



PRISON AND JAIL ACCOUNTABILITY PROJECT

The American Civil Liberties Union of Texas is a private, non-profit, non-governmental organization that defends and preserves the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. The Prison and Jail Accountability Project is a project of the ACLU of Texas, and is dedicated to making Texas prisons and jails safe and humane places to live and work through public education, public advocacy, and litigation.

The ACLU opposes private prisons because we believe that private for-profit corporations should not assume the state's responsibility for punishing those found guilty of committing criminal offenses. The goals of private enterprise conflict with the goals of punishment and rehabilitation.

The economic, policy, and correctional problems with private prisons are complex and varied. This paper focuses its discussion, however, on the issues raised by the prospect of the increased litigation that follows in the wake of private prison expansion. In addition, it comments on some specific provisions in H.B. 1480, H.B. 1669, H.B. 1852, and H.B. 2190.

Private prisons have a long and unsuccessful history in Texas. Starting in the mid-19th century, Texas "leased" its entire prison system to private companies. As one Texas history notes, "Transferring total responsibility of prisoners to private interest decreased costs to the state. It also meant lessened security, increased brutality, and a deterioration of physical facilities."¹ The conditions and corruption became such a scandal that the Legislature was forced to intervene, and it abolished the contract-lease system in the early 20th century.²

Modern private prisons do not offer Texas a cheaper, safer alternative to the publicly-run facilities currently operated by the Texas Department of Criminal Justice (TDCJ) either. On the contrary, recent history strongly suggests that expanded reliance on private prisons will shift significant financial obligations back onto Texas.

¹ S. Martin & S. Ekland-Olson, *TEXAS PRISONS: THE WALLS CAME TUMBLING DOWN* (1987) at 6.

² *Id.* at 6-8.

Further, delegating the management of an entire division of TDCJ to private prison contractors threatens to embroil TDCJ and Texas once again in litigation over how it treats prisoners, just as Texas emerges from judicial oversight of its prison system.

**EXPANDED RELIANCE ON PRIVATE FACILITIES
WILL IMPOSE ADDITIONAL BURDENS ON TDCJ**

The state has the ultimate responsibility for the conditions of confinement of prisoners. Consequently, state officials cannot escape liability for unconstitutional conditions in prisons. Therefore, in ceding operation over its own facilities to private contractors, Texas will lose control of the units, while still retaining liability for constitutional violations.

Given private prisons' history of poor performance and significant litigation losses,⁴ we anticipate that expanding private prisons will increase the number of successful prisoner lawsuits regarding conditions of incarceration. Therefore, Texas must consider the collateral impact on Texas of litigation against private contractors.

Because TDCJ cannot delegate its ultimate responsibility to provide constitutionally adequate prison conditions, TDCJ will have to defend in court its decision to send its charges into the private facilities. TDCJ's – and therefore Texas' – litigation costs will rise. These court costs are expensive, and must be factored into any cost comparison.

Second, if a single contractor is hired to operate multiple facilities and the contractor provides substandard conditions – or if the contractor becomes bankrupt – legal pressures could force TDCJ to confront the logistical and financial challenges of taking immediate charge of **all** prisoners from those facilities. TDCJ could be required to provide the full complement of constitutionally necessary services and conditions within days. If TDCJ did not own the facility, TDCJ would face the additional challenge of finding new space for these prisoners. Contracting multiple units to the same provider would increase the problem exponentially.

This is not a theoretical issue. The ACLU recently sued the Connecticut Department of Corrections for sending prisoners to a notorious Virginia Department of

³ E. Alexander, "Private Prisons and Health Care: The HMO From Hell," CAPITALIST PUNISHMENT: PRISON PRIVATIZATION & HUMAN RIGHTS, A. Coyle, et al., eds. (2003) at 69.

⁴ The Bureau of Justice Assistance reports that as of December 31, 1997, nine (13.8%) private facilities were under court orders or consent decrees for conditions at their facilities. EMERGING ISSUES ON PRIVATIZED PRISONS, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance (2001) at 50-51. Electronic databases reveal extensive on-going litigation against private prison companies.

Corrections facility. In response to the pressure, Connecticut pulled its prisoners out of Virginia.

TDCJ recently faced a comparable challenge in 1999 when it had to take over the operations of the Travis County Correctional Center, after a dozen Wackenhut employees were criminally indicted for sexual abuse of prisoners. TDCJ was forced to move and rent housing for correctional officers from across the state to Austin to take over for Wackenhut.

In 1997, Capital Correctional Resources, Inc. (CCRI) gained national notoriety for abusing prisoners in the Brazoria County (TX) Detention Center. Missouri had to bring its 415 prisoners back to Missouri from Texas.

Finally, while Texas may not indemnify a private prison if the private prison is found liable for damages, it will likely bear the cost indirectly. If a private prison turns to its insurer to cover a damages award, the cost of its insurance will likely rise, increasing the private contractor's costs. Under H.B. 2190 as currently proposed, the contractor could then ask Texas for a cost adjustment to reflect the new higher cost of operation.

**THE LEGISLATURE MUST ENSURE THAT PRIVATE PRISON LITIGATION COSTS
ARE FACTORED INTO ANY COST COMPARISON**⁶

As Elizabeth Alexander, Director of the ACLU's National Prison Project, recently explained:

[P]rivate prisons have an economic motive to cut costs in every area of operations, whether they involve security, programs or health care, as long as the savings in cost do not result in penalties under their contract with the governmental agencies⁵ or increases in the cost of litigation that outweigh the savings.⁶

The problem is that the cost of litigation generally arises only after the facility has been operating for some time, and sometimes manifests itself only indirectly. Therefore, private prison companies can promote an apparent short-term cost savings without fully incorporating an assessment of the cost of litigation.

Because the prospect of these additional costs is quite real and substantial, however, they must be factored into any comparison of the cost of publicly and privately run prison units. Legal fees, legal orders to pay damages or to relocate hundreds or

⁵ As discussed below, the proposed language of H.B. 2190 would remove the prospect of penalties from the private prison's failure to comply with the contract.

⁶ E. Alexander, "Private Prisons and Health Care: The HMO From Hell," CAPITALIST PUNISHMENT: PRISON PRIVATIZATION & HUMAN RIGHTS, A. Coyle, et al., eds. (2003) at 69.

thousands of prisoners immediately, and increased insurance premiums cost money. As mentioned above, the current bill language in H.B. 2190 would permit the private contractors to pass these costs on to the state.

In addition, private prison employees have alleged that their employers have sought to prevent public disclosure of their misdeeds, which also slows awareness of litigation costs. *See Elliott v. Wackenhut Corrections Corporation*, 2003 U.S. App. LEXIS 3320 (2003) (employee alleged WCC retaliated against him after he wrote letters to government officials regarding WCC cover ups of a prisoner escape; that WCC allowed sexual and physical assaults and drug use by prisoners; that WCC allowed prisoner to possess weapons; that WCC was not complying with its contract).

Litigation also causes more intangible but no less costly effects like the psychological impact of judicial oversight of a facility and of being a defendant named in a lawsuit. These factors increase costs by, *e.g.*, increasing staff dissatisfaction and turnover.

THE WAY PRIVATE PRISONS CUT COSTS IS AT THE ROOT OF THE PROBLEMS THAT GENERATE LITIGATION

It is now well-understood that the much of the supposed savings associated with private prisons come from the private industry's low wages and inadequate staff training.⁷

Inadequate And Poorly Trained Staff Tend To Rely On Force To Manage Prisoners

The Eighth Amendment prohibits force that is "maliciously and sadistically for the very purpose of causing harm."⁸ The *Ruiz* prison conditions litigation forced Texas to confront the extraordinarily high levels of force officers used on prisoners. Over nearly 30 years, the nature and amount of force used on prisoners remained the subject of litigation up until the settlement of the case in 2002. Consigning an entire division of the TDCJ to private contractors poses a clear threat the progress mandated by the federal court in *Ruiz*.

Professional correctional officers are the backbone of a well-managed prison system. Managing our diverse and often challenging prisoner population requires training, supervision, maturity, good judgment, and patience. Recent history has shown

⁷ *See, e.g.*, EMERGING ISSUES ON PRIVATIZED PRISONS, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance (2001) at *iii, xi*; THE CORRECTIONS YEARBOOK 2002, Camp & Camp (2001).

⁸ *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S. Ct. 995, 999 (1992), *quoting Whitley v. Albers*, 475 U.S. 312, 320-21, 106 S. Ct. 1078, 1085 (1986).

that hiring, training, supervising, and retaining officers with these qualities quite simply costs more than private facilities want to pay. As a result, too often officers rely excessively on force to manage prisoners. This is stressful to officers and prisoners, and escalates the violence – as well as the medical costs.

Competent and well-trained staff apply a range of tools other than force to manage prisoners. Indeed, TDCJ has made great strides in training officers to defuse conflict and obtain prisoner compliance by effective communication with the prisoner. Losing ground on this vital issue would represent a giant step backward for TDCJ.

Inadequate, Poorly Trained, And Poorly Supervised Staff Are Unable To Adequately Protect Prisoners

Prison officials may be held liable under the Eighth Amendment if they act with “deliberate indifference” or “reckless disregard” for a prisoner’s safety.⁹ Courts have imposed liability on line correctional officers who observed an assault or knew of a risk to a prisoner, but did nothing,¹⁰ and on higher-level supervisors who failed to act on risks they knew about.¹¹

The failure to invest in quality officer hiring and training is reflected in the private prisons’ poor record in controlling prisoner-on-prisoner violence. The Department of Justice’s Bureau of Justice Assistance cited above found that private facilities had 49% more staff assaults and 65% more prisoner on prisoner assaults than public facilities.

One reason for this disparity is that private prisons have had a poor record of creating classification systems that effectively separate dangerous prisoners from the rest of the population. In CCA’s notorious Northeast Ohio Correctional Center in Youngstown, Ohio, two prisoners were stabbed to death in less than a month because CCA had failed to implement a classification system.

Poor hiring practices have also created problems. At least two private scandal-ridden Texas facilities – CCRI’s Brazoria County Detention Center and Wackenhut’s Coke County Juvenile Justice Center – hired ex-felons as officers. That Wackenhut facility was eventually sued in 1999 when girls came forward to complain about sexual and physical abuse by staff members. One employee had a prior conviction for sexual abuse of a child. Two employees subsequently pled guilty to criminal charges stemming from their conduct at the Wackenhut facility.

⁹ See *Farmer v. Brennan*, 511 U.S. 825, 836-37, 114 S. Ct. 1970, 1978-79 (1994).

¹⁰ See, e.g., *Ayala Serrano v. Lebron Gonzales*, 909 F.2d 8, 14 (1st Cir. 1990).

¹¹ See, e.g. *Redman v. County of San Diego*, 942 F.2d 1435, 1447-48 (9th Cir. 1991).

The private facilities, perhaps because of problems in attracting employees, have failed to discipline employees for egregious misconduct. In 1998, Wackenhut was sued by a former Lockhart, Texas facility prisoner for failing to take action against an employee who raped her repeatedly for over a four-month period. Even though its internal affairs investigation found that the sex was not consensual, Wackenhut officials failed to fire or even reprimand the accused guard. The guard later quit after a second sexual assault allegation came to light.

Medical Care Is The Subject Of Litigation As Private Companies Have Cut Corners On Medical Costs.

The Eighth Amendment requires prison officials to provide prisoners with adequate medical care, which includes mental health and dental care.¹² This principle applies regardless of whether the medical care is provided by governmental employees or by private medical staff under contract with the government.¹³

Who bears the medical costs is central to making a meaningful comparison of costs. Recognizing that medical care is so costly, private contractors have sought to shift responsibility for the most expensive medical care to the public facilities. When given responsibility for providing the medical care, private prisons have cut corners in almost unimaginable ways.

The Youngstown, Ohio prisoners won a \$1.5 million judgment against Corrections Corporation of America in part for its deficient medical staffing, nonexistent infection control systems, and wholly unsuitable medical facilities. Staff delayed prisoners' access to medical care, failed to monitor properly prisoners with chronic illnesses, and conducted sick call in the unit barber shop, which lacked an examination table and other basic equipment.¹⁴

In 1997, the Dickens County Correctional Facility in Spur, Texas, run by the Bobby Ross Group, among many other problems, had unacceptable delays in providing prisoners access to medical care. Montana ultimately decided to withdraw its prisoners from this facility.

¹² *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982).

¹³ *West v. Atkins*, 487 U.S. 42, 57-58 (1988); *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100 (1997).

¹⁴ Alexander, "Private Prisons and Health Care," at 72.

¹⁵ EMERGING ISSUES at 50-51.

PARTICULARLY TROUBLING ASPECTS OF THE PROPOSED PRIVATIZING BILLS

H.B. 1480, H.B. 1669, H.B. 1852, and H.B. 2190 address a range of private prison issues. While we understand that these bills will likely be redrafted, a few aspects of these bills raise concerns that should inform further consideration of the bills.

H.B. 1480 Should Not Delegate To The Texas Board Of Criminal Justice The Power To Make A Decision That Should Remain With Publicly Accountable Officials.

Section 3 of H.B. 1480 requires the Texas Board of Criminal Justice (“Board”) to “consider whether a private vendor...may provide savings to the department by constructing or operating for the department facilities to house inmates of the institutional division and defendants sentenced to state jail felony facilities.”

To the extent this bill shifts responsibility for the privatizing decision from the legislature and to the board, we oppose it. While it may be appropriate for the Board to analyze the cost-savings question, the public policy issue regarding **whether** to privatize entire segments of the Texas Department of Criminal Justice must be resolved by the Legislature. This fundamental decision must be made by individuals who are accountable to the public, and to whom the public may make public comment. The Board is not elected, but appointed by the Governor, and is therefore only very indirectly accountable to the public. In addition, the public has significantly more limited ability to make public comment to the Board, as compared to the Legislature.

H.B. 2190 Can Be Read To Remove External Monitoring Of Private Facilities

Section 2 of H.B. 2190 deletes from Govt. Code § 495.003(c)(1) the requirement that private prison contractors’ requests for proposals “provide for regular, on-site monitoring **by the institutional division.**” While this revision could be construed to shift responsibility from TDCJ’s institutional division to its Private Facilities Division Monitoring Section, it could also be understood to remove all external monitoring altogether. The language should be clarified, if the bill purports only to reflect TDCJ’s current organization.

External monitoring is, of course, essential both to safeguard constitutionally adequate conditions and to ensure compliance with contractual obligations. Clearly, the unhappy history of private prisons’ performance demonstrates that their efforts to monitor themselves are inadequate. As stated above, the state cannot absolve itself of responsibility for the conditions of incarceration. Its failure to ensure that the conditions meet constitutional standards would likely constitute deliberate indifference, subjecting Texas to liability for the contractor’s deficiencies.

H.B. 2190 Creates Contractual Protections For Facilities That Maintain Unacceptable Conditions

Section 4 revises Govt. Code § 495.008 to add a section that states:

The department may not include in a contract a minimum acceptable standard of performance that exceeds the standard of performance achieved by the department in facilities operated by the department.

This provision is impossible to square with last session's H.B. 776, which required TDCJ to develop and implement comprehensive private prison monitoring and auditing methodologies and to have contracts with private facilities reflect this required monitoring. More importantly, however, the new provision creates a host of problems. Essentially, if TDCJ has a problem at any unit, the private contractor cannot be in breach of contract. In addition, the revision creates all the wrong financial incentives.

First, the provision essentially immunizes the private contractor from any breach of contract action if TDCJ is found by a court to maintain unconstitutional conditions.

Second, the private contractor will now have a financial incentive to provide a level of performance that is just a short step up from TDCJ's worst unit.

Third, it would make the private contractor more interested in TDCJ's correctional problems than its successes. Instead of promoting a constructive relationship in which TDCJ and the private contractor could share information about cost-effective and forward-thinking ways of addressing the many challenges of operating a prison, this contractual provision will promote suspicion and secrecy between the two entities.

Finally, any dispute about a contractor's performance will devolve into the private contractor's aggressive inquiry into the conditions of incarceration at each of TDCJ's units.

H.B. 2190 and H.B. 1852 Lift Necessary Unit Population Caps

H.B. 2190 deletes the 1000 prisoner average daily population limit, and H.B. 1852 **requires** that the so-called "DWI facilities" it creates will house more than 1,400 prisoners.

While staff to prisoner ratios are important predictors of unit safety, prison unit size is another important indicator. Larger units, particularly if staffed in the ways private contractors have staffed them, increase the chances of escape, violence, and other management problems.

H.B. 1669 Will Decrease Competition Among Private Contractors

H.B. 1669 repeals the existing 4,580 bed limit on the size of contracts. *See* Govt. Code § 493.007. Repealing this limitation creates the possibility that a single vendor could be given a contract to operate all available facilities. In addition, it will increase the financial and logistical problems TDCJ will shoulder if a court enjoins the state from housing prisoners in the private unit or if the contractor becomes bankrupt. The original limits were created for a reason, and should not be wholly discarded.

CONCLUSION

The historical problems in private prisons' performance in Texas and nationwide must be considered in evaluating the relative costs of public and private facilities. Because litigation has been – and we believe, will continue to be – necessary to bring these facilities in line with the Constitution, these problems must be calculated into the long-term liability costs that cut into any projected costs savings.

Private prisons will not lead to a better, cheaper criminal justice system. Instead, they will compound existing problems and create new liabilities for Texas.