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Eric Gallant

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Eric Gallant

Seton Hall University School of Law

The Constitutionality of the Privatization of the Prison Industry

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I. Introduction

In 2014, the FBI launched an investigation into the private, billion dollar company Corrections Corporation of America (CCA) over the running of an Idaho prison with a reputation of such intense violence that inmates nicknamed the institution “Gladiator School.”¹ The state had been outsourcing a portion of its prison population to CCA, but upon issues with violence and staffing building up, the FBI took over the investigation from the state of Idaho after one year of state investigation indicated potential intentional delay from the state government.² The issue of a private corporation seriously mishandling a prison came to national news when the American Civil Liberties Union proceeded with a class action lawsuit in 2010, alleging that CCA had failed to control prison gangs as a result of understaffing which led to numerous gang related attacks.³ The FBI investigation lasting over a year reviewed all of CCA’s underreporting of personal-hours and found that the corporation was deficient by as much as 26,000 hours in 2012 alone. The FBI maintained an investigation into potential fraudulent reporting of hours when guards were listed as working 48 hours straight to comply with minimum staffing requirements while the ACLU pursued civil remedies, but the facility was returned to state control in 2014.⁴

¹ Boone, Rebecca, *APNewsBreak: FBI Investigates Prison Company*, AP NEWS (Mar. 7, 2014), <https://apnews.com/article/business-prisons-idaho-boise-idaho-statepolice65d206a02a144115a7204da8f708c743>.

² *Id.*

³ *Id.*; see also *Press Release: FBI Concludes Lengthy Investigation of Corrections Corporation of America*, UNITED STATES ATTORNEY’S OFFICE (May 22, 2015), <https://www.justice.gov/usao-id/pr/fbi-concludes-lengthy-investigation-corrections-corporation-america>.

⁴ Boone, Rebecca, *APNewsBreak: FBI Investigates Prison Company*, AP NEWS (Mar. 7, 2014), <https://apnews.com/article/business-prisons-idaho-boise-idaho-state-police65d206a02a144115a7204da8f708c743>; *Press Release: FBI Concludes Lengthy Investigation of Corrections Corporation of America*, UNITED STATES ATTORNEY’S OFFICE (May 22, 2015), <https://www.justice.gov/usao-id/pr/fbi-concludes-lengthy-investigation-corrections-corporation-america> (FBI dropped fraud charges because the findings of reporting fraud was established but not linked to higher management to meet federal criminal fraud charge requirements).

In the year 2021, an estimated 5,444,900 persons were under the supervision of adult correctional systems in the United States and approximately 680 residents per 100,000 were incarcerated.⁵ An early 2000's study found that the United States led the world in prison population, even ahead of China and Russia in terms of percentages.⁶ The primary justification for incarceration is non-violent drug offenses, which make up approximately forty-seven percent of inmates in federal prisons held in Bureau of Prisons (BOP) or privately operated federal institutions.⁷ America has an incarceration problem, but within that issue, numerous for-profit corporations are reaping huge rewards from this prison-industrial complex. In 2021, private for-profit institutions housed fifteen percent of federal inmates and eight percent of federal and state inmates, with states like New Mexico utilizing these corporations to house as much as forty-five percent of their inmate population.⁸ There are a select few private corporations who have effectively monopolized the market and have been able to infect policy making decisions in order to line shareholders pockets with millions of dollars and the only group to suffer is one that has historically possessed limited rights.⁹ This paper will recount how the prison system has developed since colonial times, analyze the judicial body of work covering inmates rights, and present an argument that the legislation and judiciary should reconsider its current stance permitting for-profit prisons to benefit from a corrupted system.

⁵ *Correctional Populations in the United States, 2021*, BUREAU OF JUSTICE STATISTICS (Retrieved June 3, 2023), <https://bjs.ojp.gov/library/publications/correctional-populations-united-states-2021-statistical-tables> (supervision of adult correctional systems includes parole and incarceration).

⁶ Walmsley, Roy, *Global Incarceration and Prison Trends*, UNITED NATIONS OFFICE ON DRUGS AND CRIME: FORUM ON CRIME AND SOCIETY, VOL. 3, NOS. 1 AND 2 (December 2003), https://www.unodc.org/pdf/crime/forum/forum3_Art3.pdf.

⁷ Carson, Ann, *Prisoners in 2021 - Statistical Tables*, U.S. DEPARTMENT OF JUSTICE (Dec. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf>.

⁸ Budd, Kristen M., *Private Prisons in the United States*, THE SENTENCING PROJECT (June 15, 2023), <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/>.

⁹ Neate, Rupert, *Welcome to Jail Ind: How Private Companies make Money Off U.S. Prisons*, THE GUARDIAN (June 16, 2016), <https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit>.

II. History of Private Prisons: From Leasing to Modern Day

To understand the modern-day dynamic between privatized prisons and the state, it is imperative to look back at our nation's founding and the historic models used for incarceration. Prior to the construction of the federal prison system, the states managed inmates at their own discretion with minimal federal overhead nor protections for inmates.¹⁰ The courts reinforced this idea, when the courts held that a former slave who was sent to a labor camp to build railroads for a private company was not entitled to the Constitutional right of a jury of his peers while on trial for a crime committed during his confinement *Ruffin v. Commonwealth*.¹¹ During this period, the Virginia Supreme Court held that prisoners forfeit their rights of the free man once in confinement and become essentially civilly dead.¹²

A. Civil War Era

The concept of profiting from inmates as cheap labor and property to be bought and sold escalated in parallel to the build-up of the civil war. The first private prison from Louisiana was established in 1844, and would use inmates to produce cheap clothes.¹³ These prisons in the south were generally considered a form of plantations, but after the Civil War and establishment of the 13th Amendment, the market monopoly shifted.¹⁴ Seeing opportunity, Samuel Lawrence James purchased a plantation, and modeled a business plan after a trend growing in Mississippi

¹⁰ *History of Corrections in America*, NATIONAL INSTITUTE OF CORRECTIONS (Retrieved Nov. 1, 2023), <https://nicic.gov/resources/nic-library/hot-topics/history-corrections-america>.

¹¹ *Ruffin v. Commonwealth*, 62 Va. 790 (Va. 1871) (Now overturned).

¹² *Id.*

¹³ Bauer, Shane, *The True History of America's Private Prison Industry*, TIME, (September 25, 2018), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/>.

¹⁴ *Id.*

by leasing inmates from the state for \$100,000 for the inmates labor.¹⁵ Between 1870 and 1901, roughly 3,000 Louisiana convicts, who were mostly minorities, died under Samuel Lawrence James' 'supervision' which averaged between 16 to 25 percent annual death rates under his care.¹⁶ Louisiana would eventually become jealous of the profits and ban this leasing practice, which would allow the state to earn approximately \$600,000 annually (Approximately \$18,000,000 in 2023 dollars after adjusting for inflation) from the same prison labor.¹⁷ This was not a unique situation, as between 1880 and 1904, Alabama's profits from the leasing practice compensated ten percent of the state's budget.¹⁸

Just after the civil war, when freed slaves were widely used for cheap labor, a Senator from Georgia was leasing men from the state penitentiary at a rate of \$200 per year each.¹⁹ This was not just an issue for males, as Talitha LeFlouria recounted the experience of African American women prisoners who worked away on domestic and agricultural work, brick making, mining, and more during the 'post-emancipation' era.²⁰ While less of the population, women were also subject to forced labor in different roles but with the same standard of living deficiencies and hour requirements.²¹ Of the more than 2,000 felons detained in Georgia's private lease camps between 1886 and 1908, approximately ninety percent were black men,

¹⁵ Bauer, Shane, *The Origins of Prison Slavery*, BUNKHISTORY VIA SLATE (Oct. 2, 2018), <https://www.bunkhistory.org/resources/the-origins-of-prison-slavery>.

¹⁶ Bauer, Shane, *The True History of America's Private Prison Industry*, TIME, (September 25, 2018), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ LeFlouria, Talitha, "*The Hand that Rocks the Cradle Cuts Cordwood*": *Exploring Black Women's Lives and Labor in Georgia's Convict Camps, 1865-1917*, LABOR: STUDIES IN WORKING-CLASS HISTORY OF THE AMERICAS, VOLUME 8, ISSUE 3, DOI 10.1215/15476715-1275235 https://www.academia.edu/4851059/47_The_Hand_that_Rocks_the_Cradle_Cuts_Cordwood_Exploring_Black_Womens_Lives_and_Labor_in_Georgias_Convict_Camps_1865_1917.

²⁰ *Id.*

²¹ *Id.*

seven percent white men, and three percent black women.²² In June 1869, when all 393 state prisoners held at Georgia state penitentiary were leased out to the firm Grant, Alexander, & Company for two years, they were not even obligated to pay the state; the firm simply had to supply food, clothing and shelter and were able to reap the profits derived from that labor.²³ This practice of leasing transitioned America's slavery practice into legalized state outsourcing of labor with a lack of care for incarcerated individuals. Death rates were considerably high, and quality of care was low, and it can only be concluded that inmate lives were a cost of doing business to these companies.²⁴

B. Modern Day

The federal prison system was established in 1891 with the "Three Prisons Act" which created USP Leavenworth, USP Atlanta, and USP McNeil Island, which were given oversight by the Department of Justice.²⁵ However, the Bureau of Prisons was not established within the Department of Justice until 1930 with the explicit focus of managing and regulating the Federal penal and correctional institutions.²⁶

The modern private prisons began to first emerge in 1984 when Corrections Corporation of America (CCA), which was renamed to CoreCivic in 2016, began by operating a county jail and juvenile detention center immigration detainees facility in Tennessee.²⁷ CCA operated for-

²² *Id* at p. 54.

²³ *Id* at p. 55.

²⁴ Bauer, Shane, *The True History of America's Private Prison Industry*, TIME (September 25, 2018), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/>.

²⁵ *History of Corrections in America*, NATIONAL INSTITUTE OF CORRECTIONS (Retrieved Oct. 30, 2023), <https://nicic.gov/resources/nic-library/hot-topics/history-corrections-america>.

²⁶ *Id*.

²⁷ Mattera, Phil; Khan, Mafruza, *Jail Breaks: Economic Development Subsidies Given to Private Prisons*, GOOD JOBS FIRST (October 2001), <https://www.goodjobsfirst.org/wpcontent/uploads/docs/pdf/jailbreaks.pdf>

profit and their stock exploded with annual revenues rising from \$14 million in 1986 (the year it became public) to more than \$55 million in 1990 and then to \$120 million in 1994 when it moved to the New York Stock Exchange.²⁸ Before founding CCA, Terrell Don Hutto made his fortune operating a cotton plantation in the 1960s, and the company is now estimated to be worth \$1.8 billion operating prisons nationwide.²⁹

In modern day, prisons have become a pivotal issue in political circles, as the Biden administration aimed to reduce the hold private prison companies have on incarceration.³⁰ Under Trump's administration from 2017 to 2021, 81 percent of people detained by ICE were held in facilities owned or operated by private prison corporations.³¹ Despite campaign promises, in 2023, 90.8 percent of people detained in ICE custody were held in detention centers owned or operated by private prisons.³² CoreCivic (previously CCA) received \$552.2 million in revenue from just their ICE detention contracts in 2022; but GEO Group made \$1.05 billion in revenue from such ICE contracts in 2022 out of Congress's total \$2.9 billion which was appropriated³³ The creation of more and more facilities establishes a continuing need to rely on such institutions. When the contract with GEO Group for Clearfield County ended in 2021, the correctional center closure would have resulted in 300 jobs lost and a tax revenue hit for the local area which created incentive to maintain use of the facility and ensured GEO Group would retain

²⁸ *Id.*

²⁹ Bauer, Shane, *The True History of America's Private Prison Industry*, TIME, (September 25, 2018), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/>.

³⁰ Cho, Eunice, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years into the Biden Administration*, AMERICAN CIVIL LIBERTIES UNION (Aug. 7, 2023), <https://www.aclu.org/news/immigrants-rights/unchecked-growth-private-prison-corporations-and-immigration-detention-three-years-into-the-biden-administration#:~:text=Private%20prison%20corporations%2C%20like%20the,prison%20companies%20for%20immigration%20detention.>

³¹ *Id.*

³² *Id.*

³³ *Id.*

income under contract for another five years as an ICE detention center rather than state county prison.³⁴ While ICE detention centers house individuals who do not share the same rights as natural American citizens when considering Constitutional claims, it is imperative to follow the money on how these companies maintain cash-flow and **how** they decide to spend that money.

C. Lobbying

During the 2016 election cycle, private prisons gave \$1.6 million to candidates with the majority coming from GEO Group who donated \$1.36 million.³⁵ This number only rose in the 2020 election cycle when private prison PACs gave \$2.1 million to candidates, with CoreCivic providing the majority with \$1.84 million in donations.³⁶ The majority of these donations went to Republican candidates, with the consensus being that private prisons dominate in red states, but it should be noted specific candidates receiving large donations preside over districts in which CoreCivic and GEO Group had active litigation in.³⁷ For example, substantial donations went to former Senator Corey Gardner (R) of Colorado where CoreCivic and GEO Group were fighting a class-action lawsuit, where the plaintiffs alleged that GEO Group was forcing 50,000 immigrants to work without pay or for \$1 per day since 2004.³⁸

³⁴ Xian, Min, *A New Immigrant Detention Center Will Open in Former Clearfield County Prison*, WPSU (Sept. 30, 2021), <https://www.wesa.fm/courts-justice/2021-09-30/a-new-immigrant-detention-center-will-open-in-former-clearfield-county-prison>.

³⁵ *For Profit Prisons*, OPENSECRETS, (Retrieved Oct. 29, 2023), <https://www.opensecrets.org/industries/indus.php?ind=G7000>.

³⁶ *Id.*

³⁷ Lurie, Julia, *Private Prisons Have Spent More on This Election Than Any Other in History*, MOTHER JONES (Oct. 11, 2020), <https://www.motherjones.com/politics/2020/10/private-prisons-have-spent-more-on-this-election-than-any-other-in-history/>.

³⁸ *Menocal et al v. The GEO Group, Inc.*, Docket No. 1:14-cv-02887 (D. Colo., Oct 22, 2014) (The lawsuit also alleged that, “for no pay whatsoever,” the inmates were forced to clean the housing pods under threat of being put in solitary confinement for “refusing to work”); *see also* Pauly, Madison, *How a Private Prison Company Used Detained Immigrants for Free Labor*, MOTHER JONES (April 3, 2017), <https://www.motherjones.com/politics/2017/04/geo-forced-labor-lawsuit/>.

One of the leading states for placing prisoners in private prisons was Florida, which had fifteen percent of the total state prison population in for-profit institutions in 2021.³⁹ Senator Ron DeSantis (R) accepted \$100,000 from GEO Group and their CEO George C. Coley in 2018.⁴⁰ At the time, DeSantis was a potential front-runner for the Republican party if Trump would fail to receive the nomination, and both Trump and the Republican party had proved to be extremely friendly to the private prison companies unlike some states which have become increasingly defensive against for-profit prisons.⁴¹ For example, California has phased out private prisons when they held approximately 4,000 inmates but no longer allow such facilities in the state.⁴² However, GEO Group has maintained numerous lawsuits against Governor Newsom as he has attempted to limit their capacity to operate ICE detention centers in the state. In *GEO Grp., Inc. v. Newsom*, GEO Group had attempted to invoke the Supremacy Clause to fight California's initiatives to stop allowing ICE facilities as well as the private prison bans.⁴³ However, this was not GEO Group's last encounter with Governor Newsom, as in *Geo Grp. Inc. v. Newsom*, the 9th Circuit found that since state law was giving the state power to review ICE's determination of appropriate places of detention, ICE was likely to prevail on its Supremacy Clause challenge.⁴⁴ These recent developments point to the fact that even when state's attempt to limit the power these private companies have in their own state, the federal government may

³⁹ Budd, Kristen M., *Private Prisons in the United States*, THE SENTENCING PROJECT (June 15, 2023), <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/>.

⁴⁰ Wolf, Colin, *Ron DeSantis just accepted \$100k from the GRO Group, a Controversial Florida-based Private Prison Giant*, ORLANDO WEEKLY (Aug. 17, 2018), <https://www.orlandoweekly.com/news/ron-desantis-just-accepted-100k-from-the-geo-group-a-controversial-florida-based-private-prison-giant-17272961>.

⁴¹ *Id.*

⁴² Budd, Kristen M., *Private Prisons in the United States*, THE SENTENCING PROJECT (June 15, 2023), <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/>.

⁴³ *GEO Grp. Inc. v. Newsom*, 2022 U.S. Dist. LEXIS 18479 *4 (E.D. Cal., 2022)

⁴⁴ *Geo Grp. Inc. v. Newsom*, 50 F.4th 745 (9th Cir. 2022) (9th Circuit vacated the district court's denial of GEO Group's preliminary injunctive relief claim and remanded for further proceedings).

exert substantial control over who is allowed to operate detention centers and more importantly, how and where.

D. Corporations and the States

As of 2021, Nevada, California, Illinois, New York, and Washington are the first wave of states to ban for-profit detention centers through legislation for American citizens (does not include immigrant detention centers).⁴⁵ However, through practice, Arkansas, Connecticut, Delaware, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, Oregon, Rhode Island, Utah, West Virginia, and Wisconsin had zero private prison inmates as of 2021.⁴⁶ New Jersey has made moves to ban private prisons from a campaign started by activists and even went so far as to ban quasi-confinement institutions like halfway houses to only permit nonprofit groups from operating such facilities.⁴⁷ However, President Biden has sided with CoreCivic to extend their contract in New Jersey with ICE by filing a brief in support of CoreCivic's use of detention facilities.⁴⁸

According to financial reports from 2021, GEO Group owns or manages 53 prisons and jails, making it second behind CoreCivic who focuses more on immigration detention centers, with 15 prisons or jails under contracts with county or state prison authorities and 12 under

⁴⁵ La Corte, Rachel, *Washington State Governor OKs Bill Banning For-Profit Jails*, AP NEWS (Apr. 14, 2021), <https://apnews.com/article/legislature-prisons-washington-legislation-immigration-ceda36fec7dfc3a56c8fe8f7a66d3d76>.

⁴⁶ Budd, Kristen M., *Private Prisons in the United States*, THE SENTENCING PROJECT (June 15, 2023), <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/>.

⁴⁷ Dolnick, Sam, *Halfway Houses Prove Lucrative to Those at Top*, THE NEW YORK TIMES (Dec. 29, 2012), <https://www.nytimes.com/2012/12/30/nyregion/operator-of-new-jersey-halfway-houses-paid-millions-to-founder.html#:~:text=Under%20New%20Jersey%20law%2C%20only,Jersey%20has%20long%20been%20troubled>.

⁴⁸ United States of America's Statement of Interest in Support of Plaintiff's Preliminary-Injunction Motion, Case No.: 3:23-CV-00967-RK-TJB. https://www.documentcloud.org/documents/23881937-20230719_doj_statementofintent

contract with the BOP or Marshall Services.⁴⁹ These private prisons' business model hinges on being able to offer a daily rate per inmate that would be less expensive than the state alternative.⁵⁰ In addition to some states offloading their incarceration obligations, some states have begun moving towards offloading other services, such as healthcare, in the government's practice of taking the lowest bid.⁵¹ As of 2021, approximately 96,000 of the nation's 1.2 million inmates were inside private prisons, which is approximately eight percent of all inmates and fifteen percent of the federal inmate population.⁵²

E. Private Corporations' Revenue

While the majority of the money comes from government contracts, GEO Group profits immensely from their inmates "working." While some inmates are allotted 'salaries' as little as 50 cents per day, other inmates are participating in "community service" work programs.⁵³ These work programs are unpaid labor which can illuminate as to how unjust this practice is by viewing GEO Group's New Mexico prisons' handbook.⁵⁴ "Failing to report to work" qualifies as "Escape Without Force" which is the equivalent of failing to return to official custody or removing oneself from the confines of the institution and qualifies as a Category "A" Offense.⁵⁵

⁴⁹ *The GEO Group Inc*, INVESTIGATE: AFSC, <https://investigate.afsc.org/company/geo-group#:~:text=As%20of%202021%2C%20GEO%20owns,people%20using%20electronic%20monitoring%20technologies>.

⁵⁰ *Id.*

⁵¹ Neate, Rupert, *Welcome to Jail Ind: How Private Companies make Money Off US Prisons*, THE GUARDIAN (June 16, 2016), <https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit>.

⁵² Budd, Kristen M., *Private Prisons in the United States*, THE SENTENCING PROJECT (June 15, 2023), <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/>.

⁵³ Urbina, Ian, *Using Jailed Migrants as a Pool of Cheap Labor*, THE NEW YORK TIMES (May 25, 2014), <https://www.nytimes.com/2014/05/25/us/using-jailed-migrants-as-a-pool-of-cheap-labor.html>.

⁵⁴ *Guadalupe County Correctional Facility Inmate Handbook*, GEO GROUP (February 10, 2014), [https://www.law.umich.edu/special/policyclearinghouse/Documents/NM%20Handbooks%20\(1\).pdf#page=27](https://www.law.umich.edu/special/policyclearinghouse/Documents/NM%20Handbooks%20(1).pdf#page=27).

⁵⁵ *Id.* at p. 26.

This offense would allow the prison officials to punish an individual by (a) loss of privileges up to 365 days, (b) punitive segregation up to 365 days, and/or (c) loss of **all** good time earned.⁵⁶ As of 2023, an ACLU complaint against GEO Group's three Arizona facilities likening their inmate work practices to slavery is still pending.⁵⁷ The threat of punishment, extended to include encouraging others to refuse to work per the handbook, comes from GEO Group's discretion to require 365 hours of unpaid community work at several of the facilities.⁵⁸ GEO Group has boasted on their own site that New Castle Correctional Facility (Indiana) work crews logged 24,349 hours of labor in 2017 which would have totaled \$176,000 at a state minimum-wage rate, but these are not court order community service hours, this derives from the prison being allowed to require unpaid work from their inmates and collect the windfall of tax relief.⁵⁹

It is evident that operating private prisons can be extremely lucrative, it has been shown on numerous occasions that profit is not made simply through labor but cutting costs. For example, in *Carranza-Reyes v. Park County Bd. of County Comm'rs*, the court reviewed the defendant's motion for summary judgment after the plaintiff was held in custody by the immigration authorities.⁶⁰ United States Immigration and Naturalization Services (INS) contracted with the jail to provide temporary housing to certain INS detainees in exchange for payment, one of which being the plaintiff in this case.⁶¹ While under Park County's care, the plaintiff became severely ill, ultimately causing amputation of a leg and other residual damage to

⁵⁶ *Id* at p. 34 (Good Time Earned can contribute to early release but is conditioned upon minimal internal infractions).

⁵⁷ Class Action Complaint for Declaratory and Injunctive Relief. Case 2:20-cv-01182-GMS-JZB (Filed June 15, 2020), <https://clearinghouse.net/doc/109775/>.

⁵⁸ Weik, Travis, *Inmates Develop Work Ethic, Help Henry County*, GEO GROUP (May 3, 2018), <https://www.geogroup.com/News-Detail/NewsID/495>.

⁵⁹ *Id.*

⁶⁰ *Carranza-Reyes v. Park County Bd. of County Comm'rs*, 2007 U.S. Dist. LEXIS 60495 (D.C. Colo. 2007).

⁶¹ *Id* at *3.

his health.⁶² The plaintiff never received a handbook in their language of Spanish which would have included information on how to receive medical attention, but furthermore, the prison suffered from serious plumbing issues where showering was impossible, the toilets were consistently backed up, sanitation inspections were delegated and neglected, the medical screening policy was not followed, no infection control program was implemented, and other issues but INS failed to remedy the issues.⁶³ Major issues arose when one of the defendants, Captain Gore, had no policy limiting the number of detainees the Jail would accept from INS, and the Sheriff was aware the detainees slept on the floor of the pod when the bunks were filled.⁶⁴ Major problems persisted from overcrowding to minimal healthcare to lack of sanitation, but this is not an isolated incident when company profits reward minimal care to inmates.⁶⁵

While it could be theorized that differences in care is only an issue of lacking oversight, when the entire justification for allowing a prison to operate for-profit is to save money, the government should be spending less through these contracts. However, in Georgia, an audit from 2018 has shown that State prisons actually operate at a cheaper cost compared to their for-profit counterparts.⁶⁶ State prisons in Georgia, which was suffering from one of the nation's worst incarceration rates per capita, costs about \$44.56 per day, but the four private prisons cost the state \$49.07 per day for similar inmates.⁶⁷ While Georgia's governor promised to investigate

⁶² *Id.*

⁶³ *Id.* at *5-8.

⁶⁴ *Id.*

⁶⁵ *Id.* at *50-52 (District Court dismissed the claim for failure to provide a translator as an equal protection violation and inadequate medical care claims against the Park County Board Commissioners but allowed the claim against the defendant medical provider for inadequate medical care and negligence as well as inhumane conditions of confinement against the Commissioners to proceed).

⁶⁶ *Audit: Private Prisons Cost More than State-Run Prisons*, AP NEWS (Jan. 1, 2019), <https://apnews.com/general-news-af7177d9cce540ab9f2d873b99437154>.

⁶⁷ *Id.*

this issue, expansive research has shown that privately operated prisons offer no better recidivism rates and data shows they are likely not a cheaper option for states across the board.⁶⁸ Another 2011 audit found that medium-security state inmates in Arizona cost 8.7 percent less per day than those in private prisons.⁶⁹ While it is clear that the contracts do not substantially save the government money as promised, the BOP provides such little oversight as to how private institutions spend money that it is unclear where expenses are going without performing individual in-depth accountings of private prisons because the Federal BOP provides prison contracts at fixed prices that do not change based on resources or time expended by the contractors.⁷⁰

III. Case Law Treating the Private and Public Institutions Different

A. *Bivens* and Section 1983

One of the key differences in how the judiciary treats private prisons versus public prisons is how an inmate can seek relief after being subject to an Eighth Amendment violation. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* coined the term “*Bivens* action” in which the Supreme Court held that a violation of one’s Constitutional rights by federal officers can give rise to a federal cause of action for damages when that officer is acting under

⁶⁸ Bales, William D., et al., *Recidivism of public and private state prison inmates in Florida*, CRIMINOLOGY & PUBLIC POLICY 4.1: 57-82 (2005) NCJ: 205465; *see also* Pratt, Travis C., and Jeff Maahs. “*Are Private Prisons More Cost-Effective Than Public Prisons? A Meta-Analysis of Evaluation Research Studies*,” CRIME & DELINQUENCY, vol. 45, no. 3, (July 1999), <https://journals.sagepub.com/toc/cadc/45/2>.

⁶⁹ Oppel Jr., Richard, *Private Prisons Found to Offer Little in Savings*, THE NEW YORK TIMES (May 18, 2011), <https://www.nytimes.com/2011/05/19/us/19prisons.html#:~:text=Despite%20a%20state%20law%20stipulating,do%20in%20state%20run%20prisons>.

⁷⁰ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL, p. 11 (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

the color of federal authority.⁷¹ *Bivens* actions can be pursued against the federal government for violations of Constitutional rights, but Federal statute 42 U.S.C. § 1983 allows individuals to sue state and local governments for violations of federal law or the U.S. Constitution. However, this form of recovery against federal officials is not available to every inmate in America. Prisons have been a historically under-regulated government function, with the idea that prison safety, as the legitimate government interest, entitles the prison administrators to broad discretion in ensuring prison safety.⁷² The Eighth Amendment serves as a baseline, with the line “. . . nor cruel and unusual punishments inflicted” serving as the reference in which the court has interpreted the meaning of what inmates are entitled to.⁷³ The strange difference in treatment is evident by the fact that *Bivens* actions can only be pursued against state institutions, not private prisons, but 42 U.S.C. § 1983 has been allowed to pursue claims against private prisons operating under the state.⁷⁴

The Supreme Court reviewed the question of if private prison guards would be entitled to qualified immunity under 42 U.S.C.S. § 1983 as public institution prison guards are in the case of *Richardson v. McKnight*.⁷⁵ In this case, privately employed prison guards appealed a decision which denied their motion to dismiss an inmate’s tort action against them.⁷⁶ The Supreme Court first found that prison guards in private prisons would not be entitled to qualified immunity, unlike guards for government institutions, and the court acknowledges that the bottom line

⁷¹ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (*Bivens* specifically held regarding the 4th Amendment but these actions have been extending to 8th Amendment violations as well; decided 5-4).

⁷² *See Rhodes v. Chapman*, 452 U.S. 337 (1981) (Court held that housing two inmates in a single cell was not cruel and unusual punishment and prison’s main objective was security over inmate quality of life).

⁷³ U.S. CONST. AMEND. VIII.

⁷⁴ *See generally Richardson v. McKnight*, 521 U.S. 399 (1997) [and] *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

⁷⁵ *Richardson v. McKnight*, 521 U.S. 399 (1997).

⁷⁶ *Id.*

incentives for private prisons are profit and competition with the market rather than a standard of care the government would be required to maintain.⁷⁷ Justice Breyer delivered the majority opinion and wrote “It must buy insurance sufficient to compensate victims of civil rights torts. . . . And, since the firm's first contract expires after three years, . . . its performance is disciplined, not only by state review, . . . but also by pressure from potentially competing firms who can try to take its place (citations omitted).”⁷⁸ The Court found that because for-profit private firms are organized to assume a major administrative task with limited direct government supervision, plaintiffs may seek a 42 U.S.C.S. § 1983 claim against private prisons without needing to overcome qualified immunity defenses.⁷⁹ This decision’s inconsistent basis for holding out private institutions different from public prisons is echoed in Justice Scalia’s Dissent which called into question why the settled practice of determining immunity on the basis of the “public function” test wasn’t written into the majority.⁸⁰ Immunity analysis has traditionally been based on functional categories of the defendant and the nature of the responsibilities of the individual officers.⁸¹ This understanding of private prison employees strayed from traditional understanding of government contractors in the prison system, and continued to create a unique classification that treated for-profit prisons differently in subsequent cases. The Court permits individuals to pursue 42 U.S.C.S. § 1983 claims against private prisons, but when it comes to *Bivens* actions, inmates are restricted in private prisons.⁸²

When the former inmate, Malesko, sued the quasi-prison (halfway-house) for negligence, the Supreme Court in *Corr. Servs. Corp. v. Malesko* found that the *Bivens* action could not

⁷⁷ See 521 U.S. 399, 418.

⁷⁸ 521 U.S. 399, 410.

⁷⁹ See 521 U.S. 399, 400.

⁸⁰ 521 U.S. 399, 414 (Scalia, A., Dissenting).

⁸¹ *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985); see also *Butz v. Economou*, 438 U.S. 478 (1978).

⁸² 521 U.S. 399, 410; See also *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001).

proceed against a private corporation under contract with the federal Bureau of Prisons BOP because state law allowed ‘effective’ remedies against the corporation under the BOP remedies available.⁸³ The Court cites *FDIC v. Meyer* when they found that the action should be dismissed because the purpose of *Bivens* actions were to deter individual federal officers, not the agencies, from committing constitutional violations.⁸⁴ The court determined that the threat of suit against an individual’s employer was not the form of deterrence contemplated by *Bivens*.⁸⁵ The clear issue with this line of reasoning is that the court is pushing the problem onto state tort law as a form of deterrence from parallel-Eighth Amendment violations. However, if the court considered the principles of what drives the for-profit institutions, it can be concluded that any violations of state law remedies, which will vary based on location, can be considered as a ‘cost of doing business’ when private prison management is managing costs. Furthermore, by looking at the states that are more for-profit prison friendly and making the connection to political campaign donations, it is a serious risk that lobbying can influence the states to implement less inmate friendly remedies and procedures. Moreover, allowing the standard to be state law, rather than the established Eighth Amendment rights, creates the vacuum of substantially different treatment of inmates for vindicating Constitutional violations and treats inmates differently depending on what location they are incarcerated in. Unlike differences in sentencing guidelines or procedural requirements for crimes, this treatment calls into question the Equal Protection Clause because, while not a suspect class, the Supreme Court will still provide rational basis review when considering the difference in treatment of a class of people.⁸⁶

⁸³ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001).

⁸⁴ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001) (citing *FDIC v. Meyer*, 510 U.S. 471 (1994) (The Court held that the intent of *Bivens* actions were to deter individual actor’s conduct and reaching the agency overseeing the individual actor would not deter future conduct)).

⁸⁵ 534 U.S. 61, 67.

⁸⁶ U.S. CONST. AMEND. XIV; *but see Romer v. Evans*, 517 U.S. 620 (1996).

The Supreme Court further reviewed the private prison question liability in *Minneeci v. Pollard*, where a prisoner in a privately operated federal prison brought an action in federal court against petitioner prison employees alleging that the employees deprived the prisoner of adequate medical care.⁸⁷ The *pro se* petitioner-prisoner, Pollard, argued that federal law should control based on the vagaries of different states' laws, and that the state law remedies did not provide protection based on federal constitutional rights.⁸⁸ The Court reviewed the allegations that, for visiting an outside clinic for assessment and treatment of two fractured elbows, the prison guards forced him to wear restrictive jumpsuits causing "pain;" was forced to wear arm restraints; failed to provide necessary splints, physical therapy, and necessary studies; failed to make alternative arrangements for Pollard to receive meals while in casts; deprived him of basic hygiene care where he could not bathe for two weeks; provided insufficient pain medicine and pain management; and was forced to return to work before his injuries had healed resulting in exacerbated medical issues.⁸⁹ The Supreme Court reversed the Ninth Circuit's ruling that allowed the *Bivens* action against GEO Group⁹⁰ The Supreme Court went through a two-step analysis: (1) if there is any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new remedy and (2) even in the absence of an alternative, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed to any special factors counseling hesitation before authorizing a new kind of federal litigation.⁹¹ The Court decided that because state law provided an alternative process

⁸⁷ *Minneeci v. Pollard*, 565 U.S. 118 (2012).

⁸⁸ *Id* at 120.

⁸⁹ *Id* at. 122.

⁹⁰ *Pollard v. The GEO Group, Inc.*, 607 F.3d 583, 603 (9th Cir. 2010).

⁹¹ *Minneeci v. Pollard*, 565 U.S. 118, 123 (2012); *See also Bush V, Lucas*, 462 U.S. 367, 378 (1983).

capable of remedying the injury, and in doing so failed to extend the holding in *Carlson v. Green* which found that when a state survival statute abated a *Bivens* action, federal common law allowed the survival of the action in the absence of Congress providing an alternative remedy explicitly declared to be a substitute for recovery.⁹² In *Carlson*, an action that would be defeated under federal tort law was allowed to proceed because the primary objective of *Bivens* claims is the deterrence of similar violations but the court notes that in *Bivens* claims, the managing authorities are motivated by concern for Government's integrity as well as acting in accordance with the Constitution.⁹³ However, the failure to extend *Carlson*'s more encompassing understanding of recovery only creates the question of why the Court fails to allow *Bivens* actions against private institutions. The Court has noted distinct motivations for private and state prisons to comply with the Constitutional protections, but it is clear that private prisons make extraordinary profits and can fail to maintain the level of care expected of a government contractor resulting in the inmates suffering in more ways than one.

B. Prison Litigation Reform Act and Recovery

One important note about prison litigation is the legislative action of Congress when the Prison Litigation Reform Act (PLRA) was passed in 1996.⁹⁴ The act aimed to cut down on prison litigation by ensuring that all administrative avenues of redress were entertained before the courts would hear complaints.⁹⁵ The act essentially conditioned court access on exhausting all prisons' administrative remedies as well as imposing a filing fee to exclude prisoners from the

⁹² *Minneeci v. Pollard*, 556 U.S. 118, 125 (2012); see *Carlson v. Green*, 446 U.S. 14, 16 (1980).

⁹³ *Carlson v. Green* 446 U.S. 14, 21 (1980).

⁹⁴ 18 U.S.C. § 3626.

⁹⁵ 142 CONG. REC. S2285-02 at S2298 (Mar. 19, 1996).

ability to file without payment of fees which was previously available in many cases.⁹⁶

However, the act does permit escalation of claims in the case of futility in internal grievance reporting.⁹⁷ Furthermore, two of the major limitations was a cap on defendants' liability for attorneys' fees in civil rights cases, based on 150 percent of the rate paid to a publicly-appointed defense counsel, and making population caps far more difficult to obtain through injunctive relief.⁹⁸

Initially, it may seem beneficial to private prison inmates to have the protections of the PLRA, as state governmental immunity statutes with restrictions on damages are not applicable and even a state law action removed to federal court is not a "federal civil action" within the meaning of the PLRA, thus not invoking its principles.⁹⁹ One crossroads is how in a *Bivens* suit, the plaintiff may seek punitive damages against the *Bivens* defendant in a *Bivens* action.¹⁰⁰ However, some states have set such limits on punitive damages, even in wrongful death claims when brought pursuant to state law rather than via *Bivens*.¹⁰¹ Furthermore, under federal common law, the defendants could be held to joint and several liability, where some states do not give such benefit and could limit recovery through only applying several liability or a modified form of joint and several liability.¹⁰² While the Supreme Court may liken state tort to an equally

⁹⁶ 28 U.S.C. 1915(b); 42 U.S.C. 1997e(a); *but see Ross v. Blake*, 578 U.S. 632 (2016) (Supreme Court permits waiver of the exhaustion of administrative requirements when it was determined that there was evidence indicating that grievances were routinely dismissed when parallel internal investigations were pending and the prison's grievance process appeared to be inconsistent and somewhat bewildering).

⁹⁷ *Id.*

⁹⁸ 42 U.S.C. 1997e(d)(2)-(3); 18 U.S.C. 3626(a)(3).

⁹⁹ *Richardson v. McKnight*; *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1315 (11th Cir. 2002).

¹⁰⁰ *Carlson v. Green*, 446 U.S. 14, 22 (1980).

¹⁰¹ *See, e.g., Jackson v. Marsh*, 551 F. Supp. 1091 (D.C. Colo. 1982) (now recoverable under Colorado's revised wrongful death statute with limitations).

¹⁰² *Compare Hardy v. McMullan*, 612 So.2d 1146 (Ala. 1992) [and] 10 Del. C. § 6302 with C.G.S.A. § 52-572h (1986) (Two states offering joint and several tort liability compared with one state example of a pure several liability jurisdiction).

effective remedy, the individuals subject to state tort actions who may seek redress may never be actually redressed when the availability for more comprehensive judgments is limited to those allowed to proceed with *Bivens* actions.

One of the confounding principles of prison litigation is the Court's holding in *West v. Atkins*, where the court found that a private contracting physician in a public institution acted under color of state law for purposes of 42 U.S.C.S. § 1983.¹⁰³ Color of law has been traditionally defined as when the defendant has exercised power "possessed by virtue of state law and made possible only 'because the wrongdoer is clothed with the authority of state law.'"¹⁰⁴ Justice Blackmun's majority opinion stated "Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights."¹⁰⁵ Using the similar comparison, the courts found that private guard's actions were under the color of law simply by "performing a traditional state function" by working at the prison.¹⁰⁶ However, despite this established understanding that private contractors acting in public institutions are acting under the color of law and subject to 42 U.S.C.S. § 1983, the Court does not recognize private prisons as within the scope of *Bivens* actions.¹⁰⁷

IV. Differences of Life in a Private Prison

¹⁰³ *West v. Atkins*, 487 U.S. 42, 44 (1988) (Court distinguished from *Polk County v. Dodson*, 454 U.S. 312 (1981) where the Court held that public defenders do not act under the color of law, because while being employed by the state their interests are counter to the prosecution and thus counter to the state).

¹⁰⁴ *West v. Atkins*, 487 U.S. 42, 49 (1988) (citing *United States v. Classic*, 313 U.S. 299, 326 (1941))

¹⁰⁵ *West*, 487 U.S. at 56 (1988).

¹⁰⁶ *Giron v. Corrections Corporation of America*, 14 F. Supp. 2d 1245, 1248 (D.N.M. 1998) (The Court denied the defendant's motion for summary judgment in a case involving a guard raping an inmate); see also *Skelton v. PriCor, Inc.*, 963 F.2d 100 (6th Cir. 1991).

¹⁰⁷ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

A. Quality of Life

In theory, private prisons could offer the state a valuable service by providing the same function at a reduced cost. However, in its brief modern history, it has been shown that the money saved by the government is minimal, if any, and the quality of life is significantly worse in for-profit institutions compared to their state counterparts. The first important consideration to look at to understand where the profits derive from is to analyze the cost-cutting done by these private companies. When it comes to prison staff, a study reviewing data from the Criminal Justice Institute in the years 1998 and 2000 found that private prisons paid \$0.38 less per hour on average, or approximately \$14,900 less per year, and required 58 fewer hours of training prior to service than public prisons.¹⁰⁸ The salary and working conditions contribute to private sector prisons facing a much higher employee turnover rate, with New Mexico, which is home to a substantial private prison industry, saw turnovers for private prisons averaged at 43 percent compared to 15 percent for public prisons.¹⁰⁹ This disparity came to light publicly in New Mexico, when prison corporations were rarely facing fines for contract violations regarding understaffing.¹¹⁰ While serving as New Mexico's corrections secretary (and having worked for GEO Group before *and* after his tenure in Government), Joe Williams faced extreme public scrutiny for failing to collect and enforce understaffing fines worth over \$1 million at Lea County Correctional Institute.¹¹¹ More and more events have brought to light issues that have

¹⁰⁸ Blakely, Curtis and Bumphus, Vic. *Private and Public Sector Prisons – a Comparison of Select Characteristics*, U.S. COURTS (June 2004), https://www.uscourts.gov/sites/default/files/fed_probation_june_2004.pdf.

¹⁰⁹ Davis, Bella, *Push to End Private Prisons Stymied by Concerns for Local Economies*, NEW MEXICO IN DEPTH (Feb. 26, 2021), <https://nminddepth.com/2021/push-to-end-private-prisons-stymied-by-concerns-for-local-economies/>.

¹¹⁰ *Id.*

¹¹¹ *Id.*; see also State of New Mexico: Report of the Legislative Finance Committee to the Fiftieth Legislature First Session (January 2011), https://nmlegis.gov/entity/lfc/documents/session_publications/budget_recommendations/2012recommendvoli.pdf.

brought more attention and pressure as the Office of the Inspector General audits Federal BOP contracts. For example, in December of 2008 and January of 2009, when the Reeves County Detention Center had riots, the Office of the Inspector General's audit concluded that "while low staffing levels alone were not the direct cause of the disturbances, they directly affected Security and Health Services functions."¹¹² Unfortunately, this standard of treating employees poorly is just one side of the substandard treatment of individuals inside private prison walls.

B. Court Access

Taking a step back, one of the issues with the mistreatment of inmates is the ability to effectively plead issues. However, the starting point for analysis is already incredibly difficult for inmates to be heard by the court, likely exacerbated by their commonly *pro se* status.¹¹³ A comprehensive Cambridge study analyzing claims between publicly traded prisons and state prisons between 1986 to 2016 found that those incarcerated in private prisons were more likely to complain about lack of access to legal materials.¹¹⁴ Furthermore, that same study found that per capita, the number of inmate lawsuits in private prisons was significantly lower over time, with an average of 154 lawsuits per 100,000 inmates in private prisons compared to more than 778 lawsuits per 100,000 inmates in public facilities from 1985 to 2016.¹¹⁵ However, the PLRA

¹¹² DOJ OIG, *Audit of the Federal Bureau of Prisons Contract No. DJB1PC007 Awarded to Reeves County, Texas, to Operate the Reeves County Detention Center I/II, Pecos, Texas*, Audit Report 15-15 (April 2015), <https://oig.justice.gov/reports/2015/a1515.pdf>.

¹¹³ Gunderson, Anna, *Ideology, Disadvantage, and Federal District Court Inmate Civil Rights Filing: The Troubling Effects of Pro Se Status*, JOURNAL OF EMPIRICAL LEGAL STUDIES 18 (3): 603-628 (Sep. 13, 2021), <https://onlinelibrary.wiley.com/doi/abs/10.1111/jels.12290>.

¹¹⁴ Gunderson, Anna, *Inmate Litigation, Legal Access, and Prison Privatization*, CAMBRIDGE UNIVERSITY PRESS (Dec. 27, 2022), <https://www.cambridge.org/core/journals/journal-of-law-and-courts/article/inmate-litigation-legal-access-and-prison-privatization/FB0D36EBB3398D68AD9ACADB42D9C2FD>.

¹¹⁵ *Id.*

requires the exhaustion of in-house remedies before bringing such grievances to court; most state contracts with private prisons require in-house grievance policies to adhere to federal regulations setting forth procedures for receiving formal review of issues.¹¹⁶ Despite the data that suggest private prisoners reach court less, the Officer of Inspector General published a report that on average inmates from private prisons were filing grievances relating to “prison conditions” at a rate of 32.2 grievances per month on average compared to 25.3 for the BOP institutions.¹¹⁷ This number was drawn from identifying grievances filed about medical care, food, confinement, institutional operations, safety and security, sexual abuse or assault; and while these condition grievances were more common in private prisons, overall grievances filed in private prisons were lower than BOP institutions.¹¹⁸ The conflicting data shows that despite a pattern of private prisoners suffering from more condition-based issues, they are far less likely to have their day in court and in no way does the data suggest that conditions are being improved through these grievance hearings.

While data and trends cannot conclude specific causes of inmate litigation suppression, individual cases can illuminate patterns of difficulty accessing the courts. For example, in *Febre v. GEO Group*, plaintiff Benito Febre was incarcerated at a GEO Group facility and filed suit alleging his legal calls to his lawyer were denied and he was forced to use monitored and recorded phone lines in addition to limited access to the courts.¹¹⁹ In his complaint, Febre claimed that the facility responded to his initial complaint by stating that the BOP directed his

¹¹⁶ 28 C.F.R. 542.

¹¹⁷ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL, P. 22 (AUG. 2016), [HTTPS://OIG.JUSTICE.GOV/REPORTS/2016/E1606.PDF](https://oig.justice.gov/reports/2016/E1606.pdf).

¹¹⁸ *Id.*

¹¹⁹ *Febre v. GEO Group*, CV-F-05-563 REC SMS P, Order Dismissing Complaint With Leave To Amend (July 28, 2006), https://www.govinfo.gov/content/pkg/USCOURTS-caed-1_05-cv-00563/pdf/USCOURTS-caed-1_05-cv-00563-1.pdf.

complaint to be filed with GEO Group and that GEO Group policy was that “The Taft Facility is a private operation that exercises its own discretion and applies its own regulations regarding attorney-client calls.”¹²⁰ When studies show that private prison litigation is less likely to be dismissed¹²¹, it becomes apparent that there is incentive for private facilities to limit access to courts and attempt to minimize the amount of litigation brought to the attention of the courts.¹²²

In terms of quality of life, data shows that it is more dangerous to be incarcerated behind private prison bars than its state counterpart. According to the most comprehensive study from 2016, the U.S. Department of Justice found that violent attacks by inmates on correctional staff were 163 percent higher in private than public prisons.¹²³ The federal BOP audit also revealed that contracting prisons had more frequent incidents per capita of contraband finds, assaults, use of force, lockdowns, guilty findings on inmate discipline charges, and selected categories of grievances.¹²⁴ Apart from prisoner safety, these concerns also factor into the issue of inmates being less likely to be approved during parole hearings.¹²⁵ As a result of the statistically higher incident rate, contract prisons in the BOP audit had a higher rate of guilty findings monthly on

¹²⁰ Id; see also Gunderson, Anna, *Inmate Litigation, Legal Access, and Prison Privatization*, CAMBRIDGE UNIVERSITY PRESS, Table 3 (Dec. 27, 2022), <https://www.cambridge.org/core/journals/journal-of-law-and-courts/article/inmate-litigation-legal-access-and-prison-privatization/FB0D36EBB3398D68AD9ACCCDB42D9C2FD>.

¹²¹ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL, p. 22 (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹²² Gunderson, Anna, *Inmate Litigation, Legal Access, and Prison Privatization*, CAMBRIDGE UNIVERSITY PRESS, Table 4 (Dec. 27, 2022), <https://www.cambridge.org/core/journals/journal-of-law-and-courts/article/inmate-litigation-legal-access-and-prison-privatization/FB0D36EBB3398D68AD9ACCCDB42D9C2FD>.

¹²³ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹²⁴ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL, p. 14 (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹²⁵ See e.g., *Parole & Board of Parole Activities*, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, <https://doccs.ny.gov/community-supervision-handbook/parole-board-parole-activities#:~:text=At%20the%20hearing%2C%20evidence%20will,and%20cross%2Dexamine%20adverse%20witnesses>.

average with 77.9 guilty findings per month compared to 64.7 monthly findings in BOP institutions.¹²⁶ An increase in infractions creates both a less safe environment, it also negatively affects individual inmate's parole hearings and good time credits.¹²⁷

V. Equal Protection Considerations

The Equal Protection Clause establishes that the governing body may not deny people equal protection of its governing laws and treat an individual the same as others in similar conditions and circumstances.¹²⁸ However, the government is allowed to discriminate against individuals, as long as the discrimination satisfies the equal protection analysis subject to the classification drawn.¹²⁹ Historically as it relates to inmates, it was a question as to how inmates would be treated in Constitutional challenges. For example, in *Beard v. Banks*, the plurality of the Supreme Court upheld a restriction on newspapers, magazines, and photographs of specially “dangerous and recalcitrant” inmates regardless of standard first amendment analysis because the state had survived rational basis review to the restriction and the restriction was consistent with Eighth Amendment jurisprudence.¹³⁰ Under the Equal Protection Clause, prisoners may not advance claims that compare themselves to non-incarcerated persons.¹³¹ Further, the Equal Protection Clause only considers classifications based on nationality or race as inherently suspect which require close judicial scrutiny.¹³² Therefore, when presenting an equal protection claim,

¹²⁶ Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, OFFICE OF THE INSPECTOR GENERAL, p. 22 (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹²⁷ *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL, p. 22 (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹²⁸ U.S. CONST. AMEND. XIV.

¹²⁹ *See Johnson v. California*, 545 U.S. 162 (2005).

¹³⁰ *Beard v. Banks*, 548 U.S. 521, 524–25 (2006).

¹³¹ *See also Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997).

¹³² *See Graham v. Richardson*, 403 U.S. 365, 370-372 (1971).

inmates in private institutions comparing unequal treatment to public institutions under the Equal Protection Clause will be subject to rational basis review.¹³³

The difficulty with a petitioner bringing a Constitutional challenge that is reviewed by the Court under rational basis review is that the Court is extremely deferential to purported state interests. Legitimate state interests include, but are not limited to, promoting public safety and health, promoting general welfare, improving the economy, or peace and quiet.¹³⁴ On the other hand, bare desire to harm, expression of moral disapproval, or a desire to infringe freedom of speech or religion are considered illegitimate state interests.¹³⁵ An Equal Protection claim brought by inmates incarcerated in private institutions could be brought narrowly in the concept that their separate judicial remedies constitute an unallowable distinction by law or more broadly that their mistreatment and substandard living conditions compared to public institutions violates is an impermissible distinction.

A. The State's Interest

In the broader view of allowing inmates to be incarcerated by companies motivated by profit, the court will look at the purported state interest first to see if it is rationally related to the system implemented. Because the government had already established comprehensive prison systems dating back to America's founding, the purported state interest in outsourcing incarceration should be narrowed to saving the state money while maintaining general safety and welfare. It is understood that when applying rational basis review, compared to strict scrutiny,

¹³³ See generally *Romer v. Evans*, 517 U.S. 620 (1996).

¹³⁴ See generally *Plyler v. Doe*, 457 U.S. 202 (1982).

¹³⁵ See generally *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (The Supreme Court held that mental retardation was not a quasi-suspect class but no rational purpose for a zoning ordinance distinguishing those mentally retarded was present and thus invalidated the ordinance).

the court is reluctant to interfere with state decisions and the presumption favors the state.¹³⁶ For example, in *New Orleans v. Dukes*, the Court upheld a city ordinance that invalidated a vending cart operator's license but included a grandfather clause that allowed established vendors to maintain their license.¹³⁷ The Court refrains from interfering when the state purported a rational basis unless the difference of law is arbitrary or irrational.¹³⁸ Regardless, **arbitrary or irrational distinctions** of law amounting to a denial of one class of the equal protection of the laws within the meaning of the Fourteenth Amendment is sufficient for the Court to find such laws unconstitutional.¹³⁹

Looking at the general decision to allow inmates to be incarcerated in for-profit institutions, there has developed significant facts across the board that this decision could be considered either irrational or arbitrary. This could be pleaded because the legitimate interest of saving the government money can be looked at retroactively under all circumstances and determined that either (1) the state burden on budget is larger by the contracting with private institutions or (2) the state shifting a traditional government function to an industry that consistently fails to meet Constitutional standards of the Eighth Amendment is arbitrary and irrational. However, the long history of the rational basis test proves difficult in asserting such because of the extreme deference given to the state. The government has no obligation to produce evidence, or empirical data to sustain the rationality of a statutory classification and can

¹³⁶ See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (Supreme Court upheld federal government's power to prohibit filled milk from being shipped in interstate commerce).

¹³⁷ *New Orleans v. Dukes*, 427 U.S. 297, 298 (1976).

¹³⁸ *Id.*; See also *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (Supreme Court assumed health concerns justified law favoring optometrists over opticians); see also *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban).

¹³⁹ See *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); see also *Reed v. Reed*, 404 U.S. 71 (1971).

instead base its statutes on rational speculation with the burden placed on the petitioners to establish the irrational basis.¹⁴⁰

The most positive outlook on a successful challenge starts with the judiciary acting as an unbiased, and more importantly unbought, adjudicator of the facts presented.¹⁴¹ However, the Supreme Court does not take notice of actual motivations that may be evident, such as lobbying, unless that reason is animus towards protected groups.¹⁴² While difficult to prove negatives,¹⁴³ there is the possibility to assert an argument that lobbying has clouded the judgment of legislatures so far that in light of evidence of the consistent substandard conditions and Eighth Amendment violations in private prisons, the government could fail its notable low burden of its rational basis to maintain for-profit prison contracting. If lawyers representing the rights of inmates can bring to court evidence, as discussed earlier in this paper, that the government is failing to functionally save money and is permitting Eighth Amendment violations, the burden could in theory shift to the government to corroborate their claim that the contracts save money while not sacrificing the minimum standards of care due to inmates.¹⁴⁴ Courts presume that even poor decisions will eventually be remedied by the democratic process, so the fact that more and

¹⁴⁰ See *Lewis v. Thompson*, 252 F.3d 567, 569 (2d Cir. 2001).

¹⁴¹ See *Tumey v. Ohio*, 273 U.S. 510 (1927) (Adjudicators may not have actual bias regarding the outcomes of a proceeding).

¹⁴² *Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 264 (1977).

¹⁴³ *FCC v. Beach Communications*, 508 U.S. 307 (1993) (Court ruled that there were no constitutional rights infringed because there were reasonably conceivable facts that provided a rational basis for a franchise requirement classification under the Cable Communications Policy Act of 1984); *But see United States v. Phillips*, 540 F.2d 319, 326 (8th Cir. 1976) (Eighth Circuit rejected an argument that to introduce evidence the government had to negate all criminal purposes for the wiretap).

¹⁴⁴ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 434 (1985) (Court found no rational basis shown for believing that homes housing mentally retarded individuals would pose any special threat to the city's legitimate interests); see also GAO, *Immigration Detention: Actions Needed to Improve Planning, Documentation, and Oversight of Detention Facility Contracts*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (Feb. 12, 2021) (GAO found that many ICE contracts with private facilities paid blanket rates per bed, rather than per inmate, and were thus overpaying extraordinary amounts compared to services provided), <https://www.gao.gov/products/gao-21-149>.

more states have trended towards phasing out private institutions and attempted to ban private ICE facilities would favor the inmates in this.¹⁴⁵ Establishing the burden that private prisons have on the inmates, the taxpayers, and the courts reviewing their inability to function to standard will be imperative to developing the position that private institutions fail.

B. Disparity of Relief

A narrower theory of challenging the prison system at hand would involve a challenge that *Bivens* actions must be afforded to private prison inmates, this time on Equal Protection grounds. *Bivens* actions are not only taken against prison officials, as it can be brought against any federal actor, so long as they are operating under the color of law.¹⁴⁶ But private entities that act in concert with state actors may be sued pursuant to § 1983 upon an allegation that the joint activity caused a violation of a constitutional right.¹⁴⁷ The decisions in *Lebron v. Nat'l R.R. Passenger Corp.* conflicts with the current standard that private institutions cannot be regarded as governmental actors for Constitutional purposes when the actors act as an extension of the government engaged in direct state action, i.e., the public function test.¹⁴⁸ The dissent in *Minneeci*

¹⁴⁵ *Id* at 435 (Equal Protection Clause allows states wide latitude, and the Constitution presumes that “even improvident decisions will be rectified by the democratic processes”); Eisen, Lauren Brooke, *California’s Attempt to Ban Private Immigration Detention Hits a Snag*, BRENNAN CENTER (Oct. 13, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/californias-attempt-ban-private-immigration-detention-hits-snap#:~:text=32%20prohibits%20California's%20Department%20of,detention%20facilities%20starting%20in%202028>.

¹⁴⁶ See *Wood v. Strickland*, 420 U.S. 308 (1975).

¹⁴⁷ *Nwanze v. Phillip Morris Inc.*, 100 F. Supp. 2d 215 (S.D.N.Y., 2000) (citing *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 936 (1982)).

¹⁴⁸ See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 376-380 (1995) (The Court held that when the government created respondent corporation by special law for the furtherance of governmental objectives and retained permanent authority to appoint its directors the respondent was part of the government for purposes of the First Amendment); see also *Carmack v. Mass. Bay Transp. Auth.*, 465 F. sup. 2d 18 (D. Mass., 2006) (Court held that to reach private actors under 42 U.S.C.S. § 1983 the plaintiff must establish that the defendant was not a private entity but an extension of the government engaged in direct state action, or in the alternative, establish that the private organization’s actions give rise to fairly attributed indirect state action) [and] *Jersawitz v. People TV*, 71 F. Supp. 2d 1330, 1333

v. Pollard echoes these principles as Justice Ginsburg wrote, “[w]ere Pollard incarcerated in a federal- or state-operated facility, he would have a federal remedy for the Eighth Amendment violations he alleges . . . I would not deny the same character of relief to Pollard, a prison placed by federal contract in a privately operated prison.”¹⁴⁹ The core concern in *Bivens* was individual deterrent, and with evidence suggesting that privately operated prisons are performing worse on a variety of metrics, there is as strong a case as ever with the modern research that private institutions should be held accountable.¹⁵⁰ The decision not to find private prison operators as government actors goes against Supreme Court precedent utilizing tests developed to determine what constituted private parties acting as state actors. Those three tests are, (i) the nexus test, which focuses on the government’s involvement in the activity of the private party; (ii) the symbiotic relationship test, which looks to the mutual interdependence of the private party with the government; and the (iii) traditional public function test, which holds constitutionally accountable private entities performing a function that has been traditionally been the exclusive domain of the government.¹⁵¹

(i) Nexus Test

The nexus test holds that “a state normally can be responsible for a private decision only when it has exercised coercive power or has provided significant encouragement, either overt or

(N.D. Ga., 1999) (Actions by private entities can sometimes be regarded as government actions when, for many purposes at least, part of the Government itself has a strong basis for being held liable not simply resorting to corporate form to avoid obligations).

¹⁴⁹ *Minnecci v. Pollard*, 565 U.S. 118, 132 (2012) (Ginsburg, R.B., Dissenting).

¹⁵⁰ See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁵¹ See *Lawson v. Liburdi*, 114 F. Sup. 2d 131 (D.R.I., 2000) (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)).

covert, that the choice must in law be deemed to be that of the State.”¹⁵² Considering that the BOP exercises guidance on private prison operators, just as with any state operated prisons, these BOP officials act as to hold private prison operators liable for contracts failing to provide sufficient standards of living.¹⁵³ However, under this test, the complaining party must allege the nexus between the state and the challenged action, therefore it would be overly broad to say this test would suffice in all situations.¹⁵⁴

(ii) Symbiotic Relationship Test

The symbiotic relationship test finds that state action exists if the acts of a private party are attributable to the state because the government “has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity....”¹⁵⁵ Considerations for this test include whether the private entity performs a governmental function, whether it functions with substantial autonomy, to what extent it is financed independently of the state treasury, and whether or not any judgment entered against the entity will be satisfied out of the state treasury.¹⁵⁶ Given the for-profit prison industry makes its profits off (a) the government contracts and (b) inmate commissary spending and prison labor profits (which could be considered an extension of the government allowing the for-

¹⁵² *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (Court determined that in an action assessing if state social service officials’ actions in conjunction with a nursing home’s review committee transferring the respondent patient constituted state action on behalf of the nursing home).

¹⁵³ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁵⁴ *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982).

¹⁵⁵ *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) (Court held that the restaurant was an integral part of a public building and there was sufficient state participation and involvement to constitute a violation of the Equal Protection Clause as the restaurant could be found to be a state actor under the symbiotic relationship test).

¹⁵⁶ See *Rodriguez-Garcia v. Davila*, 904 F.2d 90, 98 (1st Cir. 1990).

profit prison to provide those services for a cost because the government is now failing to receive such profits) the court could view this in light favorable to a plaintiff once the stream of money is followed along the line directly from the state to any individual official acting in a private prison.¹⁵⁷

(iii) Traditional Public Function Test

The traditional public function test, stressed in Ginsburg's dissent in *Minneeci* and Scalia's dissent in *Richardson*, finds that private entities will be held as public actors when ". . . private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"¹⁵⁸ In *Richardson*, the court dismissed the notion that correctional facilities have been exclusively public.¹⁵⁹ While this system can be traced throughout America's history, private corporations operating prisons trace directly to slavery and post-emancipation Jim Crow roots and should be viewed in a lens subjecting the potential defendants to much higher scrutiny than has been thus far.¹⁶⁰ The court in *Lawson v. Liburdi* distinguished the decision from the Sixth Circuit's decision in *Skelton v. Pri-Cor, Inc.*, stating that the private company operated the prison as a money making venture, not constructed as a delegation of the state's responsibility.¹⁶¹ Apart

¹⁵⁷ See 365 U.S. 715, 725; See generally Neate, Rupert, *Welcome to Jail Ind: How Private Companies make Money Off US Prisons*, THE GUARDIAN (June 16, 2016), <https://www.theguardian.com/us-news/2016/jun/16/us-prisons-jail-private-healthcare-companies-profit>.

¹⁵⁸ *Blum v. Yaretsky*, *supra* at 1005 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974) (Court used the public function test to analyze if the respondent utility company's actions constituted state action)); See *Minneeci v. Pollard*, 565 U.S. 118, 132 (2012) (Ginsburg, R.B., Dissenting); See *Richardson v. McKnight*, 521 U.S. 399, 414 (1997) (Scalia, A., Dissenting).

¹⁵⁹ *Richardson v. McKnight*, 521 U.S. 399, 405 (1997).

¹⁶⁰ *History of Corrections in America*, NATIONAL INSTITUTE OF CORRECTIONS (Retrieved Oct. 1, 2023) <https://nicic.gov/resources/nic-library/hot-topics/history-corrections-america>; Bauer, Shane, *The True History of America's Private Prison Industry*, TIME (September 25, 2018), <https://time.com/5405158/the-true-history-of-americas-private-prison-industry/>.

¹⁶¹ *Lawson v. Liburdi*, 114 F. Supp. 2d 31, 40 (D.R.I., 2000); *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100 (6th Cir. 1991).

from the heavy flow of campaign donations, it can be hard to conclude that these private companies simply had facilities available for the government to increasingly rely on in recent years without an agreement between the government to delegate their role down to for-profit corporations.¹⁶² It would be difficult for any observant viewer to not consider private prisons to be a function of state action, deriving the benefit from the state, receiving inmates of the state, profiting off of inmates from the states by providing commissary services, and under regulations by the BOP. The Supreme Court should consider reviewing their decisions regarding *Bivens* actions and revisiting the state actor question as it relates to private prison officials as echoed in the dissenting opinions and previous holdings.

To compare against the understanding of private police forces, the court in *People v. Zelinski* found that when a department store security detained a woman for suspected shoplifting, the California Supreme Court found that the store employees were utilizing the coercive power of the state to further a state interest.¹⁶³ Under the court's reasoning, the seizure was unreasonable and required a suppression of evidence because the scope of the quasi-police's power extended only to protecting the interests of the store, no further.¹⁶⁴ In the prison context, the function and objectives for private or public operators is the same, only the administrator differs. Unlike private prisons, private police forces do not reflect the state's parallel interest, they only reflect the function in a limited format.¹⁶⁵ Private prisons are too similar in function practically to be held out to a different standard than a private police force would, especially considering the history showing prisons were the exclusive function of the state.

¹⁶² Cho, Eunice, *Unchecked Growth: Private Prison Corporations and Immigration Detention, Three Years into the Biden Administration*, ACLU (Aug. 7, 2023).

¹⁶³ *People v. Zelinski*, 594 P.2d 1000 (Cal. 1979) (en banc).

¹⁶⁴ *Id* at 1006.

¹⁶⁵ *See generally Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

VI. Public Policy Recommendations

The most glaring issue with the system of allowing for-profit companies to operate private prison facilities is how these corporations are able to experience the monumental profit they do. With private prisons only accounting for approximately 15 percent of federal prisoners in private detention centers and the BOP's annual budget for 2022 totaling \$7.849.4 billion, why is the publicly traded company GEO Group producing a net income of \$171.8 million in 2022 and company revenue, profit margins, and EPS only rising in from 2021?¹⁶⁶ We should not allow corporations, where the board of directors hold a fiduciary duty to protect shareholder interests, to participate in the legislative decision-making process through lobbying to affect real inmates' lives. While the lobbying industry has become common practice in America in a variety of sectors, inmates already suffer sufficiently limited Constitutional rights for their lives further sold to corporations.

Many controversial issues in America, such as affirmative action or the abortion debate, receive support from both sides convening with financial support through lobbying for legislation and legal actions. However, the private prison industry is a one-sided issue when it comes to support. The only force blocking the corporations from further profiting from buying

¹⁶⁶ Budd, Kristen M., *Private Prisons in the United States*, THE SENTENCING PROJECT (June 15, 2023), <https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/>; *Federal Prison System FY 2023 Budget Request at a Glance* <https://www.justice.gov/jmd/page/file/1489431/download>; *Geo Group (NYSE:GEO) Full Year 2022 Results*, YAHOO FINANCE (Feb. 15, 2023), [https://finance.yahoo.com/news/geo-group-full-2022-earnings-103219503.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAC1KtqHyj80P2tMZLNqxfS8Wh2tYnRx5r0wQpeU7wNgdVFCYUm7EHAG0DBo6bQ376AOYoNypQ-bBxN16VWg3kO6_ZhPXi36bFSvPeNSVNL LM5U1gUgWOGZHkK_qBSVYnFGC0DA3TyjqHIV1SRK1Nh6QgTHutP_gCsUcR67rvnl_#:~:text=GEO%20Group%20\(NYSE%3AGEO\)%20Full%20Year%202022%20Results&text=Revenue%3A%20US%242.38b%20\(up,US%240.58%20in%20FY%202021\).](https://finance.yahoo.com/news/geo-group-full-2022-earnings-103219503.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAC1KtqHyj80P2tMZLNqxfS8Wh2tYnRx5r0wQpeU7wNgdVFCYUm7EHAG0DBo6bQ376AOYoNypQ-bBxN16VWg3kO6_ZhPXi36bFSvPeNSVNL LM5U1gUgWOGZHkK_qBSVYnFGC0DA3TyjqHIV1SRK1Nh6QgTHutP_gCsUcR67rvnl_#:~:text=GEO%20Group%20(NYSE%3AGEO)%20Full%20Year%202022%20Results&text=Revenue%3A%20US%242.38b%20(up,US%240.58%20in%20FY%202021).)

legislation is the few state legislatures who decided to address this issue.¹⁶⁷ On the other hand, there are many organizations that take inmate's interests to the judiciary. For example, the Legal Aid Society worked on litigation and advocacy to improve the conditions and treatment of individuals incarcerated in New York City jails and New York State prisons aiming at prison reform.¹⁶⁸ While there are some organizations that promote inmates' rights, there are just as many organizations promoting expanding prison population and incarceration incentives. The American Legislative Exchange Council maintained CCA as a corporate member and pushed for laws that expanded prisoner populations.¹⁶⁹ For example, Arizona passed a controversial statute which mandated police officers to detain any individual that could not prove they were citizens of the United States upon request immediately.¹⁷⁰

The Government has effectively been incentivized through cases to push their responsibility of maintaining prisons to the private sector. The continued rulings establish that, despite limited oversight, the governments are not responsible to inmates for the facilities that the state sends them to. The *West* holding decides that private contractors acted under color of law but private officers are not entitled to the same protections the government actors are in *Richardson*.¹⁷¹ However, in *Corr. Servs. Corp.*, the court holds out that *Bivens* will not be extended to federal private prisons when it will be against public institutions.¹⁷² There are

¹⁶⁷ La Corte, Rachel, *Washington State Governor OKs Bill Banning For-Profit Jails*, AP NEWS (Apr. 14, 2021), <https://apnews.com/article/legislature-prisons-washington-legislation-immigration-ceda36fec7dfc3a56c8fe8f7a66d3d76>.

¹⁶⁸ *The Prisoners' Rights Project*, LEGAL AID SOCIETY (Retrieved November 18, 2023), <https://legalaidnyc.org/programs-projects-units/the-prisoners-rights-project/>.

¹⁶⁹ *Banking on Bondage: Private Prisons and Mass Incarceration*, ACLU (November 2, 2011), <https://www.aclu.org/documents/banking-bondage-private-prisons-and-mass-incarceration>.

¹⁷⁰ Id; see also Gonzalez, Daniel, *10 years after SB 1070, what happened to Arizona's undocumented population?*, ARIZONA REPUBLIC (Jan. 12 2020), <https://www.azcentral.com/story/news/politics/immigration/2020/01/12/sb-1070-law-ten-years-later-what-happened-arizona-immigrants/2716782001/>.

¹⁷¹ See *Richardson v. McKnight*, 521 U.S. 399 (1997); *West v. Atkins*, 487 U.S. 42 (1988).

¹⁷² See *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

almost no repercussions for the state offloading their responsibilities to private companies, and when that obligation is offloaded, the Bureau of Prisons retains extremely minimal oversight.¹⁷³ The American Bar Association (ABA) Criminal Justice Standards specifically states that “contracts with private corporations or other private entities for the operation of a secure correctional facility should be disfavored.”¹⁷⁴ Further, 23-10.5(b) states, “Governmental authorities should not enter into a contract with a private entity for the operation of any correctional facility, secure or not, unless it can be demonstrated that the contract will result either in improved performance or in **substantial cost savings**, considering both routine and emergency costs, with no diminution in performance” (emphasis added).¹⁷⁵ The impartial ABA standards pose the suggestion that private prisons should be the last resort, and further that the government should be held accountable for their justification in putting their inmates in the hands of private corporations.¹⁷⁶ But when the government fails to properly oversee these institutions, it is extremely unlikely that any private prison could prove substantial cost savings without diminishing performance.

With prison overcrowding becoming an increasing issue, not only are conditions at-risk of becoming worse, but the judiciary and legislation will eventually arrive at an ultimate crossroads of how to handle America’s prison industrial complex.¹⁷⁷ While America’s

¹⁷³ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL, p. 11 (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁷⁴ ABA Criminal Justice Standards (3d Ed.). *Treatment of Prisoners Standard 23-10.5, Privately Operated Correctional Facilities* (Dec. 5, 2018).

¹⁷⁵ ABA Criminal Justice Standards (3d Ed.). *Treatment of Prisoners Standard 23-10.5, Privately Operated Correctional Facilities* (Dec. 5, 2018).

¹⁷⁶ *Id.*

¹⁷⁷ Games, Gerald, *Prison Crowding Research Reexamined*, FEDERAL BUREAU OF PRISONS (Revised, January 1994), https://www.bop.gov/resources/research_projects/published_reports/cond_envir/oreprvariance.pdf; see also Wildra, Emily, *Since you asked: Just how overcrowded were prisons before the pandemic, and at this time of social distancing, how overcrowded are they now?*, PRISON POLICY INITIATIVE (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/>

systematic problem of mass incarceration can have many solutions and many theorized causes, the court today can start fixing the problem by holding the BOP and politicians accountable to the treatment of inmates. Furthermore, it seems incomprehensible how private prison contractors are able to make such profits distributed to shareholders at a 'lower rate' than the state, unless one factors in subpar conditions or the failure for the state to account for expected income from prison services or profit derived from prison labor. As it relates to inmate judicial remedies, the Court's failure to acknowledge private prisons as an extension of the government's prison actors is only to the detriment of the inmates who were supposed to be entitled to the protections of the Eighth Amendment. Further, rate of infractions resulting in loss of good time credits being higher in private prisons warrants extensive investigation into the system rewarding private institutions for prolonging sentencing.¹⁷⁸ While Equal Protection challenges will prove difficult, it is no less important to plead to the court that the unjust difference in treatment and corrupt prison industry have created a inferior classification of inmates whose rights deserve to be vindicated.

overcrowding/ (As of 2020, the federal prison system was operating at approximately 103% capacity and some states operated as high as 120% capacity).

¹⁷⁸ See First Step Act of 2018, 115 P.L. 391; *see also* *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*, OFFICE OF THE INSPECTOR GENERAL, p. 22 (Aug. 2016), <https://oig.justice.gov/reports/2016/e1606.pdf>.