2020) (reporting that CoreCivic spent \$1.23 million on lobbying in 2019).

prison corporation in the 1970s.⁵⁷ Private prison lobbyists advocate for harsh legislative initiatives that increase the number of individuals sentenced to prison time⁵⁸ because “private prisons make money from putting people behind bars.”⁵⁹ In addition, prison lobbyists battle to grow appropriations in expenditures in law enforcement, pass severe immigration laws, and increase immigration detention.⁶⁰ They also seek to influence lawmakers to implement unforgiving incarceration policies like the 2010 Arizona immigration legislation, originally titled “The Support Our Law Enforcement and Safe Neighborhoods Act” (SB 1070).⁶¹ Several reports show that private prison lobbyists had a hand in drafting the legislation that became SB 1070.⁶² Corporations are free to make campaign contributions to elected government officials, and the private prison lobby contributes liberally.⁶³ In light of the seminal 2010 Supreme Court case *Citizens United*,⁶⁴ private prison corporations’ campaign contributions can now be made directly from the private prison corporate treasury to the federal and state legislators and judges whom they hope to influence.⁶⁵ Research indicates that private prison companies contribute millions of dollars to mostly incumbent politicians, seeking to garner influence in the legislative process, to continue privatizing the prison regime and receive advantageous contracts for private prison construction.⁶⁶ And, importantly, this is not in response to a real need for more incarceration. These policies unnecessarily inflate the criminal state, creating a mirage of needing more prison beds, and the very people driving the mirage profit from its existence.

According to news reports, more problems appear in the courthouse.⁶⁷ In what would eventually come to be known as the “Kids For Cash” scandal, two Pennsylvania judges sentenced juveniles to detention at twice the state average, earning \$2.6 million in kickbacks.⁶⁸ In Iowa, the husband of a federal judge had significant stock holdings of two private prisons; he increased those holdings just five days before an immigration raid his spouse authorized where nearly 400 workers were arrested, and of those, about 270 were sentenced to five months in

⁵⁷ See ASHTON & PETTERUTI, *supra* note 53, at 22–24.

⁵⁸ See *id.* The private prison companies promote and advocate for “three-strikes” and “truth-in-sentencing” legislation because this creates more business. *Id.* at 3.

⁵⁹ *Id.* at 21.

⁶⁰ See Laura Sullivan, *Prison Economics Helped Drive Ariz. Immigration Law*, NAT’L PUB. RADIO (Oct. 28, 2010, 11:01 AM), <https://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law> [<https://perma.cc/VJU7-PV5L>]; see also Geiza Vargas-Vargas, *The Investment Opportunity in Mass Incarceration: A Black (Corrections) or Brown (Immigration) Play?*, 48 CAL. W. L. REV. 351, 357–58 (2012) (“Prison companies cannot justify building new prisons on the basis of drug convictions. However, prison companies *can* justify the building of new prisons based on a whole new kind of prisoner: the illegal alien, and more specifically, the ‘Mexican.’”).

⁶¹ cummings, *supra* note 4, at 438–39; see ASHTON & PETTERUTI, *supra* note 53, at 30; see *How Corporate Interests Got SB 1070 Passed*, NAT’L PUB. RADIO (Nov. 9, 2010, 1:00 PM), <https://www.npr.org/2010/11/09/131191523/how-corporate-interests-got-sb-1070-passed> [<https://perma.cc/G6UR-BGF6>]; see also Fang, *supra* note 52.

⁶² See Sullivan, *supra* note 60; see also *How Corporate Interests Got SB 1070 Passed*, *supra* note 61.

⁶³ ASHTON & PETTERUTI, *supra* note 53, at 15–22.

⁶⁴ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 319, 362–67 (2010).

⁶⁵ See andré douglas pond cummings, *Procuring ‘Justice?’: Citizens United, Caperton, and Partisan Judicial Elections*, 95 IOWA L. REV. BULL. 89, 98 (2010) [hereinafter *Procuring ‘Justice?’*]; see also Atiba R. Ellis, *Citizens United and Tiered Personhood*, 44 J. MARSHALL L. REV. 717, 745–49 (2011) (describing the potential nefarious consequences of *Citizens United*).

⁶⁶ cummings, *supra* note 4, at 437–39; see ASHTON & PETTERUTI, *supra* note 53, at 15–22; see also SHAPIRO, *supra* note 11, at 39.

⁶⁷ See *infra* notes 68–70 and accompanying text.

⁶⁸ ‘Kids for Cash’ Captures a Juvenile Justice Scandal from Two Sides, NAT’L PUB. RADIO (Mar. 8, 2014, 6:26 PM), <https://www.npr.org/2014/03/08/287286626/kids-for-cash-captures-a-juvenile-justice-scandal-from-two-sides> [<https://perma.cc/NJ7A-KNVV>]; Urbina, *supra* note 17.

federal prisons.⁶⁹ And in Mississippi, a former commissioner of the Department of Corrections accepted over \$1 million in bribes in exchange for lucrative state contracts with private prisons.⁷⁰ It is true that corruption occurs in public incarceration settings, but the profit incentive maximizes those opportunities at the expense of the prisoners' liberty.⁷¹

Because a for-profit prison's primary motivation is to maximize profit, lowering the operational costs of running a facility is often at the forefront of their decision-making process.⁷² This goal often results in fewer available educational opportunities for prisoners, and because private prison corporations benefit from high recidivism, they have every incentive not to use proven anti-recidivism programs.⁷³ As one commentator notes, "[m]uch of the presumed cost savings of private prisons are achieved through lower staffing costs: private prisons pay their employees less than public prisons."⁷⁴ Likewise, private incarceration facilities understaff relative to public ones,⁷⁵ and even the staff eventually hired by private prison corporations tend to be underqualified and suffer from higher turnover.⁷⁶ These decisions sometimes lead to disastrous results.⁷⁷

In one 2016 case, a federal judge said conditions at one private prison "paint[ed] a picture of such horror as should be unrealized anywhere in the civilized world," as the prison was essentially run by gangs, held organized gladiator-style fights encouraged by guards, and had "sexual misconduct . . . among the worst that we have seen in any facility anywhere in the nation."⁷⁸ In another stunning case, "[a] private prison in Idaho . . . established a reputation as a 'gladiator school' because prison guards encouraged violence between inmates."⁷⁹ Oklahoma Director of Department of Corrections Joe Allbaugh stated that he does not "believe taxpayers

⁶⁹ Samantha Michaels, *A Federal Judge Put Hundreds of Immigrants Behind Bars While Her Husband Invested in Private Prisons*, MOTHER JONES (Aug. 24, 2017), <https://www.motherjones.com/crime-justice/2017/08/a-federal-judge-put-hundreds-of-immigrants-behind-bars-while-her-husband-invested-in-private-prisons/> [<https://perma.cc/SUPV-NX3K>].

⁷⁰ Alana Blinder, *2 Former Mississippi Officials Plead Guilty in a Graft Case Involving Private Prisons*, N.Y. TIMES (Feb. 25, 2015), <https://www.nytimes.com/2015/02/26/us/christopher-epps-former-mississippi-prisons-chief-pleads-guilty-in-corruption-case.html> [<https://perma.cc/BG8G-PECA>]. The investigation into the former commissioner uncovered an even broader scheme: former legislator Cecil McCrory; former state senator Irb Benjamin of Madison; Teresa Malone, the wife of former lawmaker and former House Corrections Chairman Bennett Malone; Texas businessman Mark Longoria; Dr. Carl Reddix; business and government consultant Robert Simmons; former MDOC insurance broker Guy E. Evans; and prison consultant Sam Waggoner were all charged and pled guilty. Jimmie E. Gates, *4 Louisiana Businessmen Charged in Chris Epps' Corruption Case*, CLARION LEDGER (Oct. 4, 2018, 3:24 PM), <https://www.clarionledger.com/story/news/2018/10/04/chris-epps-corruption-case-4-la-businessmen-charged-bribery/1524892002/> [<https://perma.cc/VYY3-ZD3Q>].

⁷¹ See *infra* Section III.A.

⁷² In fact, this downward pressure on operational cost is perhaps the marquee feature of private incarceration and how the concept is sold to legislatures and other public decision-makers. See generally BAUER, *supra* note 5, at 40, 142–43, 204–05, 253 (showing that as an undercover prison guard, decisions from hiring, through training, to guarding prisoners, are all subject to this downward pressure leading to unwise and unsafe outcomes).

⁷³ See, e.g., Judith Greene, *Comparing Private and Public Prison Services and Programs in Minnesota: Findings from Prisoner Interviews*, 11 CURRENT ISSUES CRIM. JUST. 202, 215–16 (1999) (finding that prisoners were significantly less likely to have access to any kind of education during private incarceration).

⁷⁴ Matt Simmons, *Punishment & Profits: A Cost-Benefit Analysis of Private Prisons*, OKLA. POL'Y INST. (Aug. 7, 2013), <https://okpolicy.org/punishment-profits-a-cost-benefit-analysis-of-private-prisons/> [<https://perma.cc/3LVH-8KD3>].

⁷⁵ See David M. Siegel, *Internalizing Private Prison Externalities: Let's Start with the GED*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 106–07 (2016).

⁷⁶ David N. Khey, *Privatization of Prison*, in 3 THE ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1036, 1041 (Wesley G. Jennings ed., 1st ed. 2016).

⁷⁷ See, e.g., BAUER, *supra* note 5, at 143–44.

⁷⁸ Timothy Williams, *Privately Run Mississippi Prison, Called a Scene of Horror, Is Shut Down*, N.Y. TIMES (Sept. 15, 2016), <https://www.nytimes.com/2016/09/16/us/mississippi-closes-private-prison-walnut-grove.html> [<https://perma.cc/3DLD-AHJV>].

⁷⁹ Simmons, *supra* note 74.

should be paying a premium for our prisoners [to private corporations]. . . . [B]ecause I think we can house inmates more efficiently.”⁸⁰ At bottom, cost-effectiveness alone means nothing without accounting for the quality of the prison environment, which evidence shows borders on abusive.⁸¹

The profit motive also leads to less safety for correctional officers as operators drive down expenditures when reducing staffing costs.⁸² Private prisons pay individual officers less: on average private corrections officers “received salaries that were about \$7,000 lower than the average public officer’s salary.”⁸³ And in addition to paying each private officer less than their public counterparts, private prison operators “also tend to hire fewer officers; private prisons report an average of one officer per 6.9 inmates compared to one officer per 4.9 inmates in public facilities.”⁸⁴ In Oklahoma, “the ugliest outbreaks of prison violence toward correctional officers and among inmates have occurred in [that state’s] private prisons, underlining the dangerous conditions in those facilities.”⁸⁵

In addition, the legitimacy of the justice system at large suffers from both normative and descriptive problems of private incarceration.⁸⁶ As discussed above, private prisons have been plagued by scandals, some of which have gripped the nation’s attention.⁸⁷ Because the systemic problems of private incarceration stretch from legislation through release, the public has witnessed the negative effects on legislators, judges, and the prison institutions themselves.⁸⁸ These problems have contributed to a declining view of the justice system among U.S. residents,⁸⁹ including debates over the morality of investing in the private prison industry.⁹⁰ Scholarly research also largely views the normative case for private incarceration with great skepticism,⁹¹ including a recent, sophisticated data-driven analysis finding a causal link between private prisons and a state’s aggregate incarceration totals.⁹²

⁸⁰ Andrew Knittle, *Oklahoma Paid Record \$92.7 Million to Private Prisons in 2015*, OKLAHOMAN (Mar. 29, 2016, 7:00 AM), <https://oklahoman.com/article/5487769/oklahoma-paid-record-927-million-to-private-prisons-in-2015> [<https://perma.cc/Y7T7-MPT4>].

⁸¹ See, e.g., Developments in the Law—the Law of Prisons, 115 HARV. L. REV. 1838, 1883 (2002).

⁸² See Megan Mumford et al., *The Economics of Private Prisons*, HAMILTON PROJECT (Oct. 20, 2016), https://www.hamiltonproject.org/papers/the_economics_of_private_prisons [<https://perma.cc/KE4V-3RHA>].

⁸³ *Id.*

⁸⁴ *Id.*; see also BAUER, *supra* note 5, at 142–43.

⁸⁵ Ryan Gentzler, *Private Prisons Are Bad Policy, but They’re Not to Blame for Oklahoma’s Incarceration Problem*, OKLA. POL’Y INST. (Mar. 12, 2018), <https://okpolicy.org/private-prisons-are-bad-policy-but-theyre-not-to-blame-for-oklahomas-incarceration-problem/> [<https://perma.cc/7AQH-V8ED>].

⁸⁶ See *infra* notes 106–11 and accompanying text.

⁸⁷ See *supra* notes 68–81 and accompanying text.

⁸⁸ See *supra* notes 47–85 and accompanying text.

⁸⁹ Congressional job approval remains among the lowest in the past quarter-century. *Congress and the Public*, GALLUP, <http://news.gallup.com/poll/1600/Congress-Public.aspx> [<https://perma.cc/3XL7-W9XD>] (last visited Apr. 1, 2020). Public opinion on the justice system at large has decreased since the early 2000s. *Confidence in Institutions*, GALLUP, <http://news.gallup.com/poll/1597/Confidence-Institutions.aspx> [<https://perma.cc/JZY5-CSZH>] (last visited Apr. 1, 2020).

⁹⁰ Mike Antonucci, *California’s Pension Fund Managers Are at Odds with Activists and Some Union Leaders over Divestments*, LA SCH. REP. (Feb. 27, 2018), <http://laschoolreport.com/californias-pension-fund-managers-are-at-odds-with-activists-and-some-union-leaders-over-divestments/> [<https://perma.cc/F82R-XBDY>].

⁹¹ See, e.g., Yoav Peled & Doron Navot, *Private Incarceration – Towards a Philosophical Critique*, 19 CONSTELLATIONS 216, 216–17, 30 (2012) (developing a moral argument against private incarceration based on civic republican foundations).

⁹² G.I. Galinato & R. Rohla, *Do Privately-Owned Prisons Increase Incarceration Rates?*, 67 LABOUR ECONOMICS 101908 (2020).

III. ACCESS TO JUSTICE

The discussion about whether for-profit prison corporations can deliver on their stated purpose masks a more important failing: they are crucial components in perpetuating the failed policies that lead to mass incarceration and hamper access to justice.⁹³ Public prisons have their share of problems, of course: overcrowding, safety, and crumbling infrastructure among them.⁹⁴ But injecting the core state function of incarceration with a profit motive leads to its own problems, many of which particularly affect already disadvantaged and oppressed communities.⁹⁵ In fact, private, for-profit incarceration violates all three principles of the United States Department of Justice’s Office for Access to Justice: ensuring fairness, increasing efficiency, and promoting accessibility.⁹⁶

A. Ensuring Fairness

One of the core principles of “access to justice” initiatives is ensuring that the judicial system delivers “fair and just outcomes for all parties, including those facing financial and other disadvantages.”⁹⁷ Placing a financial motive into the justice system works directly against that purpose.⁹⁸

First, private prison operators have a strong financial incentive to keep prison occupancy as high as possible because, as a business, large and predictable revenue streams are crucial for corporate health and vitality.⁹⁹ This incentive manifests in lobbying against common sense criminal justice reforms and lobbying for expansion of criminal and immigration laws.¹⁰⁰ For example, as introduced above, a report by National Public Radio revealed “a quiet, behind-the-scenes effort to help draft and pass Arizona Senate Bill 1070 by an industry that stands to benefit from it: the private prison industry.”¹⁰¹ The enormous gulf dividing the political power harnessed by large corporations and the marginalized groups who suffer the consequences of over-criminalization increases the odds that the justice system will not deliver the fair and just outcomes envisioned by access to justice advocates, instead tending toward results that enrich the already powerful.¹⁰²

In addition to the legal but harmful lobbying efforts of for-profit incarceration corporations, privatization necessarily increases the avenues of corruption, often at the risk of

⁹³ See Julia Bowling, *Do Private Prison Contracts Fuel Mass Incarceration?* BRENNAN CTR. FOR JUST. (Sept. 20, 2013), <https://www.brennancenter.org/our-work/analysis-opinion/do-private-prison-contracts-fuel-mass-incarceration> [<https://perma.cc/S5VV-2DCU>].

⁹⁴ See P.R. Lockhart, *America Is Finally Being Exposed to the Devastating Reality of Prison Violence*, VOX (Apr. 5, 2019, 7:10 PM), <https://www.vox.com/policy-and-politics/2019/4/5/18297326/prison-violence-ohio-alabama-justice-department-lawsuit> [<https://perma.cc/ZMK2-6XBR>].

⁹⁵ See Section III.A.

⁹⁶ See Sections III.A–C. There are varying definitions of “access to justice.” The categories mentioned herein are meant to be representative rather than definitive or exhaustive. *Access to Justice*, U.S. DEP’T. JUST., <https://www.justice.gov/olp/access-justice> [<https://perma.cc/9GJQ-CZVS>] (last updated Oct. 24, 2018).

⁹⁷ *Id.*

⁹⁸ See discussion *infra* notes 98–119 and accompanying text.

⁹⁹ See, e.g., CORRIS. CORP. OF AM., FORM 10-K 36 (Feb. 24, 2010), <http://ir.corecivic.com/sec-filings/sec-filing/10-k/0000950123-10-016309> [<https://perma.cc/UTD5-9VDN>] (“We believe the long-term growth opportunities of our business remain very attractive as insufficient bed development by our customers should result in a return to the supply and demand imbalance that has been benefiting the private prison industry.”).

¹⁰⁰ See Cohen, *supra* note 50 (“The two largest for-profit prison companies in the United States – GEO and Corrections Corporation of America – and their associates have funneled more than \$10 million to candidates since 1989 and have spent nearly \$25 million on lobbying efforts.”).

¹⁰¹ Sullivan, *supra* note 61.

¹⁰² See *infra* notes 103–20 and accompanying text.

harming marginalized communities.¹⁰³ The seductive presence of wealth can influence decision-making at various points of the criminal justice process.¹⁰⁴ For example, a wide-ranging kickback scheme perpetrated by then-Mississippi Department of Corrections Commissioner Christopher Epps touched on almost every aspect of imprisonment: construction of facilities, maintenance of those facilities, operation of those facilities, prisoner health care, commissary services, inmate telephone use, post-release tracking and monitoring, and drug testing.¹⁰⁵ After investigating the scheme, Mississippi recovered \$26.6 million in settlement agreements with the various private prisons and other companies involved in the scandal.¹⁰⁶

The corruptive effects of privatization have also touched judges.¹⁰⁷ In Pennsylvania, as described above, two juvenile court judges were involved in a scheme to close a county-run detention facility, forcing children into a privately-run center and sentencing juveniles to harsher punishments, including detention for behavior that would otherwise not merit such a sentence.¹⁰⁸ This scheme, known as the “kids-for-cash” scandal, resulted in, among other things, the suicide of one teenager, a guilty plea from one judge, and a criminal conviction of the other.¹⁰⁹

More recently, as illustrated above, an investigation alleged that the husband of a federal court judge increased his stock holdings of companies involved in private detention days before a large raid that resulted in almost 400 arrests.¹¹⁰ Court filings suggest that the judge knew about and took part in the planning of the raid for several months beforehand.¹¹¹ These instances show that fairness in the legal system disappears when those involved with dispensing justice have a financial stake in the outcome, and even if no wrongdoing occurred in the case involving the federal judge, such financial entanglement strips away the appearance of fairness.¹¹²

The avenues for corruption are not limited to the courthouse, as some of the largest companies involved in for-profit incarceration are now expanding into areas adjacent to their core business, many of which prey on communities of color and poor communities.¹¹³ GEO Group, for example, lists post-release services on their website, including “programs tailored to pretrial, parole, probation, in-custody populations and those involved in immigration proceedings.”¹¹⁴ Unfortunately, these services are also ripe for abuse.¹¹⁵ In Georgia, one

¹⁰³ See *supra* notes 99–102 and accompanying text; see *infra* notes 103–20 and accompanying text.

¹⁰⁴ See *infra* notes 105–20 and accompanying text.

¹⁰⁵ Press Release, Jim Hood, Attorney Gen., Office of the Attorney Gen. State of Miss., Hood Recovers \$26.6 Million, Settles Final Epps Bribery Case (Jan. 24, 2019), <http://www.agjimhood.com/releases/hood-recovers-26-6-million-settles-final-epps-bribery-case/> [<https://perma.cc/KB8L-U524>].

¹⁰⁶ *Id.*

¹⁰⁷ See *infra* notes 107–11 and accompanying text.

¹⁰⁸ See Urbina, *supra* note 17.

¹⁰⁹ The Associated Press, *Mom Blames Son’s Suicide on Luzerne County Judge in ‘Kids for Cash’ Case*, PENN LIVE, https://www.pennlive.com/midstate/2011/02/mom_blames_luzerne_county_judg.html [<https://perma.cc/JY3C-QHUA>] (last updated Jan. 6, 2019); *Pennsylvania Judge Gets 28 Years in ‘Kids for Cash’ Case*, NBC NEWS, http://www.nbcnews.com/id/44105072/ns/us_news-crime_and_courts/t/pennsylvania-judge-gets-years-kids-cash-case/#.Xi25a8hKiUI [<https://perma.cc/ELK5-6955>] (last updated Aug. 11, 2011).

¹¹⁰ Michaels, *supra* note 70.

¹¹¹ See *id.*

¹¹² See *supra* notes 107–11 and accompanying text.

¹¹³ See *infra* notes 114–20 and accompanying text.

¹¹⁴ *GEO Continuum of Care*, GEO GROUP, INC., https://www.geogroup.com/geos_continuum_of_care [<https://perma.cc/B7AH-8LJV>] (last visited Apr. 1, 2020).

¹¹⁵ See *Rutherford County, TN: Private Probation*, C.R. CORPS, <http://www.civilrightscorps.org/work/criminalization-of-poverty/rutherford-county-tn-private-probation> [<https://perma.cc/7ZFU-QAHY>] (last visited Apr. 1, 2020); see also Rhonda Cook, *Private Probation Company Settles Lawsuits for More than \$2 Million*, ATLANTA J.-CONST. (Feb. 2, 2017), <https://www.ajc.com/news/local/private-probation-company-settles-lawsuits-for-more-than-million/mkHQH9KFMSBNC4E8bK6QzM/> [<https://perma.cc/RP65-FUJ3>].

company settled a case for \$1.5 million based on “illegally throwing [the plaintiffs] in jail for not paying supervision fees and fines for traffic offenses or minor crimes like public intoxication.”¹¹⁶

And in Tennessee, Civil Rights Corps reached “a landmark settlement in a first-of-its-kind class action case . . . against Rutherford County and PCC, Inc., a private probation company that made millions of dollars over more than a decade by exploiting the poorest people in Rutherford County.”¹¹⁷ That lawsuit, which ended with a \$14.3 million settlement, “alleged an unconstitutional racketeering enterprise between the County and the for-profit probation company to extort money from impoverished people”; as a result, the probation company went out of business, and Rutherford County agreed, *inter alia*, to prevent future privatization of its probation system.¹¹⁸

Private companies continue to expand into new profit-making areas and make decisions that lead to unjust outcomes for vulnerable groups, including a recent agreement between Cook County, Illinois and Track Group for ankle monitors capable of two-way communication.¹¹⁹ The technology enables employees at Track Group’s monitoring center to initiate a call with the juvenile that cannot be declined and includes both speaking and monitoring, all of which is recorded and remains available for any purpose, including criminal investigation.¹²⁰

These episodes represent a preview of what is to come if government entities continue the process of privatizing justice. Introducing profit into the justice system thwarts fairness, often by placing additional burdens on poor and minority groups, which is antithetical to the concept of fair and just outcomes that is fundamental to the idea of access to justice.¹²¹

B. Increasing Efficiency

The Department of Justice also recognizes as a core principle of access to justice that the judicial system should deliver “fair and just outcomes effectively, without waste or duplication.”¹²² At first blush, private, for-profit incarceration seems a good match for increasing efficiency because producing greater efficiency is a core promise of these businesses,¹²³ but they have failed to deliver on that promise.¹²⁴ Empirical research into this question is ongoing, and at this point is not conclusive because widescale for-profit incarceration is a relatively new phenomenon.¹²⁵ However, a growing body of studies suggests that private facilities are at best equally efficient,¹²⁶ and in many cases are significantly less efficient.¹²⁷ An early meta-analysis of twenty-four independent studies in 1999 revealed no statistically significant difference in per diem cost of an individual prisoner in public or private facilities, whether such facility was minimum-, medium-, or maximum-security.¹²⁸

¹¹⁶ Cook, *supra* note 115.

¹¹⁷ Rutherford County, TN: Private Probation, *supra* note 115.

¹¹⁸ *Id.*

¹¹⁹ See Kira Lerner, *Chicago’s Ankle Monitors Can Call and Record Kids Without Their Consent*, CITYLAB (Apr. 8, 2019), <https://www.citylab.com/equity/2019/04/chicago-electronic-monitors-juveniles-can-call-and-record-them-without-consent/586639/> [<https://perma.cc/DHU2-92HA>].

¹²⁰ *Id.*

¹²¹ See *supra* notes 97–120 and accompanying text.

¹²² Access to Justice, *supra* note 96.

¹²³ See HARTNEY & GLESMANN, *supra* note 26.

¹²⁴ See *infra* notes 125–39 and accompanying text.

¹²⁵ See Travis C. Pratt & Jeff Maahs, *Are Private Prisons More Cost-Effective than Public Prisons? A Meta-Analysis of Evaluation Research Studies*, 45 CRIME & DELINQ. 358, 358 (1999).

¹²⁶ See *id.* at 358–59.

¹²⁷ See *id.* at 359.

¹²⁸ *Id.* at 358.

More recently, the American Civil Liberties Union (ACLU) collected information from states and the federal government and published the results.¹²⁹ The Arizona Auditor General found that it was costlier to house prisoners in private facilities for “both minimum- and medium-custody beds – the two categories of beds for which the [Arizona Department of Corrections] contracts.”¹³⁰ A committee in Monmouth County, New Jersey recommended against private prisons because of potentially “increased risk of liability and safety risks without proof of cost savings.”¹³¹ In a separate memo from then-Attorney General Sally Yates, she noted that:

[T]ime has shown that [private prisons] compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of Inspector General, they do not maintain the same level of safety and security.¹³²

And while there are a small sample of studies that have found minimal cost reduction, those purported savings often result from unpalatable cost-cutting.¹³³ For example, in a careful examination of nine states that housed at least 3000 prisoners in private prisons, Christopher Petrella found that people of color were overrepresented in private facilities relative to their public counterparts and that this outcome was the result of “finely tailored contractual provisions that implicitly exempt private prison companies from housing certain types of individuals whose health care and staffing costs disproportionately attenuate profit margins.”¹³⁴ Or, stated another way, private prisons cherry pick the inmates they would most like to house because those prisoners are healthy and active, thereby providing greater profit margins in saving on healthcare costs and exploiting for labor gains.¹³⁵

Other studies find inimicable cost-reduction in services that otherwise provide inmates with well-documented societal benefits.¹³⁶ Two researchers recently examined recidivism rates of similar prisoners housed in public and private facilities in Oklahoma and found that when holding other factors constant, people in general were more likely to recidivate when they spent more time in a private prison, and that men in private facilities were particularly more likely to recidivate.¹³⁷ Another study found that private prisons are staffed by fewer guards, and those guards are less qualified and undertrained compared to their public counterparts; those factors were hypothesized to account for the fact that private facilities are more dangerous, both for prisoners and staff, due to higher rates of violence.¹³⁸ Similar findings in a report by the Office of Inspector General comparing federal prisons to private facilities served as a key reason that the Department of Justice under President Obama decided to phase out the use of privately

¹²⁹ SHAPIRO, *supra* note 11, at 6–7.

¹³⁰ *Id.* at 19.

¹³¹ *Id.* (emphasis omitted).

¹³² Memorandum from Sally Yates, Deputy Attorney Gen. U.S. Dep’t of Justice to Acting Dir. Fed. Bureau of Prisons (Aug. 18, 2016), <https://www.justice.gov/archives/opa/file/886311/download> [<https://perma.cc/5THE-8VG9>].

¹³³ See Christopher Petrella, *The Color of Corporate Corrections, Part II: Contractual Exemptions and the Overrepresentation of People of Color in Private Prisons*, in 3 *RADICAL CRIMINOLOGY* 81, 82–83 (2014).

¹³⁴ *Id.* at 82–83.

¹³⁵ See *id.*

¹³⁶ See *supra* notes 73–74 and accompanying text; see *infra* notes 137–39 and accompanying text.

¹³⁷ Andrew L. Spivak & Susan F. Sharp, *Inmate Recidivism as a Measure of Private Prison Performance*, 54 *CRIME & DELINQ.* 482, 499–500 (2008).

¹³⁸ See Curtis R. Blakely & Vic W. Bumphus, *Private and Public Sector Prisons: A Comparison of Select Characteristics*, 68 *FED. PROB.* 27 (2004); see also BAUER, *supra* note 5, at 40, 142–43, 252–53.

contracted facilities, although that decision, but not the underlying evidence, was reversed by Attorney General Jeff Sessions.¹³⁹

Private, for-profit prisons have not lived up to their promised efficiency, and ensuring access to justice requires that outcomes are delivered effectively and without waste, a result that private prison companies have not been able to produce.¹⁴⁰ The cost-cutting mechanisms employed to deliver profits to shareholders have not led to cheaper incarceration, and as researchers continue to gather and analyze data from the growing privately-incarcerated population, a strong body of evidence is showing that cost-cutting measures result in less-safe prisons with fewer opportunities for successful rehabilitation.¹⁴¹

C. Promoting Accessibility

Finally, the Office for Access to Justice aims to eliminate “barriers that prevent people from understanding and exercising their rights,”¹⁴² which is a goal that private, for-profit incarceration hinders in at least two ways.¹⁴³ First, in many states, it is harder to access information from private prisons than their public counterparts.¹⁴⁴ Public facilities are subject to certain records requests, while private facilities often are not.¹⁴⁵

Second, funding is a core part of democratic engagement for criminal justice.¹⁴⁶ Traditionally, voters can exercise their direct democratic voting rights to approve or disapprove of bonds for prison construction.¹⁴⁷ This activity serves as an important check on prosecutorial conduct by limiting the amount of people that can be incarcerated at any one point.¹⁴⁸ Data in this area is hard to come by, but throughout the 1980s, “an average of 60 percent of all local referenda for jail bonds was rejected.”¹⁴⁹ State legislators can bypass voters on this front, however, by contracting with a private company who invests the capital for construction of the facility and drawing funds for a contract (as long as twenty years in many states) from the state’s general coffers.¹⁵⁰ In this way, private prisons narrow the ability of people to exercise their rights to participate in setting the boundaries of criminal justice spending to only voting for representatives.¹⁵¹ And as discussed above, the concentrated interest of private prison corporations means they will spend large sums of money lobbying and donating to individual legislators to capture their support.¹⁵²

¹³⁹ DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MONITORING OF CONTRACT PRISONS (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf> [<https://perma.cc/LRX3-EN73>]; Memorandum from Jefferson B. Sessions III, Attorney Gen. U.S. Office of the Attorney Gen., to Acting Dir. Fed. Bureau of Prisons (Feb. 21, 2017), https://www.bop.gov/resources/news/pdfs/2017_0224_doj_memo.pdf [<https://perma.cc/K955-88GV>].

¹⁴⁰ See *supra* notes 122–39 and accompanying text.

¹⁴¹ See *supra* notes 73–86 and accompanying text.

¹⁴² Access to Justice, *supra* note 95.

¹⁴³ See *infra* notes 144–52 and accompanying text.

¹⁴⁴ See Lauren-Brooke Eisen, *Private Prisons Lock Up Thousands of Americans with Almost No Oversight*, BRENNAN CTR. FOR JUST. (Nov. 8, 2017), <https://www.brennancenter.org/analysis/private-prisons-lock-thousands-americans-almost-no-oversight> [<https://perma.cc/8G7D-EXEN>].

¹⁴⁵ See *id.*

¹⁴⁶ See *infra* notes 147–52 and accompanying text.

¹⁴⁷ Dana C. Joel, *The Privatization of Secure Adult Prisons: Issues and Evidence*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS* 51, 58 (Gary W. Bowman et al. eds., 1993).

¹⁴⁸ See *id.* at 57.

¹⁴⁹ *Id.* at 58.

¹⁵⁰ See *id.* at 59–60.

¹⁵¹ See *id.* at 58–60.

¹⁵² See *supra* notes 46–67 and accompanying text.

Far from increasing society’s access to justice by removing barriers to exercising individuals’ rights, private, for-profit incarceration tilts the balance of power toward small groups of wealthy and politically connected organizations.¹⁵³

IV. CONCLUSION

Private prisons have not been the panacea promised by corporations responsible for selling their use to government entities. From private local jails to federal prisons, we see rampant prisoner abuse; underqualified and underpaid staff; lack of educational opportunities and rehabilitation programs; and cost savings that vanish on close analysis. If nothing else, privatization creates an unacceptable risk of deprivation of liberty and safety in order to increase profits.

About 30 years ago, the ABA passed Resolution 115B cautiously calling for a moratorium on private prisons while their impact and constitutional dimensions could be evaluated. Since then, we have seen the failure of the industry to deliver on its promises along with larger trends in the carceral state, including: the growth of mass incarceration; powerful political lobbying and campaign spending by private prison corporations; harsher criminal laws and penalties; opposition to sentencing reform and decriminalization by private prison corporations; explosive growth in the use of private prisons and jails by many states and the federal government; diversification of prison corporations into other for-profit services that incentivize keeping peoples’ lives entangled in the criminal justice system (*e.g.*, probation, interlock devices, monitoring services); corruption; private immigration detention; and capture of the American Corrections Association by private industry.

President Biden built on the foundation formed by the 2016 Office of Inspector General report and signed an Executive Order on January 26, 2021, forbidding the Department of Justice from renewing any contracts with for-profit corporations for criminal detention services because his administration “must reduce profit-based incentives to incarcerate by phasing out the Federal Government’s reliance on privately operated criminal detention facilities.”¹⁵⁴ And several states have joined the movement banning private, for-profit corporations from operating prison facilities, including California¹⁵⁵ and Nevada.¹⁵⁶ It is likewise time to update Resolution 115B to reflect these circumstances and call for the end to this industry.

The question is not whether private prisons are good policy, but rather, why does anyone think they are?

Respectfully submitted,

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¹⁵³ See *supra* notes 142–52 and accompanying text; see *supra* Part II.

¹⁵⁴ “Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities,” Exec. Order No. 2021-02070, 86 C.F.R. 7483 [<https://www.federalregister.gov/d/2021-02070>].

¹⁵⁵ California Assembly Bill 32 (2019-2020), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB32]. Note that AB32 has several exceptions that allow the state to use private facilities in some instances, such as under order from a federal court – which was an initial impetus for the state turning to such facilities in the first instance.

¹⁵⁶ Nevada Assembly Bill 183 (2019), [<https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6286/Overview>].

Criminal Justice Section

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