

BRINGING TRANSPARENCY AND ACCOUNTABILITY TO CRIMINAL JUSTICE INSTITUTIONS IN THE SOUTH

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INTRODUCTION

In our years of litigating civil rights cases on behalf of people entangled in the criminal justice system in the South, a few truths have become evident. First, no good comes from permitting government officials to perform their duties in secret. Second, officials who have become accustomed to operating without accountability are loath to relinquish the power that comes from conducting their business without public scrutiny. Third, when public officials resist efforts to shine a light on their activities, there is often something to hide. Fourth, public scrutiny is often a prerequisite for changing harmful, entrenched practices.

Even as other government institutions are becoming increasingly transparent in their practices, many criminal justice agencies—prisons, jails, and other entities of “correctional” supervision—resist the idea that the public should play a role in their oversight. There is a deeply held belief that security will be compromised if the public is permitted to know how these institutions are performing. Additionally, there is a culture in the corrections field that fosters the notion that keeping quiet about correctional operations and incidents is the correct, moral thing to do. In our practice, we have encountered otherwise law-abiding public officials who violate open records laws, disregard discovery rules, hide or alter records, or otherwise break the law in an effort to shield public information from public view.

Accordingly, our organization and others have recently stepped up efforts to insist that prisons, jails, and law enforcement come out from behind a veil of

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secrecy. Rather than operating prisons and jails as hidden, mysterious places at the far edge of democracy, correctional institutions and all parts of the criminal justice system should be transparent and accountable to the public. The push toward transparency is vital because our criminal justice institutions are expanding and privatizing at an unprecedented rate, imposing huge financial and social costs on the taxpaying public.

Transparency is also vital because we cannot rely on courts to keep people in the criminal justice system reasonably safe from harm. Both transparency and accountability are necessary to uphold the rights of people under criminal justice control and to ensure that the criminal justice system evolves in ways that genuinely promote the public interest. It is imperative that we encourage a nuanced, evidence-based public debate on the efficacy of our criminal justice practices as the system expands.

To that end, this Article will examine: (1) recent accounts of criminal justice institutions' resistance to transparency and accountability; (2) the increased need for transparency as the criminal justice system expands and privatizes; (3) the limited role that courts can play in protecting criminal defendants and prisoners from abusive practices; and (4) the role of the media and the public in demanding that criminal justice institutions are accountable to the people who fund their operations. We conclude that the public has the right to information that will allow individuals to understand and intelligently consider the performance of our criminal justice institutions. We further conclude that the media and the public have a responsibility to provide much-needed oversight to these institutions.

I. THERE IS AN ENTRENCHED CULTURE OF SECRECY IN MANY OF OUR CRIMINAL JUSTICE INSTITUTIONS IN THE SOUTH.

As a general rule, in democracies like ours, the principles of openness and transparency in government are accepted and endorsed.¹ All fifty states and the federal government have some form of freedom of information law that permits citizens to examine the work product of government agencies.² Citizens can attend city council meetings, view public meeting minutes, review public expenditures, and otherwise comment on or participate in the operation of our

1. See REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, OPEN GOVERNMENT GUIDE (2011), available at <http://www.rcfp.org/ogg/index.php> (compiling open records and open meetings laws for all fifty states); see also *infra* note 3.

2. See *id.*; see also Martin E. Halsuk & Bill F. Chamberlain, *The Freedom of Information Act 1966-2006*, 11 COMM. L. & POL'Y 511, 512-37 (2006) (discussing the legislative history of FOIA and subsequent amendments which emphasized open government and citing a FOIA report by the Senate, published in 1965, which stated "government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

government.³

The line between a public record and a “state secret” muddies considerably, however, when it comes to the operation of our criminal justice institutions. On the one hand, there is a growing recognition in the United States that these institutions must become more accountable to the public. In 2008, for example, the American Bar Association passed a resolution calling on governments to make correctional facilities more transparent.⁴ In 2006, the Commission on Safety and Abuse in America’s Prisons listed transparency as one of its chief recommendations to improve prison conditions.⁵ We have seen the U.S. Department of Justice file suit against an Arizona sheriff who repeatedly failed to comply with requests for information regarding allegedly discriminatory practices by the county police department.⁶ We have even seen

3. See, e.g., ALA. CODE § 36-12-40 et seq. (open records law); ALA. CODE § 36-25A-1 et seq. (open meetings law); FLA. STAT. ANN. § 119.01 et seq. (open records law); FLA. STAT. ANN. § 226.011 et seq. (open meetings law); GA. CODE ANN. § 50-18-70 et seq. (open records law); GA. CODE ANN. § 50-14-1 et seq. (open meetings law); KY. REV. STAT. ANN. § 61.870 et seq. (open records law); KY. REV. STAT. ANN. § 61.810 et seq. (open meetings law); LA. REV. STAT. ANN. § 44:1 et seq. (open records and meetings law); MISS. CODE ANN. § 25-41-1 et seq. (open meetings law); MISS. CODE ANN. § 25-61-1 et seq. (open records law); N.C. GEN. STAT. § 132-1 et seq. (open records law); N.C. GEN. STAT. § 143-318.9 et seq. (open meetings law); S.C. CODE ANN. § 30-4-10 et seq. (open records and meeting law); TEX. GOV’T CODE ANN. § 552.001 et seq. (open records law); TEX. GOV’T CODE ANN. § 551.001 et seq. (open meetings law).

4. CRIMINAL JUSTICE SECTION, AMER. BAR ASSOC., REPORT TO THE HOUSE OF DELEGATES (2008) (“RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to develop comprehensive plans to ensure that the public is informed about the operations of all correctional and detention facilities . . . within their jurisdiction and that those facilities are accountable to the public.”).

5. THE COMM’N ON SAFETY & ABUSE IN AM.’S PRISONS, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 15, 95 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf, (stating that “[m]ost correctional facilities are surrounded by more than physical walls; they are walled off from external monitoring and public scrutiny to a degree inconsistent with the responsibility of public institutions.”). The Commission on Safety and Abuse in America’s Prisons, initially convened in 2005, heard testimony from corrections professionals that underscored the importance of transparency in the management of correctional facilities. For example, Jeffrey Washington, the Deputy Executive Director of the American Correctional Association, testified that “transparency or openness” are “among the best measures to prevent abuse in prisons.” *Standards and Accreditation for the Safe Operation of Correctional Facilities: Hearing Before Commission on Safety & Abuse in America’s Prisons* (2005) (statement of Jeffrey Washington, Deputy Exec. Dir., Amer. Corr. Assoc.), available at http://www.prisoncommission.org/public_hearing_3.asp.

6. Complaint at 5-7, *United States v. Maricopa County*, No. 2:10-CV-01878-LOA (D. Ariz. Sept. 2, 2010) (stating the Department of Justice attempted, without success, to obtain responses from the sheriff to “reasonable requests for information regarding the use of federal funds” in conducting police work). Assistant Attorney General Thomas Perez, commenting on the suit, stated: “It is unfortunate that the [Department of Justice] was forced to resort to litigation to gain access to public documents and facilities [to conduct its civil rights investigation].” Raoul Reyes, *Arizona Sheriff Isn’t Above the Law*, USA TODAY, Sept. 30, 2010, at 21A.

an effort by the U.S. military to make prisons in Afghanistan and Iraq more transparent to the public.⁷ Some of these calls for transparency are largely symbolic, but they signal the possibility of a new era in which the operation of our criminal justice institutions may be exposed to greater public scrutiny, thereby opening the door to careful reflection about policies and practices that often disparately impact the poor, communities of color, and other marginalized groups.⁸

On the other hand, in our practice, we have seen a resistance to and fear of allowing public scrutiny of criminal justice institutions. We have also seen the deleterious effects of permitting such institutions to operate without transparency: unfair and illegal criminal justice practices are permitted to flourish in secret. We provide the following accounts as example of instances in which criminal justice actors have (A) denied access to public records about prison operations; (B) failed to disclose personal financial benefit gained from the criminal justice system; (C) denied access to public information about police conduct; (D) condoned the closing of public courtrooms in violation of law, and (E) deterred public scrutiny of criminal justice institutions by imposing unreasonable fees on open records requests.

A. Denial of Access to Public Records Regarding Prison Deaths, Suicides, and Beatings.

We often encounter government officials who refuse to produce public records in violation of state open records laws.⁹ Government officials often believe that these records are the property of the criminal justice agency rather than the property of the public.

In our experience, no government agency has been as hostile to the idea of openness in government as the Alabama Department of Corrections. Consider the case of Farron Barksdale.

On August 6, 2007, Farron Barksdale, a 32-year-old man with schizophrenia, was sentenced to life in prison without parole for the murder of

7. Alan Gomez, *How the U.S. Reshaped an Afghan Prison's Image*, USA TODAY, Aug. 4, 2010, at 1A (reporting that "U.S. military leaders believe that running a transparent prison is critical to ending the armed conflict in Afghanistan."); Alan Cullison, *U.S. Set to Open New Afghan Prison--Pentagon Pledges Improved Transparency and Plans Open Hearings in a Move to "Increase Credibility,"* WALL ST. J., Nov. 16, 2009, at A10.

8. Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 21-27 (2007) (discussing the impact of racial profiling and prosecutorial discretion on communities of color); Jeffrey Fagan & Mukul Bahkshi, *New Frameworks for Racial Equality in the Criminal Law*, 39 COLUM. HUM. RTS. L. REV. 1, 20 (2007); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007).

9. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 956 (2006) (noting that criminal justice "insiders" have a vested interest in avoiding public scrutiny).

two Huntsville, Alabama police officers.¹⁰ Five days later, Barksdale was found comatose in his cell at Kilby Correctional Facility.¹¹ On August 21, 2007, Barksdale died.¹² An autopsy revealed numerous large bruises on his body.¹³ In an effort to learn what caused her son's death, Barksdale's mother requested the incident report and other documents from the Commissioner of the Department of Corrections regarding her son's death.¹⁴ The Commissioner denied the request, stating that the documents were part of the inmate's file and that inmates' files were not public records.¹⁵

The Department's refusal to produce the Barksdale incident report was not an isolated instance.¹⁶ When the Southern Center for Human Rights sought to investigate claims of excessive force and violence at Donaldson Correctional Facility in Bessemer, Alabama, the answer was the same: no documents would be provided.¹⁷ The Department maintained that it could forever shield from public view every document in its possession relating to incidents that occurred in Alabama prisons.¹⁸ The Department's Commissioner admitted that the Department never disclosed such records:

Q: When a **homicide** occurs in prison, are there any documents generated by the Alabama Department of Corrections that may be released to the public under the Open Records Act?

A: No.

Q: When a **suicide** occurs in prison, are there any documents generated by the Alabama Department of Corrections that may be released to the public under the Open Records Act?

A: No.

Q: When a **serious physical assault** occurs in prison, are there any documents generated by the Alabama Department of Corrections that may be released to the public under the Open Records Act?

A: No.

10. *Allen v. Barksdale*, 32 So. 3d 1264, 1266 (Ala. 2009). The Barksdale family was represented in this case by Jake Watson, Herman Watson, Jr., and the Southern Center for Human Rights.

11. *See id.*

12. *See id.*

13. Adam Nossiter, *New Autopsy of Prisoner Fails to Resolve Mystery*, N.Y. TIMES, Nov. 8, 2007, at A24, available at <http://www.nytimes.com/2007/11/08/us/08prisoner.html>.

14. *Allen*, 32 So. 3d at 1266.

15. *See id.*

16. Holly Hollman, *Suit Seeks Barksdale's Inmate File*, DECATUR DAILY (Sept. 21, 2007), <http://legacy.decaturdaily.com/decaturdaily/news/070921/barksdale.shtml>; Kelly Kazek, *Lawsuit Filed in Inmate Death*, ATHENS NEWS-COURIER (Sept. 20, 2007), <http://enewscourier.com/local/x1037409132/Lawsuit-filed-in-inmate-death>; Jay Reeves, *Suit Seeks Prison System Records on Inmate Deaths, Assaults*, ASSOCIATED PRESS, Sept. 20, 2007, available at http://blog.al.com/live/2009/12/alabama_corrections_agency_und.html.

17. *See* Reeves, *supra* note 16.

18. *Allen*, 32 So. 3d at 1270.

Q: When an incident of **excessive force** occurs in prison, are there any documents generated by the [Department of Corrections] that may be released to the public under the Open Records Act?

A: No.¹⁹

The Warden of Donaldson Correctional Facility further testified that he could see no reason why documented allegations of excessive force by officers should *ever* be made available to the public.²⁰ As in many criminal justice agencies, the culture of secrecy in the Alabama Department of Corrections runs deep.

Government actors often justify their resistance to transparency on the ground that production of documents could hamper security or interfere with prosecutions. And, of course, there are instances in which it may be necessary to redact or withhold documents for the protection of a confidential informant, to protect a witness, or to shield confidential medical information.²¹ Too often, however, government agencies refuse to release public documents, citing only unsupported allegations that “the sky will fall” if public records are produced. In the *Barksdale* case, the Department came forth with no evidence to suggest that release of the requested records would jeopardize security.²² Instead, the Department claimed that if the public could view documents describing injuries and deaths in its prisons, it would lead to prison riots;²³ public disturbances;²⁴ and “[a]ssaults, murders, rapes, [and] thefts.”²⁵

The Supreme Court of Alabama disagreed with this rationale.²⁶ It found that the Alabama Department of Corrections had a duty under the Open Records Act to make prison incident reports public, subject to the Department’s right to redact sensitive information on a case-by-case basis.²⁷ The Court held that even in the prison context, “[t]he document reflecting the work of the government belongs to the public.”²⁸ Other state courts have reached similar

19. Deposition of Richard Allen, Comm’r, Ala. Dep’t of Corr. at 38, 41, *Barksdale v. Allen*, No. CV-2007-900654 (Ala. Cir. Ct. May 8, 2008) (emphasis added).

20. Deposition of Gary Hetzel, Warden, Donaldson Corr. Facility at 50-51, *Barksdale v. Allen*, No. CV-2007-900654 (Ala. Cir. Ct. June 16, 2008).

21. *Allen*, 32 So. 3d at 1274 (stating that prison incident reports are public records, subject to the Department’s right to redact such records in certain limited circumstances).

22. *Id.* at 1273 (holding that the Commissioner did not carry his burden of showing that the disclosure of incident reports would lead to disturbances).

23. Brief of Appellant at 26, *Allen*, 32 So.3d 1264 (No. 1080242).

24. *Id.* at 25.

25. *Id.* at 26.

26. The Supreme Court of Alabama specifically rejected the Department’s argument that public officials would shirk their duty to investigate assaults if the public had access to documents. *See Allen*, 32 So. 3d at 1274 (“Suffice it to say, we find it hard to believe that a corrections officer would neglect his or her job because the public would have access to certain records reflecting the actions of the officer as a government employee.”).

27. *Allen*, 32 So. 3d at 1274.

28. *Id.* at 1271.

conclusions.²⁹ In addition, some states have enacted open records laws that expressly provide for the disclosure of documents maintained by prison officials.³⁰

When the records from the *Barksdale* case were finally disclosed, they showed that Barksdale was given anti-psychotic medications that expressly warn against overexposure to heat and was then confined in a punishment cell during a record-breaking heat wave.³¹ When found, Barksdale was comatose with a body temperature of over 108 degrees.³² The massive bruising on Barksdale's body has never been explained.³³ No matter the cause of the bruising, the Department's vehement refusal to produce the Barksdale records made it appear that the Department had something to hide.

Remarkably, even after the Alabama Supreme Court ruled that the Open Records Act applies to prisons, the Alabama Department of Corrections continued to disregard the Open Records law.³⁴ The Department ignores Open

29. See, e.g., *Furman v. Holloway*, 312 S.W.2d 520, 521-23 (Ark. 1993) (affirming the circuit court's decision that inmate files are public records under the state Freedom of Information Act and that, therefore, a prisoner is entitled to review his inmate file; and finding reasonable the limitations imposed by the court, namely the removal of documents from the file that are "deem[ed] to be of a sensitive or confidential nature and which would cause great harm to third persons if disclosed"); *Newberry Pub. Co. v. Newberry Cnty. Comm'n on Alcohol & Drug Abuse*, 417 S.E.2d 870, 873 (S.C. 1992) (finding a violation of the state's Freedom of Information Act where the state had a policy of denying all requests for criminal investigative reports and requiring a "case-by-case" determination "as to which portions of a[n] [investigative] report are exempt and which portions must be disclosed").

30. See, e.g., TENN. CODE ANN. § 4-6-140(c) (Vernon 2010) (requiring that "all inmate records and the information therein shall be open for public inspection . . . [unless] otherwise made confidential by the provisions of [the state's open records law, TENN. CODE ANN. § 10-7-504 (Vernon 2010)], but permitting redaction of certain information in requested records to protect officers, informants or prisoners, and the withholding of information altogether only if "identifying information cannot be deleted in a manner sufficient to protect" officers, informants or prisoners); TEX. GOV'T CODE ANN. § 552.029(8) (Vernon 2010) (providing the public a right of access to documents containing "basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.").

31. M.J. Ellington, *Barksdale Records Detail Last Hours*, ASSOCIATED PRESS, Dec. 2, 2009, available at <http://www.timesdaily.com/article/20091202/ARTICLES/912025031?Title=Barksdale-records-detail-last-hours>.

32. See *id.*

33. Bob Lowry, *Attorney Says State Report Fails to Explain How Barksdale Got Bruises*, HUNTSVILLE TIMES (Dec. 1, 2009), http://blog.al.com/breaking/2009/12/attorney_says_state_report_fai.html.

34. The absence of a deadline in the Alabama Open Records Act for state officials to respond to freedom of information requests permits state officials to ignore such requests for weeks, months, or until they are sued for violation of the Act. Other states, by contrast, provide a statutory deadline by which the government must respond to records requests. See, e.g., GA. CODE ANN. § 50-18-90 (2011) (requiring public officials in Georgia to respond to open records requests within three days); see also *Wallace v. Greene County*, 274 Ga. App. 776, 783 (2005) (stating that Georgia law permits the recovery of attorney fees if the government official in question does not "affirmatively respond" within three days and does

Records Act requests for months, producing public documents only after repeated threats of litigation.³⁵ And, recently, the Department has refused to turn over any documents whatsoever regarding Rocrast Mack, a man who was allegedly beaten to death by correctional officers in August 2010.³⁶

The *Barksdale* case is not the only example of a prison system hiding records about deaths. We have seen the same unwillingness to disclose information in the context of federal litigation where the rules of discovery require production of documents and where protective orders often limit its disclosure.³⁷

The litigation following the death of Damon Lee at Georgia's Astry State Prison is a case in point. On February 7, 2002, twenty-four-year-old Lee was found dead in his cell with a broken neck and lacerated spinal cord.³⁸ Lee, who stood five feet and six inches tall and suffered from mental illness, had been placed in a segregation cell with a life-sentenced prisoner who was ten inches taller, had a significant history of assault in the prison system, and had assaulted another man less than twenty-four hours earlier. Over the course of hours, witnesses heard cries for help from Lee's cell, yet no officer responded. Lee's death came on the heels of a warning letter to the Department stating that conditions in the unit where Lee was killed were unacceptably dangerous.³⁹

Lee's mother subsequently obtained *pro bono* counsel, sued the Department, and sought documents and information detailing the circumstances leading up to the death. The Department failed to disclose which officers had been on duty at the time of the death, withheld documents that were responsive to discovery requests, produced key documentation only after depositions, and

not provide a "substantial justification" for his failure to meet the deadline).

35. See Letters from Southern Center for Human Rights to Alabama Dep't of Corr. (June 25, 2010, July 13, 2010, Aug. 9, 2010, Aug. 31, 2010, and Sept. 2, 2010) (on file with authors) (requesting same documents under Open Records Act and noting Department's failure to respond to previous requests).

36. *Alabama Inmate Beaten to Death By Guards at Ventress Prison*, EQUAL JUSTICE INITIATIVE (Aug. 17, 2010, 3:54 PM), <http://www.eji.org/eji/node/463> (reporting that witnesses said Mr. Mack was beaten by officers while he was handcuffed and subdued and that he sustained massive injuries resulting in his death); *Alabama Inmate Fatally Injured in Assault on Prison Officer*, ASSOCIATED PRESS (Aug. 12, 2010), http://blog.al.com/wire/2010/08/alabama_inmate_fatally_injured.html.

37. See, e.g., *Goforth v. Meadows*, 127 F. App'x 470 (11th Cir. 2005) (unpublished) (reversing grant of summary judgment and holding that Department of Corrections denied *pro se* prisoner access to discovery, including his own medical records); *LaBounty v. Coughlin*, 137 F.3d 68, 71-72 (2d Cir. 1998) (reversing grant of summary judgment where defendants failed to respond to discovery requests).

38. Amended Complaint at 10, *Kitchen v. Humphrey*, No. 1:03-CV-8-1 (WLS) (M.D. Ga. June 26, 2003).

39. Mara Shalhoup, *Maximum Insecurity: Nobody Paid Attention the Night Damon Tyrone Lee Was Beaten to Death Inside a Georgia Prison Cell*, CREATIVE LOAFING (Apr. 9, 2003, 10:35 AM), <http://clatl.com/atlanta/maximum-insecurity/Content?oid=1241077>.

claimed that certain, important documents were destroyed or lost.⁴⁰ The federal judge in Lee's case blasted the Department for "willfully fail[ing] to engage in discovery" and violating a court order to turn over documents.⁴¹ So egregious was the Department's conduct that the court ruled it would order the jury to decide the question of liability in plaintiff's favor.⁴²

Both Mr. Lee's case from Georgia and the *Barksdale* case from Alabama show the length that some law enforcement officials are willing to go to shield information from the taxpaying public. In both cases, government officials felt so strongly that they were in the right in hiding information that they broke the law. Both cases also illustrate the critical importance of having *pro bono* counsel to prevent defendants from running roughshod over prisoners in civil rights litigation and open records proceedings. The fact is that it is virtually impossible for a *pro se* prisoner to navigate complex rules of court, conduct discovery, and otherwise litigate a civil rights case from a prison cell.⁴³ *Pro bono* attorneys perform an important public service when they take on prisoners rights cases; without them, the rights of many of our most vulnerable citizens would go unprotected.

B. Failure to Disclose Personal Financial Benefit

Demanding that public officials account for how they spend taxpayer dollars is one of the most fundamental ways that the public can monitor government operations.⁴⁴ In Alabama, we discovered a bold effort to hide information about how sheriffs convert taxpayer money for their personal gain.

The inquiry began in a Decatur, Alabama court. In January 2009, U.S. District Court Judge U.W. Clemon sent Morgan County Sheriff Greg Bartlett to jail after the Sheriff admitted in open court that in the past three years he had pocketed \$212,000 in food money meant to feed detainees.⁴⁵ In 2008 alone, the Sheriff added \$96,000 to his personal income, pushing his salary near those of the highest paid officials in Alabama.⁴⁶

40. Memorandum of Law in Support of Plaintiff's Motion to Compel and for Sanctions at 17, *Kitchen v. Humphrey*, No. 1:03-CV-8-1 (WLS) (M.D. Ga. Aug. 27, 2004).

41. Order of Judge W. Louis Sands at 4, *Kitchen v. Humphrey*, No. 1:03-CV-8-1 (WLS) (M.D. Ga. Mar. 31, 2008).

42. Bill Rankin, *Judge Blames Prison System in Cell Death*, ATLANTA JOURNAL-CONSTITUTION, Apr. 4, 2008, at D3.

43. See *supra* note 37.

44. Bibas, *supra* note 9, at 917 (noting that greater transparency and participation would facilitate the monitoring of criminal justice insiders by checking their self-interests and agency costs).

45. Adam Nossiter, *As His Inmates Grew Thinner, a Sheriff's Wallet Grew Fatter*, N.Y. TIMES, Jan. 8, 2009, at A11.

46. Ashley Broughton, *Sheriff Jailed for Pocketing Money Meant for Inmate Meals*, CNN (Jan. 9, 2009, 8:29 PM), <http://www.cnn.com/2009/CRIME/01/09/alabama.sheriff.jailed/index.html?iref=allsearch>.

At a hearing on the matter, the court heard testimony from skinny jail detainees who stated that they were fed paper thin bologna slices and bloody chicken, in meager portions, leaving them hungry.⁴⁷ Sheriff Bartlett, who took the stand and admitted that in 2008, for the bargain price of \$500, he purchased an 18-wheeler-truckload of corndogs from a friend who ran a trucking company.⁴⁸ Sheriff Bartlett and another sheriff split the corndogs, and Morgan County jail detainees were served corndogs for breakfast, lunch, and dinner for at least three months.⁴⁹

Skimming money from jail food accounts is viewed as legal in Alabama.⁵⁰ A Depression-era statute, still in operation in fifty five of sixty seven Alabama counties, offers a perverse incentive for sheriffs to do just that.⁵¹ The statute provides \$1.75 per jail detainee each day for food,⁵² and sheriffs may pocket any money left over. The Morgan County Jail, however, is under a federal consent order, and the Southern Center for Human Rights successfully argued that the Sheriff's meager rations violated a provision in the order requiring that people in the jail be provided adequate nutrition.⁵³

After learning how Sheriff Bartlett fattened his bank account by depriving

47. Hearing Transcript, *Maynor v. Morgan County*, No. 01-0851-NE (N.D. Ala. Jan. 7, 2009) at 16:11-20 (describing the amount of peanut butter provided in a jail lunch sandwich as if it were "sprayed on with an aerosol can"), 19:18-22 (describing weight loss of 35 to 40 pounds due to meager meals), 50:11-12 (describing "paper-thin bologna" slices), 51:24-52:2 (describing "uncooked" chicken), 87:25-88:2 (describing hunger even after eating food served by the jail), 97:1-9 (describing headaches due to hunger).

48. *Id.* at 150:22-25 (Court: "Now, you say you bought a truckload of corn dogs. Was it a truckload or an 18-wheeler?" Morgan County Sheriff: "Well, it was an 18-wheeler. It was not filled to the top. It was filled like 5 or 6 feet high."), 151:22-23 (testifying that the truck-load of corn dogs cost the Sheriff \$500), 153:4-8 (testifying that the Sheriff paid \$500 to a friend, who had been unable to sell the corn dogs).

49. *Id.* at 42:6-13, 65:19-23 (testifying that corn dogs were served for each meal for about three months).

50. See ALA. CODE § 36-22-17 (LexisNexis 2011) (providing that Alabama sheriffs may "keep and retain funds" allocated for providing meals to people in the custody of the jail). Sheriffs have interpreted the "keep and retain" provision as grounds to take money from funds allocated to provide meals to people in their custody and keep it for their own personal use. This practice goes back to the 1800s. See also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 65 (2009) (noting that Alabama sheriffs were "financially motivated to arrest and convict as many people as possible, and simultaneously to feed them as little as they could get away with").

51. The Morgan County Sheriff was not the only Alabama sheriff who depleted the jail food fund for his personal gain. The Mobile County Sheriff resigned in 2006 after pleading guilty to two misdemeanors, perjury and an ethics offense for shifting \$13,000 from a jail food fund to his personal retirement account in violation of law. See Broughton, *supra* note 46.

52. ALA. CODE § 14-6-42 (LexisNexis 2011) (providing that \$1.75 is the amount "actually necessary" for food for each prisoner daily).

53. See Consent Order, *Maynor v. Morgan County*, No. 01-0851-NE (N.D. Ala. Sept. 25, 2001).

detainees, we sought to determine whether other sheriffs were similarly profiting. When we sent Open Records Act requests to Alabama's other sheriffs asking how much food money they pocketed, the Director of the Alabama Sheriffs Association sent each sheriff a letter advising them to ignore the open records law. "My recommendation to you is not to answer the letter or to receive their phone call," the director of the Sheriffs Association wrote.⁵⁴ Only after the *Birmingham News* took the Sheriffs Association to task for advising sheriffs to break the law did sheriffs start to comply with it.⁵⁵ Sheriff Bartlett's pocketing of over \$200,000 and the ensuing media coverage prompted draft legislation aimed at changing the statute that sheriffs have relied on for decades to increase their salaries.⁵⁶

Similar stories of persons seeking to enrich themselves through the criminal justice system abound throughout the country. In South Georgia, Clinch County court officials were prosecuted after it was revealed that they had charged state court misdemeanants illegal \$10-15 fees, which were split and pocketed by court personnel.⁵⁷ In Luzerne County, Pennsylvania, two juvenile court judges attained significant personal wealth by accepting kickbacks from a private juvenile detention center to which they sent increasing numbers of children.⁵⁸ The criminal justice system provides fertile ground for exploitation, and oversight is needed to ensure that profit is never the motivating factor behind criminal justice policy.

C. Covering Up Police Misconduct

Atlanta's recent experience with its police department's "Red Dog Unit" underscores the need for a robust open records law and public scrutiny of police practices. The Red Dog Unit of the Atlanta Police Department (APD) was created in the 1980s to combat drug crime, but since became "known for its fatigues and in-your-face tactics," and for citizen complaints about its

54. Editorial, *Alabama Sheriffs Risk Being Sued for Violating the State's Public-Records Law*, BIRMINGHAM NEWS (Mar. 3, 2009), <http://www.al.com/opinion/birminghamnews/editorials.ssf?/base/opinion/1236071713202760.xml&coll=2>.

55. *Id.* (observing "[w]hat, in fact could more public" than how a sheriff spends public funds).

56. *See id.*; *see also* Bob Lowry, *Who Should Furnish Jail Food*, HUNTSVILLE TIMES (Jan. 15, 2009), <http://www.al.com/news/huntsvilletimes/local.ssf?/base/news/1232030738182800.xml&coll=1>.

57. Alyson Palmer & Andy Peters, *Ex-Judge Blitch Pleads Not Guilty After Months of Being Listed as Un-Indicted Co-Conspirator*, FULTON COUNTY DAILY REPORT (July 21, 2008), <http://www.law.com/jsp/article.jsp?id=1202423121013&slreturn=1&hblogin=1> (reporting federal court indictment alleged that court officials imposed illegal fees on criminal defendants and that the profit went to two court clerks, a sheriff's deputy, and other officials, in addition to their official salaries).

58. Ian Urbina, *Despite Red Flags About Judges, A Kickback Scheme Flourished*, N.Y. TIMES, Mar. 27, 2009, at A1.

conduct.⁵⁹ In 2006, officers with the Red Dog Unit gunned down Kathryn Johnston, a 92-year-old African American woman, in an illegal drug raid on her home, then planted drugs in the home in an attempt to cover up their conduct.⁶⁰

More recently, Red Dog officers were involved in a warrantless raid of a local bar patronized by gay men.⁶¹ Just before the 2009 raid, several officers who participated in the raid were witnessed “drinking heavily,” downing “shot after shot of the potent liquor Jagermeister.”⁶² During the raid, APD officers made anti-gay slurs and forced 60 to 70 men to lie face down on the floor in “spilled beer and broken glass,” “pressed their boots into the back of certain patrons,” and handcuffed some and kicked others, while they searched them and entered all of their names in a police database.⁶³ The APD officers did all of this without reasonable suspicion or probable cause to believe that any individual patron, let alone every person at the establishment, was involved in any criminal activity.⁶⁴

A lawsuit followed. When discovery commenced, plaintiffs requested information about what took place during the raid, including which officers engaged in various acts of misconduct.⁶⁵ In addition, the plaintiffs sought

59. Steve Visser & Marcus K. Garner, *Red Dog Disbanded*, ATLANTA JOURNAL-CONSTITUTION, Feb. 7, 2011, at A1, available at <http://www.ajc.com/news/atlanta/red-dog-disbanded-830653.html>.

60. Ernie Suggs, *Two Atlanta Officers Fired After Internal Investigation Into Shooting*, ATLANTA JOURNAL-CONSTITUTION, June 9, 2010, at A1.

61. Amended Complaint at 4, *Calhoun v. Pennington*, No. 1:09-CV-03286-TCB (N.D. Ga. Mar. 17, 2010). The Southern Center for Human Rights filed *Calhoun v. Pennington* with private attorney Daniel J. Grossman and Lambda Legal Defense and Education Fund, Inc.

62. Rhonda Cook, *APD Undercover Officers Drank Shots Just Before Eagle Bar Raid*, ATLANTA JOURNAL-CONSTITUTION, Feb. 15, 2010, at B1, available at <http://www.ajc.com/news/atlanta/apd-undercover-officers-drank-839054.html>.

63. Amended Complaint, *supra* note 61, at 18-20 (describing the raid conducted by APD officers and members of a special force, the Red Dog Unit), 4-5 (alleging officers made “anti-gay slurs” during the search). After the filing of the lawsuit, the APD named two police officers to serve as Gay Lesbian Bisexual and Transgender (GLBT) community liaisons and created a GLBT Advisory Board “to identify issues within the community that the department needs to address – from cultural and sensitivity training to updated policies and procedures.” Press Release, Atlanta Police Dep’t, Atlanta Police Department Fulfills Pledge to Name 2nd GLBT Liaison (Sept. 30, 2010).

64. Amended Complaint, *supra* note 61, at 5 (seeking damages and declarative relief to provide redress to plaintiffs for being unlawfully detained and searched in violation of Amendments IV and XIV of the U.S. Constitution and article 1, section 1, parts XIII and XVII of the Georgia Constitution). None of the bar patrons were charged with any crime. *Id.* at 26. Moreover, statements made by APD supervisors and its former chief of police acknowledged that certain elements of the raids were conducted according to APD policy. *Id.* at 20-23.

65. Motion to Compel Discovery and For Sanctions, *Calhoun v. Pennington*, No. 1:09-CV-3286-TCB, App. A & B (N.D. Ga. Oct. 6, 2010) (enumerating defendants’ failures to respond to discovery requests).

information regarding APD's policies and practices on police raids.⁶⁶

In response, the City destroyed evidence, failed to preserve evidence, failed to conduct a search for responsive information and failed to follow court orders.⁶⁷ Specifically, plaintiffs' forensic expert determined that certain APD officers deleted mobile phone texts and pictures sent and taken during the raid *after* the court had ordered them to produce their cell phones for inspection.⁶⁸ The defendants also overrode back-up tapes for the APD's e-mails, voicemails and computers *after* the court ordered the defendants to produce the tapes to plaintiffs.⁶⁹ In addition, when one of plaintiffs' attorneys reviewed documents at APD offices, he identified "thousands of previously unproduced documents" that were responsive to plaintiffs' requests but which defendants had not disclosed.⁷⁰ All of this led the federal court hearing the case to state that the defendants were "woefully deficient" in their responses to the plaintiffs' discovery requests.⁷¹

Atlanta's mayor responded to the allegations that the APD destroyed evidence by promising to conduct an investigation and publicly address any wrongdoing.⁷² The case subsequently settled for \$1.2 million and the promise of systemic reform.⁷³ Shortly thereafter, the Mayor disbanded the Red Dog Unit.⁷⁴

66. *Id.*

67. *Id.*

68. *Id.* at 7-14. The plaintiffs submitted expert forensic testimony that concluded that the officers had deleted mobile phone texts and pictures concerning the raid and sent during the raid. *Id.* at 10. Affidavit of John Carney, Calhoun v. Pennington, No. 1:09-CV-3286-TCB, Attach. 4 paras. 4-9 (N.D. Ga. Oct. 6, 2010). *See also* United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 258 (Fed. Cl. 2007) ("Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence.").

69. Motion to Compel Discovery and For Sanctions, *supra* note 65, at 14-15, 19-20.

70. *Id.* at 7 (citing Affidavit of Daniel Grossman, Attach. 3 paras. 19-22, 25-27, Calhoun v. Pennington, No. 1:09-cv-3286-TCB) (N.D. Ga. Dec. 8, 2010).

71. Stephanie Ramage, *Erasing the Eagle: Evidence in Lawsuit Against the City of Atlanta Missing or Destroyed*, SUNDAY PAPER, Oct. 17, 2010, at 21-22, available at http://stephanieramage.com/wp-content/uploads/2011/02/Erasing_the_Eagle_Oct_17_2010.pdf.

72. Rhonda Cook, *Atlanta Mayor Promises Investigation into Report Police Destroyed Records*, ATLANTA JOURNAL-CONSTITUTION, Oct. 22, 2010, at B1, available at <http://www.ajc.com/news/atlanta/atlanta-mayor-promises-investigation-688240.html> (quoting Mayor Kasim Reed: "We're going to investigate every allegation ... If true we're going to deal with the individuals in a public way. It will not be private.").

73. Consent Order, Calhoun v. Pennington, No. 1:09-CV-3286-TCB (N.D. Ga. Dec. 8, 2010), Doc. No. 265-1 & 265-2 (finding that each of the named plaintiffs "was unlawfully searched, detained, and/or arrested . . . and that none of the Plaintiffs was personally suspected of any criminal activity" and approving a settlement agreement that provided for payment by the defendants to plaintiffs of \$1.25 million and requires the implementation of enumerated reforms that include "revocation or amendment of unconstitutional" police policies and requires that the APD "investigate and finally adjudicate all citizen complaints of police misconduct of any kind within 180 days of the complaint").

74. *See* Conley, *infra* note 79.

This case illustrates how forcing disclosure from government agencies often requires ample resources—in this case, sophisticated technology and expert testimony—to prevail over efforts to hide information.⁷⁵ Atlanta's experience with the Red Dog Unit also underscores the need for mechanisms, beyond litigation, that allow the public to monitor police conduct. Civilian complaint review boards, with power to demand documentary evidence and compel testimony, are one such mechanism. The current incarnation of Atlanta's Citizen Review Board (CRB) was created by the Atlanta City Council after the death of Kathryn Johnston.⁷⁶ The CRB was tasked with investigating Ms. Johnston's death, as well as other citizen complaints of improper conduct by APD officers.⁷⁷ The CRB is a crucial vehicle for addressing police misconduct and has the potential to reign in abuses while promoting police practices that better assist the communities they serve.⁷⁸

D. Closed Courtrooms

Another way in which criminal justice insiders block citizens from monitoring the criminal justice system is by literally closing the courthouse

75. To provide another example, the *Times-Picayune*, ProPublica, and PBS's *Frontline* have been investigating police misconduct and alleged vigilante killings that took place immediately following Hurricane Katrina; the results of this extensive investigation are catalogued on a website where the public can read documents, see photographs, and listen to interviews. See LAW AND DISORDER, <http://www.pbs.org/wghb/pages/frontline/law-disorder/> (last visited Feb. 24, 2011) (self-described as "an online investigation into questionable shootings by the New Orleans Police Department in the wake of Katrina."). During the course of investigating these deaths, a ProPublica reporter sought to review 800 autopsy reports from the Katrina disaster. When he informed the local coroner's office that he would send a public records request, according to Thompson, the coroner's assistant responded: "you can do that, but we don't follow the law anyway." It then took litigation and tens of thousands of dollars to obtain the public records. Interview by Terry Groce with A.C. Thompson, Nat'l Public Radio (Aug. 4, 2010), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=128974671>.

76. See Atlanta, Ga., City Council Ordinance 07-O-0141 (Mar. 7, 2007); Rhonda Cook, *Citizens Review Board Battles Atlanta Mayor, Police*, ATLANTA JOURNAL-CONSTITUTION, Mar. 10, 2010, at B1, available at <http://www.ajc.com/news/atlanta/citizens-review-board-battles-361243.html>; Rhonda Cook, *Report Charges Misconduct at Atlanta Police Department*, ATLANTA JOURNAL-CONSTITUTION, May 24, 2010, at A1, available at <http://www.ajc.com/news/atlanta/report-charges-misconduct-at-534078.html>.

77. Rhonda Cook, *Report Charges Misconduct*, *supra* note 76 (noting that "36 [APD] officers have refused to answer questions on various complaints"). The creation of the CRB is a positive development, but the CRB has struggled to carry out its mission. It was not initially given subpoena power and other powers necessary to conduct adequate investigations into alleged police misconduct.

78. SOUTHERN CTR. FOR HUMAN RIGHTS, SUPPORTING AN EFFECTIVE & FAIR CITIZEN REVIEW BOARD (2009), available at <http://www.schr.org/files/post/SCHR%20CRB%20Report.pdf>; see also, Jim Buress, *Citizen Review Board Finds Police Misconduct During Eagle Raid*, ATLANTA PUBLIC RADIO (Aug. 12, 2010), <http://www.publicbroadcasting.net/wabe/news.newsmain/article/1/0/1687805/Atlanta./Citizen.Review.Board.Finds.Police.Misconduct.During.Eagle.Raid>.

doors.⁷⁹ We are privileged to live in a country in which we are guaranteed the right to public trials and open courtrooms.⁸⁰ Despite these guarantees, members of the public are routinely denied access to “public” courtrooms, and cases are often adjudicated in hearings that occur behind closed doors. For example, last year, the U.S. Supreme Court reversed the conviction of an Atlanta man convicted of a drug crime after the trial court, citing insufficient space, refused to let the defendant’s uncle into the courtroom during jury selection.⁸¹ Just one year later, a judge from the same Atlanta court hung a sign outside her courtroom that read “Only Defendants and Victims Allowed in Courtroom.”⁸² In south Georgia, moreover, state court judges routinely arraign defendants, accept guilty pleas, and impose sentences while in their chambers, in back rooms at the courthouse, or otherwise out of public view. This has been the case in Webster County, where pleas to misdemeanors have been heard by a probate judge at her desk with her office door closed.⁸³ In Cordele, Georgia, criminal court is often held inside the local jail, where family members crowd in a hallway outside a small jail “courtroom,” hoping to be permitted inside when their relative’s case is called.⁸⁴ Members of the general public are prohibited access.⁸⁵ The courtroom door is shut and guarded by a deputy, with a sign that reads: “Closed Hearing: Do Not Enter.”⁸⁶

Closing the courthouse doors to the public is not only illegal in many cases, it intimidates citizens and discourages them from understanding how local criminal justice institutions are operating. But the courts belong to the public, and citizens must be able to monitor the conduct of court officials. Community court-watching groups play a vital role in ensuring that courts remain open to the public and bearing witness to illegal or inappropriate practices.⁸⁷ We cannot

79. See, e.g., Janet L. Conley, *‘Keep Out’ Signs, Locked Doors*, FULTON COUNTY DAILY REP. (Jan. 27, 2011), http://www.dailyreportonline.com/Editorial/News/singleEdit.asp?individual_SQL=1%2F27%2F2011%4037312 (reporting that some Atlanta judges are placing signs outside their courtrooms prohibiting the public from observing proceedings inside).

80. See U.S. CONST. amend. I, VI, XIV; see also Ga. Const. art. 1, § 1, para. 11 (providing that criminal trials “shall . . . [be] public.”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (“The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open.”); *R.W. Page Corp. v. Lumpkin*, 249 Ga. 576, 578 (1982) (“Georgia law, as we perceive it, regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law.”).

81. See *Presley v. Georgia*, 130 U.S. 721 (2010).

82. See *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 WL 330960 (E.D. Cal. Feb. 9, 2009).

83. John Cole Vodicka, *Behind Closed Doors*, FREEDOMWAYS, Mar.-Apr. 2008, at 3.

84. First Amended Complaint at paras. 63-64, 177, *Hampton v. Forrester*, No. 03-CV-118 (Ga. Sup. Ct. May 20, 2003).

85. Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment at 3-5, *Hampton*, No. 03-CV-118 (Mar. 12, 2004).

86. *Id.* at 5.

87. See EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY

emphasize enough the importance of these organizations or the dire need for more such groups to expose the every-day injustices that occur in county, municipal, and other courts throughout the country.⁸⁸

E. Charging Excessive Fees for Public Records

Another strategy used by government officials to block access to public information is to charge citizens excessive fees for the privilege of reviewing public documents. We encountered this strategy in Gulfport, Mississippi.

In an effort to crack down on people who owed misdemeanor fines, the City of Gulfport employed a fine collection task force.⁸⁹ This police task force trolled through predominately African American neighborhoods, rounding up people who had outstanding court fines. After arresting and jailing them, the City of Gulfport processed these people through a court proceeding at which no defense attorney was present or offered.⁹⁰ Many people were jailed for months after hearings lasting just seconds.

While the City collected money, it also packed the jail with hundreds of people who could not pay, including people who were sick, disabled, or mentally ill.⁹¹ When we sought to investigate this matter by requesting our clients' city court files, the City presented us with a bill for \$513 which it insisted that we must pay for the privilege of viewing these public records. The fee amounted to about \$50 per case for files that often consisted of a few pages. This cost prevented most criminal defendants from being able to see their own court records, thus perpetuating the injustices that occurred in the court and hiding from the public the fact that court files were incomplete and in disarray. Charging excessive fees for public documents is an effective means of blocking public scrutiny of public institutions. It is another practice that cannot be tolerated if we are to improve the efficacy and fairness of our criminal justice system.

SELECTION (2010), available at <http://www.eji.org/eji/raceandpoverty/juryselection> (recommending community court-watching as one way to eliminate racial bias in jury selection).

88. A new blog called Second Class Justice (www.secondclassjustice.com) was recently created to serve as a forum to document unfair and discriminatory treatment of people in the criminal justice system.

89. Complaint, Thomas v. City of Gulfport, No. 1:05-CV-349-LG-RHW (S.D. Miss. Aug. 9, 2005).

90. Robin Fitzgerald, *Suit Claims Gulfport Court Has Created Debtors' Prison*, SUN HERALD (Gulfport), July 23, 2005, at A1, available at <http://www.schr.org/node/115>.

91. Kit Roane, *When the Poor Go to Court*, U.S. NEWS & WORLD REPORT, Jan. 15, 2006, available at <http://www.usnews.com/usnews/news/articles/060123/23indigent.htm>.

II. THE PUBLIC NEEDS FULL INFORMATION TO MONITOR THE EXPANSION OF OUR CRIMINAL JUSTICE SYSTEM AND TO JUDGE ITS SUCCESSES AND FAILURES.

The notion that our criminal justice institutions are “naturally” closed off from public scrutiny is entrenched, and the work of changing that notion must be intentional and strategic. There is an increased need for transparency as the criminal justice system expands and privatizes.

A. Transparency and Accountability Are Needed to Check Unwarranted and Costly Expansions of the Criminal Justice System.

Much has been written about our exploding prison population.⁹² The United States has less than five percent of the world's population, but almost a quarter of the world's prisoners.⁹³

In 2008, our prison population hit the two million mark.⁹⁴ Since then, in many southern states, the number of prisoners has remained steady or gone up.⁹⁵ Alabama was one of the states reporting the largest increase in prisoners in 2009.⁹⁶ In Georgia, one in thirteen adults is in prison, jail, or on probation or parole, and the prison system costs the state \$1 billion per year.⁹⁷ Soaring incarceration rates have had a disparate impact on African Americans and Latinos nationwide: one in eleven African Americans and one in twenty seven Latinos are under correctional control whereas the number for whites is one in

92. See PEW CHARITABLE TRUSTS, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 3 (2009), available at http://www.pewcenteronthestates.org/uploadedFiles/PSP_P_1in31_report_FINAL_WEB_3-26-09.pdf; MARC MAUER, RACE TO INCARCERATE (2006); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339 (2006).

93. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1; *Rough Justice in America: Too Many Laws, Too Many Prisoners*, ECONOMIST, July 22, 2010, AT 33, available at <http://www.economist.com/node/16636027>.

94. WILLIAM J. SABOL & HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 (2009).

95. Press Release, Bureau of Justice Statistics, Number of State Prisoners Declined By Almost 3,000 During 2009; Federal Prison Population Increased by 6,800 (June 23, 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/press/pim09stpy09acpr.cfm> (reporting that Alabama, Florida, and Louisiana were among the states with the largest increases in prison population in 2009); see also PEW CHARITABLE TRUSTS, ONE IN 100: BEHIND BARS IN AMERICA 2008 8-9 (2008), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf (reporting that the southern states have the highest increase in the number of prisoners).

96. PEW CHARITABLE TRUSTS, *supra* note 95, at 29.

97. PEW CHARITABLE TRUSTS, *supra* note 92, at 7; Carrie Teegardin, *Georgia Prison Population, Costs on the Rise*, ATLANTA JOURNAL-CONSTITUTION, Apr. 4, 2010, at A1, available at <http://www.ajc.com/news/georgia-prison-population-costs-429757.html> (reporting that the job of overseeing 60,000 prisoners and 150,000 persons on probation consumes one of every seventeen state dollars).

forty five.⁹⁸

The juxtaposition of skyrocketing prison populations and state budget deficits poses real and immediate threats to the health and safety of people in prison all over the country.⁹⁹ Often, prison officials are doing their best to run their institutions humanely and within the bounds of the Constitution, but they face an impossible task. The volume of people they house is beyond what they can safely manage within their budget.

There are signs that the criminal justice system is expanding in ways that are neither economically sustainable, nor likely to reduce crime. In the next Subpart, we discuss how profit-motivated private probation companies in Georgia have vastly increased the number of people on probation with no corresponding evidence of benefit to public safety.¹⁰⁰ There has been a similar proliferation of for-profit criminal justice businesses offering anger management classes, ankle monitoring, polygraph examinations, drug tests, and court-ordered therapy.¹⁰¹ In our experience, many of these are “fly-by-night” operations that exercise tremendous power over people with little government or public oversight.

The criminal justice system has also become self-propelling, increasingly imposing huge fines and fees on criminal defendants to fund its operations.¹⁰² In our practice, we are seeing increasingly more fees levied for medical services, drug tests, polygraph tests, police officers’ funds, crime victims’ funds, clerk fees, attorneys’ fees, sex offender registration fees, probation fees, and jail fees. This trend has a tremendous impact on the poor, and anecdotal evidence suggests that defendants’ families often bear these costs. Failure—or inability—to pay such fees can result in re-incarceration.¹⁰³

Our criminal justice institutions are swallowing billions of dollars, yet we are not getting a satisfactory return on our investment.¹⁰⁴ A recent study by the Bureau of Justice Statistics found that two-thirds of incarcerated persons are re-

98. PEW CHARITABLE TRUSTS, *supra* note 92, at 7.

99. *Coleman v. Schwarzenegger*, No. CIV S-90-0520, 2009 WL 330960, at *1 (E.D. Cal. Feb. 9, 2009) (noting “severe overcrowding” creating a “state of emergency” within the California prison system).

100. *See infra* Part III.B.

101. *See, e.g.*, JUDICIAL CORRECTION SERVICES, <http://www.judicialservices.com> (last visited Feb. 10, 2011) (offering private probation services in Alabama, Georgia, Florida and Mississippi); SECURE ALERT, <http://www.securealert.com/> (last visited Jan. 24, 2011) (a publicly traded company offering ankle monitoring technology services and drug and alcohol testing services, among other services, to states and municipalities, including Georgia).

102. ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010) (finding that “[c]ash-strapped states have increasingly turned to user fees to fund their criminal justice systems”).

103. *See id.* at 19-26.

104. PEW CHARITABLE TRUSTS, *supra* note 92, at 17-21 (discussing the “declining impact of incarceration on crime”).

arrested for new crimes within three years of release.¹⁰⁵ Research has shown that using prison as a sanction for lower level offenders is not cost-effective and does not reduce crime.¹⁰⁶ At a time when states are facing their worst fiscal crisis in years, public scrutiny is crucial to monitoring the efficacy of our expanding criminal justice institutions.

B. There Is an Increased Need for Transparency and Accountability as the Criminal Justice System Privatizes.

We have seen a recent increase in the privatization of criminal justice functions.¹⁰⁷ These companies must be subject to public scrutiny to ensure that they are performing a service consistent with the goals of public safety, rehabilitation, and reduction of recidivism.

1. Private Prisons

Despite the public role that prisons fill, incarceration is now also in the hands of private companies motivated by profit. Corporations have stepped in to build more prison and detention beds as government budgets have slimmed and prison crowding and immigrant detention has increased. As of 2009, about 8% of prisoners, or about 128,000 people, were incarcerated in private prisons.¹⁰⁸ Among the largest companies providing these services are Corrections Corporation of America (CCA) and the GEO Group (formerly Wackenhut). In the first quarter of 2009, CCA reported that it “placed into service” 1020 detention beds and that its revenues were \$404.2 million.¹⁰⁹

Soaring incarceration in the 1980s ushered in a bonanza for the private sector.¹¹⁰ Since then, more privately run prisons and detention centers have

105. Press Release, Bureau of Justice Statistics, Two-Thirds of Future State Prisoners Rearrested for Serious New Crimes (June 2, 2010), <http://bjs.ojp.usdoj.gov/content/pub/press/rpr94pr.cfm> (finding, based on a fifteen-state study, that 67% of people released from state prisons in 1998 committed “at least one serious new crime” in the following three years and that recidivism for certain crimes surpassed 70%).

106. PEW CHARITABLE TRUSTS, *supra* note 92, at 17-21.

107. Coleman v. Whitworth, No. 1:04-CV-3181-JOF (N.D. Ga. 2006) (order dismissing lawsuit filed by parolee against private electronic monitoring company and members of the Board of Pardons and Parole for charging \$270/month for electronic monitoring).

108. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009-STATISTICAL TABLES 2 (June 2010).

109. *Corrections Corporation of America Announces First Quarter 2009 Financials*, CORRECTIONSCORP.COM (May 7, 2009), <http://www.correctionscorp.com/newsroom/news-releases/175/> (noting that in 2009, the federal government also awarded CCA a contract for a 4000-bed facility); Renee Feltz & Stokely Baksh, *Detention Retention*, AM. PROSPECT (June 2, 2009), http://www.prospect.org/cs/articles?article=detention_retention.

110. See AMY CHEUNG, THE SENTENCING PROJECT, PRISON PRIVATIZATION AND THE

sprung up nationwide.¹¹¹ Changes to immigration law in the mid-1990s that resulted in mandatory detention of certain immigrants coupled with post-9/11 detention policies have provided further incentive for private companies to expand.¹¹² CCA and GEO expect further growth, stemming primarily from the federal government's detention of immigrants.¹¹³ Indeed, a National Public Radio investigation uncovered that individuals connected with the private prison industry had a heavy hand in drafting and passing Arizona Senate Bill 1070—a controversial law that creates various state-law criminal offenses relating to immigration and is expected to drive up the number of people arrested, detained and deported for immigration-related offenses.¹¹⁴

With private companies playing a greater role in the operation of prisons, how will we hold them accountable? Some have called for greater transparency. During several legislative sessions, the U.S. Congress has considered legislation to expressly extend the Freedom of Information Act (FOIA) to private prisons that contract with government agencies.¹¹⁵

USE OF INCARCERATION 1 (2004); Margaret Talbot, *The Lost Children*, NEW YORKER, Mar. 3, 2008, at 58-60 (discussing the advent of the private prison industry); see also *Memphis Publ'g Co. v. Cherokee Children & Family Servs.*, 87 S.W.3d 67, 76 (Tenn. 2002) (“Since the 1980s, governmental entities in various parts of the nation have looked increasingly to privatization as a possible solution to perceived problems of inefficiency or expense in the provision of public services.”).

111. See CORR. CORP. OF AM., SEC FORM 10-K, at 5 (2009) (noting that as of the end of 2008, CCA operated sixty-four correctional and detention facilities with a design capacity of 85,000 beds in nineteen states and the District of Columbia); see also *The Business of Detention*, BUSINESSOFDETENTION.COM, <http://www.businessofdetention.com/> (last visited Feb. 10, 2011) (featuring Interactive Detention Center Map showing eighteen detention centers currently owned and operated by CCA, nine located in the south).

112. See, e.g., Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 111 HARV. L. REV. 1936, 1946-55 (2000) (discussing the impact of the 1996 Illegal Immigration Reform and Responsibility Act, including mandatory detention); Robert Koulisch, *Blackwater and the Privatization of Immigration Control*, 20 ST. THOMAS L. REV. 462, 474-75 (2008) (discussing the impact of post-9/11 immigration policies and the impact on prison privatization).

113. Renee Feltz & Stokely Baksh, *Detention Retention*, AM. PROSPECT (June 2, 2009), http://www.prospect.org/cs/articles?article=detention_retention (quoting executives from the GEO Group, Inc. and CCA as citing the detention of immigrants as the “primary driver for growth” of the private prison industry).

114. *Prison Economics Help Drive Arizona Immigration Law*, NAT'L PUBLIC RADIO (Oct. 28, 2010) <http://www.npr.org/templates/story/story.php?storyId=130833741> (describing NPR's review, over several months, of campaign finance reports, lobbying documents, and corporate records which revealed that the private prison industry helped to draft and pass Arizona Senate Bill 1070). Arizona Senate Bill 1070 is currently being challenged in federal court by multiple suits, including a suit by the U.S. Department of Justice, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010), *aff'd*, No. 10-16645 2011 WL 1346945 (9th Cir. 2011), which resulted in an injunction preventing Arizona from implementing parts of Senate Bill 1070.

115. See, e.g., Private Prison Information Act of 2009, H.R. 2450, 111th Cong. (2009) (introduced “to require non-Federal prison and correctional facilities holding Federal prisons under a contract with the Federal Government to make the same information available to the

Proponents of the bill recognized that accountability must begin with transparency. But, so far the bill has failed. The companies that run private prisons have maintained they are not subject to FOIA because they are not public agencies.

2. Private Probation Companies

Increasingly in Georgia, private, for-profit companies contract with cities and counties to manage the misdemeanor probation process. People who are charged with misdemeanors and cannot pay their fines that day in court are placed on probation under the supervision of these for-profit companies until they pay off their fines. On probation, they must pay these companies substantial monthly “supervision fees,” which, in some cases, may be double or triple the amount that a person of means would have to pay for the same offense. The privatization of misdemeanor probation has placed unprecedented law enforcement authority in the hands of for-profit companies that essentially act as collection agencies.¹¹⁶

In Augusta, Georgia, the Southern Center for Human Rights investigated the practices of a private probation company, Sentinel Officer Services, Inc., on behalf of Marietta Conner. Ms. Conner, age 63, was charged with “failure to yield to a pedestrian in the crosswalk,” and fined \$140. She was unable to pay the \$140 fine on the day of court and, consequently, she was placed on probation with Sentinel, at a rate of \$39 per month.

Over the course of four months, Ms. Conner made five payments totaling \$185.99. Yet, every time Ms. Conner made a payment, more money was allocated to her probation fees than to her fine. For example, when Ms. Conner made a \$20 payment, only one dollar went toward the fine, whereas \$19 went to Sentinel. When Ms. Conner made a \$40 payment, only \$11 went toward the fine, while \$29 went to Sentinel. By the time she had paid \$185.99, she still owed \$119.01 in “supervision” fees. In other words, because Ms. Conner had to utilize the services of a probation company, she was ultimately required to pay more than *twice* the amount of the original fine.

Private probation in Georgia has corrupt origins. A Georgia parole board member was convicted of accepting a \$75,000 bribe for his role in encouraging the passage of private probation legislation.¹¹⁷ There are now at least thirty nine

public that Federal prisons and correctional facilities are required to make available.”).

116. SOUTHERN CTR. FOR HUMAN RIGHTS, PROFITING FROM THE POOR: A REPORT ON PREDATORY PROBATION COMPANIES IN GEORGIA 7-8 (2008) (noting reports of probation companies threatening people with arrest, continuing to schedule appointments and seeking money from people even after their probation has expired, routinely failing to inform people on probation that they can convert their fine into community service after paying a certain amount of money, and increasing the number of meetings a person is required to attend in order to pressure the person to scrape money together to pay their fine).

117. Bobby Whitworth, Former Chairman of the Georgia Board of Pardons and

private probation companies around the state.¹¹⁸ Due to Georgia's booming private probation industry, the state currently has the highest population of people on probation out of any state in the country.¹¹⁹ At the helm of this movement is Representative Clay Cox, a state legislator and owner of one of the largest private probation companies in Georgia. In 2009, Representative Cox proposed a bill to abolish the state agency that oversees his business.¹²⁰ The legislation was withdrawn after the *Atlanta-Journal Constitution* took Cox to task for his monumental lapse in judgment.¹²¹

Surely, companies like Sentinel, performing public services under contract, should be subject to Georgia's open records law. Yet, in 2006, Georgia's General Assembly passed Georgia Code Annotated section 42-8-106, which made "all reports, files, records, and papers of whatever kind relative to the supervision of probationers by a private corporation" a confidential, state secret.¹²²

This statute was a gift to the private probation industry at the expense of public accountability. It underscores the power of private entrepreneurs, intent on expanding the criminal justice system to line their own pockets.

The private probation industry continues to grow in Georgia. There has been little public debate—and no studies—as to whether these companies are beneficial or merely serve to ensnare people, who pose no threat, in years of correctional supervision with no corresponding benefit to society.

Since private entities are increasingly serving public functions in the criminal justice system, thereby serving as a proxy for government itself, the public must have access to information that reveals how these private entities are carrying out their work.

Paroles, was convicted of influence peddling for his role in passing legislation that substantially increased the use of for-profit probation in Georgia. *See Whitworth v. State*, 622 S.E.2d 21, 23-24 (Ga. 2005). The law Whitworth helped pass, SB 474, effectively transferred supervision of 25,000 misdemeanants from the State Department of Corrections to individual counties. *See id.* Private probation companies—eager to move in and obtain lucrative contracts in the individual counties—stood to benefit greatly from this change in the law. *See id.*

118. SOUTHERN CTR. FOR HUMAN RIGHTS, *supra* note 116, at 4.

119. *See* LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES 3 (2006) (finding that at the end of the year in 2006, there were 6059 people on probation per 100,000 people in Georgia. By contrast, Alabama had 1592; Florida had 1925; Kentucky had 1279; Louisiana had 1186; Mississippi had 1116; Texas had 2515; and Virginia had 800).

120. Cameron McWhirter & Bill Rankin, *Lawmaker Writes Bill That Affects Own Private Probation Industry*, ATLANTA JOURNAL-CONSTITUTION, Mar. 11, 2009, at A1.

121. *See* Bill Rankin & Cameron McWhirter, *Probation Bill Needs Revise for Next Year*, ATLANTA JOURNAL-CONSTITUTION, Mar. 14, 2009, at B1.

122. GA. CODE ANN. § 42-8-106 (2010).

III. THE PUBLIC NEEDS FULL AND COMPLETE INFORMATION TO MONITOR
CRIMINAL JUSTICE INSTITUTIONS BECAUSE COURTS HAVE FAILED TO PROVIDE
AN EFFECTIVE FORM OF OVERSIGHT AND NO OTHER FORM OF EFFECTIVE
OVERSIGHT EXISTS.

We need a fully informed public to monitor our criminal justice institutions because we cannot rely on our courts to keep people in prison safe from harm, and no other form of effective oversight exists.

The Alabama Department of Corrections is a case in point. Alabama's prisons have been the subject of numerous lawsuits spanning nearly thirty years.¹²³ Yet, even after decades of court oversight, they continue to be crowded and dangerous.¹²⁴ The state's prisons were built to hold 14,000 people, but today hold nearly 30,000.¹²⁵ In 2005, a federal judge called the state's overcrowded, understaffed women's prison "a time bomb ready to explode."¹²⁶ In 2009, Donaldson Correctional Facility, the state's highest security prison, operated with *half* the security staff recommended by its own staffing study and nearly *twice* its designed capacity of prisoners.¹²⁷ Recent litigation has highlighted serious failures in medical care, especially for persons with diabetes and HIV/AIDS.¹²⁸ Still, not a week goes by when our office does not

123. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (finding that handcuffing an Alabama inmate to a hitching post for more than seven hours with no water or bathroom breaks was cruel and unusual punishment); *Newman v. Alabama*, 559 F.2d 283, 286 (5th Cir. 1977), *rev'd in part on other grounds sub nom. Alabama v. Pugh*, 438 U.S. 781 (1978) ("It should not need repeating that compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide the necessary funds."); *Laube v. Haley*, 234 F. Supp. 2d 1227, 1252 (M.D. Ala. 2002) (granting preliminary injunction to remedy unconstitutional conditions in women's prison); *Austin v. Hopper*, 28 F. Supp. 2d (M.D. Ala. 1998) (approving settlement of claim alleging failure to provide adequate toilet facilities to inmates on work squads); *Complaint, Hicks v. Hetzel*, No. 2:09-CV-155 (M.D. Ala. Feb. 26, 2009) (alleging excessive violence and crowding at maximum security prison).

124. Sebastian Kitchen, *Prisons Underfunded, Understaffed*, MONTGOMERY ADVERTISER (Aug. 9, 2009), <http://theprisoninsider.com/archives/652> (reporting that Commissioner Allen warned of budget deficits facing the crowded, aging prison system); David Brewer, *Chief Justice Says Drug Courts Are the Way to Go*, HUNTSVILLE TIMES (Apr. 24, 2008), <http://www.al.com/news/huntsvilletimes/index.ssf?/base/news/1209028552123100.xml&coll=1> (reporting that Alabama Supreme Court Justice Sue Bell Cobb advocates for drug courts as a way to reduce the state's skyrocketing prison population).

125. ALA. DEP'T OF CORR., MONTHLY STATISTICAL REPORT FOR MARCH 2010 (2010), available at <http://www.doc.state.al.us/docs/MonthlyRpts/2010-03.pdf>.

126. *Laube*, 234 F. Supp. 2d at 1252.

127. Plaintiff's Motion for Summary Judgment, *Hicks v. Hetzel*, No. 09-CV-155 (M.D. Ala. Apr. 6, 2009) (referencing prison incident reports).

128. See, e.g., *Gaddis v. Campbell*, 301 F. Supp. 2d 1310 (2004) (approving settlement of action brought by diabetic prisoners); *Complaint at 10, Aris v. Campbell at 10*, No. CV-05-PWG-0396 (N.D. Ala. June 1, 2005) (seeking to remedy systemic inadequacies in the provision of medical care in Alabama's prison for the elderly and infirm); *Complaint at 2, Leatherwood v. Campbell*, No. CV-02-BE-2812-W (N.D. Ala. Mar. 13, 2004) (alleging lack of appropriate medical treatment for prisoners with HIV and AIDS); see also Carla Crowder, "Medical Failure" Blamed in HIV Inmate Deaths, BIRMINGHAM NEWS (Aug. 28, 2003),

receive letters and calls from people who have been stabbed, raped, or otherwise injured at the Alabama prison where they are incarcerated.

Federal court intervention has changed the most horrifying prison conditions,¹²⁹ but as Elizabeth Alexander has persuasively argued, the Eighth Amendment does not protect the vast majority of prisoners from harm:

In a series of decisions, the Supreme Court has preserved the form of Eighth Amendment challenges to conditions of confinement but little of the substance, by allowing severely overcrowded prisons, suggesting that considerations of cost can defeat an Eighth Amendment claim, and allowing Eighth Amendment claims to be defeated even when prison conditions are objectively intolerable and deny prisoners basic human needs, including health care.¹³⁰

In other words, many people who are incarcerated in intolerable conditions have no legal remedy.¹³¹ The Eighth Amendment does not prohibit dangerous prisons; it only protects prisoners from conditions that pose a serious risk of harm that is *known* to a particular correctional employee.¹³² Similarly, the Eighth Amendment does not ensure that prisoners are provided with *adequate* medical care, but rather entitles a prisoner with a serious medical need to something slightly better than gross medical malpractice.¹³³

The 1996 Prison Litigation Reform Act (PLRA) and subsequent cases interpreting the PLRA have erected further barriers to prisoners seeking relief from the courts.¹³⁴

<http://www.schr.org/node/103>.

129. See, e.g., Douglas Martin, *William Wayne Justice, Judge Who Remade Texas, Dies at 89*, N.Y. TIMES, Oct. 15, 2009, at B11, (describing Judge Justice's role in ordering reforms in the Texas Department of Corrections, "a prison system with two doctors for every 17,000 prisoners, where 2,000 inmates slept on the floor and where inmate trustees . . . essentially ran the cell blocks through coercion").

130. Elizabeth Alexander, *Prison Health Care, Political Choice and the Accidental Death Penalty in Michigan*, PRISON LEGAL NEWS, Jan. 2010, at 1.

131. *Sturdivant v. Lovette*, No. 08-0634-WS-C, 2009 WL 3415368 (S.D. Ala. Oct. 20, 2009) (finding no Eighth Amendment violation where jail detainee was confined for twenty eight days in an eight foot by four foot cell without a bunk, running water, or lights, and with a hole on the floor for human waste that overflowed onto the floor); *White v. Marshall*, No. 2:08CV362-CSC, 2008 WL 4826283, at *3, *8-*9 (M.D. Ala. Nov. 5, 2008) (holding that plaintiff's confinement for thirty days in a strip cell with only a drain in the floor for urinating, cold sandwiches three times a day, no clothing except for a paper gown, no mattress for twenty four days, no blanket, no wash basin, no personal hygiene items, no lights, no ventilation, and no shower or exercise for fourteen days were not deprivations of "the minimal civilized measures of life's necessities.").

132. *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (equating deliberate indifference standard required to show an Eighth Amendment violation with criminal recklessness standard).

133. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Goebert v. Lee County*, 510 F.3d 1312, 1327 (11th Cir. 2007) (noting a prisoner who alleges medical injury must show more than gross negligence).

134. *Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong.

People around the world were horrified by images of Abu Ghraib.¹³⁵ What few people know is that if such conduct occurs in a prison or jail in this country, those subject to it have no redress in the federal courts due to the “physical injury” requirement of the PLRA.¹³⁶

Our office litigated such a case.¹³⁷ Tactical squad officers in riot gear stormed through a prison—swearing at inmates, using anti-gay slurs,¹³⁸ chanting “kill, kill, kill,” and dumping prisoners’ personal and religious items on the floor or in toilets.¹³⁹ Male prisoners were ordered to strip and subjected to full body cavity searches in view of female staff.¹⁴⁰ One man was ordered to “tap dance” while naked.¹⁴¹ The Court of Appeals for the Eleventh Circuit held that this conduct did not satisfy the physical injury requirement of the PLRA.¹⁴²

Other courts have found the PLRA’s physical injury requirement was not satisfied by:

A “bare allegation of sexual assault” even where male prisoners alleged that a corrections officer had sexually assaulted them repeatedly over a span of hours;¹⁴³

Prisoners being housed in cells soiled by human waste and subjected to the screams of psychiatric patients;¹⁴⁴

A prisoner being forced to stand or squat in a 2 ½-foot wide cage for twelve to thirteen hours, naked for the first ten hours, in acute pain, with clear, visible swelling in a leg that had been previously injured in car accident;¹⁴⁵

A prisoner kept in solitary confinement, his hands and feet shackled, subjected to body cavity strip searches and allowed out of his cell only three hours per week;¹⁴⁶

A prisoner who complained of suffering second-degree burns to the face.¹⁴⁷

19-24 (2008) (statement of Stephen B. Bright, Southern Center for Human Rights).

135. Bob Herbert, *America’s Abu Ghraibs*, N.Y. TIMES, May 31, 2004, at A17.

136. 42 U.S.C. § 1997(e)(e) (2006) (providing that “no federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”).

137. See *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc).

138. See *Harris v. Garner*, 190 F.3d 1279, 1282 (11th Cir. 1999), *vacated*, 197 F.3d 1059 (11th Cir. 1999), *reinstated in part on reh’g*, 216 F.3d 970 (11th Cir. 2000).

139. See Brief of Appellants at *5-*6, *Harris v. Garner*, 1998 WL 34084122 (11th Cir. Oct. 21, 1998).

140. See *id.*

141. See *id.*

142. See *Harris v. Garner*, 190 F.3d at 1287.

143. See *Hancock v. Payne*, No. CIV.A.103CV671JMR, 2006 WL 21751, at *3 (S.D. Miss. Jan. 4, 2006).

144. See *Harper v. Showers*, 174 F.3d 716, 719-20 (5th Cir. 1999).

145. See *Jarriett v. Wilson*, 162 F. Appx. 394, 404 (6th Cir. 2005).

146. See *Adnan v. Santa Clara Cnty. Dep’t of Corr.*, No. C-02-3451, 2002 U.S. Dist. LEXIS 28368, at *2, *9-*13, (N.D. Cal. Aug. 15, 2002).

147. See *Brown v. Simmons*, No. V-03-122, 2007 WL 654920, at *6 (S.D. Tex. Feb. 23, 2007).

Recently, we have concluded that suits could not be brought by a man who was ordered to walk around with his pants and underwear at his ankles, in front of laughing correctional officers, a man who reported that an officer put a leash over his head and ordered him to crawl like a dog, or by women who complained that officers barged into their shower and toilet areas without announcing themselves, opened the shower curtains and made sexual comments to them. These men and women have no redress in the federal courts.¹⁴⁸

Finally, in most correctional systems in the United States, no form of serious, independent oversight exists. Other countries have independent oversight bodies that regularly inspect, monitor, and report on prison operations. This is a rarity in the United States, where prisons mostly police themselves.

IV. THE PUBLIC AND THE MEDIA HAVE A RESPONSIBILITY TO DEMAND INFORMATION ABOUT AND EXAMINE THESE INSTITUTIONS.

Stephanos Bibas has written about the “great gulf” that divides insiders and outsiders in the criminal justice system and impairs public confidence in the law.¹⁴⁹ He contrasts the “knowledgeable, powerful” professional class of criminal justice insiders (judges, prosecutors, police, defense counsel) with a poorly informed, powerless public that gets its information about the criminal justice system from television and movies.¹⁵⁰ As discussed in Part I, we believe that this gulf is widened by the deliberate actions of criminal justice insiders to block the distribution of information about their operations.

There is growing evidence to suggest that we cannot afford to tolerate a criminal justice culture in which insiders are permitted to prevent the public from understanding its operations. For one thing, when criminal justice insiders are permitted to control the flow of information about their operations, there is too great a temptation to distort the truth.

When the Supreme Court of Alabama forced the Alabama Department of Corrections to disclose its internal assault reports in 2009, the records showed that the Department had been significantly and routinely underreporting the rate of violence.¹⁵¹ For example, the Department publicly claimed that there were no assaults or fights during months in which numerous prisoners had been assaulted or raped.¹⁵² The Department further disclosed only one assault “with

148. Each of the prisoners subjected to the alleged abuses described sought assistance from the Southern Center for Human Rights either directly or through a family member or friend. Each person is or has been incarcerated in an Alabama or Georgia prison or jail.

149. See Bibas, *supra* note 9, at 912-13.

150. See *id.*

151. See *id.* at 956 (noting that criminal justice insiders may “misreport data or distort statistics to paint rosy pictures of their own performance”).

152. For example, the Department publicly reported that in March 2009, there were zero assaults, zero fights, and zero sexual assaults at Donaldson Correctional Facility. See

serious injury” between April 2008 and April 2009, when, in fact, at least sixteen Donaldson prisoners were taken to outside hospitals for emergency treatment for violent trauma during this period.

Another reason to insist on transparency in the criminal justice system is the system’s enormous cost. We can no longer afford to rely on prisons as the only solution to the problem of crime. Our current over-reliance on prison has come with crippling financial tolls. For example, public distrust of the criminal justice system and public misconceptions underestimating the duration of prison terms have led to an increase in sentences.¹⁵³ The number of persons serving sentences of life without parole increased by 22% between 2002 and 2008.¹⁵⁴ The Sentencing Project reports that it costs one million dollars to house a single life-sentenced prisoner for forty years (from ages thirty to seventy).¹⁵⁵ Few states can afford such a financial burden.

“It takes an educated public to demand reform of America’s prisons and jails.”¹⁵⁶ Commentators have called for data collection, record keeping, and publication of criminal justice statistics as a way to increase transparency and rational criminal justice decision-making.¹⁵⁷ Three recent studies underscore

Plaintiffs’ Motion for Summary Judgment, *Hicks v. Hetzel*, No. 09-cv-155-WKW, 22-23 (M.D. Ala. Feb. 9, 2010). Internal incident reports, however, revealed two knifings, three other assaults with weapons, and seven assaults/fights without weapons in March 2009. One of these assaults required a prisoner to be transported to the hospital for eye trauma, another required a prisoner to be transported to the hospital after being beaten in the face with a lock, a third prisoner was severely beaten with a piece of wood, and another alleged he was raped. *See id.* The Department publicly reported that in June 2008, there were zero assaults and zero fights at Donaldson that month. *See id.* at 23. In fact, there were at least six fights/assaults, including one in which a prisoner was stabbed fifteen times, requiring emergency transport to an outside hospital for a collapsed lung, and another in which a prisoner was found “unresponsive” and “covered with blood” with “blood on the locker boxes, wall, and floor of the cell.” *Id.*

153. Bibas describes how people “outside” of the criminal justice system “form generalized opinions *ex ante* about crime and punishment” based on incomplete information about crime; “the general public does not see the aggravating and mitigating facts of individual real cases.” Bibas, *supra* note 9, at 926-27. “When people receive too simple a description of a crime, they mentally fill in the blanks and base the sentences they would impose on stereotypes or on memorable or recent examples.” *Id.* Bibas goes on to describe a revealing survey: “[E]ven though 88% of survey respondents favored a mandatory three-strikes statutes in the abstract, most favored one or more exceptions when presented with specific cases.” *Id.*

154. Ashley Nellis, The Sentencing Project, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT’G REP. 27 (2010), available at http://sentencingproject.org/doc/publications/inc_federalsentencingreporter.pdf (stating that over 41,000 persons are now serving sentences of life without parole in the United States and that the number has increased 22% between 2003 and 2008).

155. *See id.* at 30 (“An estimate by The Sentencing Project found that a state will spend upwards of \$1 million to incarcerate a life-sentenced person for forty years [from age thirty to seventy]”).

156. THE COMM’N ON SAFETY AND ABUSE IN AMERICA’S PRISONS, *supra* note 5, at 95.

157. Bibas, *supra* note 9, at 956, 962.

the importance of data collection as a means to eliminate ineffective criminal justice practices and to improve the efficacy and legitimacy of the criminal justice system.

First, a 2010 study by Alabama's Equal Justice Initiative (EJI) found entrenched racial discrimination in jury selection.¹⁵⁸ The EJI conducted research in eight southern states over two years and found that "racially biased use of peremptory strikes and illegal racial discrimination in jury selection remains widespread, particularly in serious criminal cases and capital cases."¹⁵⁹ For example, the study found that "in Houston County, Alabama, 80% of African Americans qualified for jury service have been struck in death penalty cases."¹⁶⁰ Moreover, the report concludes, "[h]undreds of people of color called for jury service have been illegally excluded from juries after prosecutors asserted pretextual reasons to justify their removal. Many of the assertions are false, humiliating, demeaning, and injurious."¹⁶¹ The report both summarizes the results of research and provides the public with information to prevent racial discrimination in jury selection and for providing relief when it does occur.¹⁶²

A second important study in New York reviewed police stop statistics and confirmed the disparate impact on blacks of the "stop and frisk" practices by the New York Police Department (NYPD). The New York Civil Liberties Union (NYCLU) reviewed data regarding the NYPD's "stop and frisk" practices from 2004 through the first three months of 2010.¹⁶³ Evaluation of the

158. EQUAL JUSTICE INITIATIVE, *supra* note 87, at 5, 9-13 (discussing the history of racial discrimination in jury selection and legal responses, including the 1875 Civil Rights Act and the U.S. Supreme Court's decisions in *Swain v. Alabama*, 380 U.S. 202 (1965) and *Batson v. Kentucky*, 476 U.S. 79 (1987)).

159. *Id.* at 5 (providing a comprehensive study of racial bias in jury selection, based on research in Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Tennessee).

160. *Id.*

161. *Id.* at 6.

162. *See id.* at 44-55 (recommending that prosecutors who are found to have engaged in racially biased jury selection should be held accountable; that in certain cases, *Batson v. Kentucky* should be applied retroactively; that states should provide remedies to people called for jury selection who are illegally excluded; and that state and local justice systems should ensure that low-income residents and sole caregivers for children or other dependants have an opportunity to serve as jurors).

163. *Stop and Frisk Practices*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices> (last visited Oct. 24, 2010). Pursuant to New York's freedom of information law, NYCLU attempted to obtain the raw data regarding the NYPD's "stop and frisk" practices "in hopes of facilitating an independent analysis of [NYPD's] stop and frisk practices." *See NYCLU Moves to Force NYPD to Disclose Stop-and-Frisk Database*, NYCLU, <http://www.nyclu.org/node/1186> (last visited Oct. 24, 2010). The NYPD, however, steadfastly refused until a New York court held that the police data is public information. *See New York Civil Liberties Union v. New York City Police Dep't*, No. 115154/07, 2008 WL 2522233, at *3 (N.Y. Sup. Ct. May 7, 2008) (finding that the NYPD's "stop and frisk" report database is "clearly subject to . . .

NYPD's data revealed that, for each year of data, 87-90% of the people stopped were "totally innocent."¹⁶⁴ In other words, about two million people in New York were subjected to "police stops and street interrogations," but were innocent of wrongdoing.¹⁶⁵ The data also revealed that 49-54% of the people stopped by the NYPD were black.¹⁶⁶ The data called into question the "stop and frisk" practices that an NYPD spokesperson described as "an important ingredient in crime-fighting."¹⁶⁷ NYCLU's analysis of police data has allowed the public to evaluate whether the NYPD has engaged in racial profiling and whether the NYPD is effectively carrying out its mission to promote safety and security.

The third example of the type of research that contributes to a sound public debate about the criminal justice system is a study that examined the performance of a drug court. As the prison population has soared, in part due to draconian drug laws, state and local jurisdictions have examined alternatives to incarceration.¹⁶⁸ Drug courts are one alternative that has been adopted.¹⁶⁹ A study, funded by the U.S. Department of Justice, analyzed the performance of a single drug court in Portland, Oregon, through the lens of ten years of data.¹⁷⁰ The study found that diverting people to drug courts was less expensive than sending people through the traditional court-system, saving taxpayers \$79 million over ten years.¹⁷¹ The data also revealed that participants in the drug court program lowered the incidence of re-arrest for participants by 30%.¹⁷²

disclosure" under the state's freedom of information law pursuant to which NYCLU had attempted to obtain the information); *see also* Christine Hauser, *Police Told to Give Street-Stop Data*, N.Y. TIMES, May 31, 2008, at B5.

164. *Stop and Frisk Practices*, NYCLU, *supra* note 163.

165. *Id.*

166. *Id.*

167. Hauser, *supra* note 163. *See also* Andrew Gelman, Alex Kiss & Jeffrey Fagan, *An Analysis of the New York Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASSOC. 813, 813 (2007) (reviewing data from 125,000 stops by the NYPD over a fifteen-month period and finding that "persons of African and Hispanic descent were stopped more frequently than whites, even after controlling for [police] precinct variability").

168. *See, e.g.*, THE CONSTITUTION PROJECT, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS 53-55 (2008), *available at* http://www.sentencingproject.org/doc/publications/inc_transition2009document.pdf; Colin Asher, *Kentucky Partners with Pew Center to Lower CJ Costs* (Aug. 21, 2010), *available at* http://criminaljustice.change.org/blog/view/kentucky_partners_with_pew_center_to_lower_cj_costs.

169. *See, e.g.*, PEW CHARITABLE TRUSTS, *supra*, note 95, at 17-18; THE CONSTITUTION PROJECT, *supra* note 168.

170. Michael W. Finigan, Shannon M. Carey & Anton Cox, NPC Research, *The Impact of a Mature Court Over 10 Years of Operations: Recidivism and Costs* (2007) (analyzing the operations of a drug court in Multnomah County located in Portland, Oregon, which is the second oldest drug court in the United States).

171. *Id.* at iv (explaining the savings of the drug court program).

172. *Id.* at ii.

Hard data on whether alternatives to incarceration promote public safety is essential to discussing ways to stem the growth of incarceration in our country.

Too often, the media focuses on sensational or aberrant stories of the criminal justice system, while more nuanced information is not reported. If left alone, many criminal justice institutions will happily continue to operate in secret. The public and the media have a responsibility to ensure that this does not happen. Shouldering this responsibility will require a shift in our current culture of relative indifference to the criminal justice system and those entangled in it. This shift will not be easy, nor will it happen overnight. Many people prefer not to think about the subject of what goes on behind prison walls. We have found that it can be difficult to interest even newspaper reporters in stories about what is happening inside our prisons. A reporter for one Alabama newspaper once told us that assaults and deaths in prison are “not news.” This reporter’s observation is consistent with our experience. We hear from prisoners who report rape, stabbings, and assaults on a weekly basis. Yet, these incidents seldom appear in the media.

When media do take an interest, criminal justice actors take notice, and they respond. Paul von Zielbaur’s *New York Times* series exposing the quality of medical care in New York prisons brought national attention to an underreported problem.¹⁷³ Carla Crowder of the *Birmingham News* wrote a series of articles exposing the failure of the Alabama Department of Corrections to provide minimally adequate medical care to patients with HIV and AIDS.¹⁷⁴ And, in Georgia, Bill Rankin of the *Atlanta Journal-Constitution* has authored numerous, thoughtful, engaging articles educating the public on indigent defense, the death penalty, incarceration, and other criminal justice issues.¹⁷⁵ Bill Rankin’s coverage of indigent defense issues, for example, helped to build support among state legislators that culminated in the passage of the 2003 Georgia Indigent Defense Act, which established a statewide public

173. Paul von Zielbaur, *As Health Care in Jails Goes Private, 10 Days Can Be a Death Sentence*, N.Y. TIMES, Feb. 27, 2005, at A1; Paul von Zielbaur, *A Spotty Record of Health Care in City Detention*, N.Y. TIMES, Mar. 1, 2005, at A1; Paul von Zielbaur, *In City’s Jails, Missed Signals Open Way to Season of Suicides*, N.Y. TIMES, Feb. 28, 2005, at A1.

174. Carla Crowder, *Prison’s Medical Care Blasted Limestone HIV Units Facilities, Delays in Pill Distribution Cited*, BIRMINGHAM NEWS (Mar. 12, 2004), http://sentencingcommission.alacourt.gov/News/news_art_montg_3.12.04b.html.

175. See, e.g., Bill Rankin et al., *A Matter of Life or Death: Death Still Arbitrary*, ATLANTA JOURNAL-CONSTITUTION, Sept. 23, 2007, at A1 (reporting that the administration of the death penalty in Georgia is infected with racial and geographic bias); Bill Rankin, *No Money, No Defense for Poor: As Public Defender Funds Run Short, Lawyers Drop Their Criminal Clients*, ATLANTA JOURNAL-CONSTITUTION, May 6, 2009, at A1 (reporting that the State’s failure to provide sufficient funds to pay attorneys appointed to represent the poor in criminal cases pushed attorneys to abandon their clients); Bill Rankin, *Wronged “Deadbeat Dad” May be Freed of Child Support*, ATLANTA JOURNAL-CONSTITUTION, July 24, 2009, at B1, available at <http://www.ajc.com/news/wronged-deadbeat-dad-may-99868.html>.

defender system.¹⁷⁶

An example of tremendous change wrought, in large part, by media pressure, is the change to Georgia's sex offender laws. In 2006, Georgia decided to summarily rid itself of its approximately 10,500 registered sex offenders.¹⁷⁷ The Georgia legislature passed a law that made it illegal and punishable by ten to thirty years in prison for any registered sex offender to live or work within 1000 feet of schools, parks, churches, swimming pools, day care centers and school bus stops.¹⁷⁸ Thousands of people on the registry—from serious offenders to teens whose only crime was consensual sex with other teens—came within forty-eight hours of being driven from their homes.

At first, the law was enormously popular and its legislative sponsors were championed as “tough on crime” and conservative protectors of children.¹⁷⁹ But it soon became clear that the legislation had vastly overstepped. No study had been commissioned on whether the restrictions would reduce crime. No thought had been given to where to resettle the hundreds of registered sex offenders who reside in Atlanta alone.¹⁸⁰ The law kicked elderly and disabled people out of their homes. It banished teenagers whose only crime was having consensual sex with other teens of similar age.¹⁸¹ It evicted cancer and hospice patients and people in nursing homes.¹⁸² In the years that followed the law's passage in 2006, at least 1069 people on the Georgia sex offender registry were

176. AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 59, 62 (2006) (describing the impact of reporting by Bill Rankin for the *Atlanta Journal-Constitution* and others in generating support for the passage of a bill reforming indigent defense in Georgia).

177. Jill Young Miller, *Registered Sex Offenders Ordered to Find New Homes*, ATLANTA JOURNAL-CONSTITUTION, May 19, 2006, at A1.

178. See GA. CODE ANN. § 42-1-15 (West 2010).

179. Editorial, *No Tears for Predators*, SAVANNAH MORNING NEWS (June 21, 2006), <http://savannahnow.com/stories/061006/4006274.shtml> (“If registered sex offenders don't like being displaced too often, too bad. There's always Antarctica.”).

180. Chandler Brown, *Sheriff: New Sex Offender Law 'Nearly Impossible to Enforce'*, ATLANTA JOURNAL CONSTITUTION, June 23, 2006, at E3, available at <http://sexoffenderissues.blogspot.com/2007/06/sheriff-new-sex-offender-law-nearly.html> (“‘There is not one place in DeKalb County where any sexual offender can live. Not one,’ [Sheriff Thomas] Brown said at a news conference. ‘Where are the 490 offenders going to go? I have no earthly idea.’”).

181. See Maureen Downey, Editorial, *A Sex Law Gone Awry: It's Unjust to Saddle Teens with Damning Label for Life*, ATLANTA JOURNAL-CONSTITUTION, Oct. 21, 2007, at B6.

182. See Motion for Preliminary Injunction to Prevent Nine Elderly and Disabled Plaintiffs From Being Evicted From Their Homes, Nursing Homes, and Hospice Care Facilities at 3-10, *Whitaker v. Perdue*, No. 4:06-CV-140-CC (N.D. Ga. Oct. 12, 2006) (seeking to enjoin Georgia's 1000-foot residence restriction law on behalf of a man in hospice care, an Alzheimer's patient in a nursing home, a 100-year-old man, and others); Editorial, *Be Tough and Smart*, COLUMBUS LEDGER-ENQUIRER, Oct. 19, 2006, at A8 (calling Georgia's sex offender residence law “about as wisely crafted as a concrete canoe” and stating that “[a]t least one of the people affected [by the law] will probably die before a judge can even rule on a petition on his behalf”).

evicted from homes located within 1000 feet of a church or swimming pool.¹⁸³ Once rendered homeless by the law, many people on the registry had nowhere to go. The State responded by “direct[ing] homeless offenders into the woods.”¹⁸⁴

Sex offenders are potentially the most reviled group of people on the face of the earth. This is a group with no political capital of any sort. And yet the media recognized the miscarriages of justice caused by the Georgia law and aggressively took lawmakers to task for sloppy drafting. Newspapers that had at first heralded this “strict” new law crafted to protect children from “predators,”¹⁸⁵ instead disparaged the law. We began to see headlines like *Sex Offender Law Too Extreme* from the *Augusta Chronicle* and *Real Offender in this Sex Case is Georgia Law* from the *Atlanta Journal-Constitution*.¹⁸⁶ Ultimately, the media coverage helped to usher in a new era of rational discourse about how to reduce sexual violence.¹⁸⁷ In particular, we have seen an emerging consensus that Georgia’s broad brush law went too far when it punished teenagers who engaged in consensual sex with other teens of like age in the same way as it punished adults convicted of serious sexual crimes.¹⁸⁸ In May 2010, the Georgia legislature reversed course, eliminating the most nonsensical provisions of the law¹⁸⁹ and adding a provision that permits

183. See Brief in Support of Motion for Summary Judgment on Behalf of “Ex Post Facto” Subclass at 2, *Whitaker v. Perdue*, No. 4:06-CV-140-CC (N.D. Ga. Sept. 28, 2009).

184. See Greg Bluestein, *Homeless Georgia Sex Offenders Directed to Woods*, ASSOCIATED PRESS, Sept. 28, 2009, available at http://www.breitbart.com/article.php?id=D9B08C7G0&show_article=1 (reporting that the manager of the state’s sex offender administration unit said “state probation officers have directed homeless offenders into the woods” and noting that “[t]he muddy camp on the outskirts of prosperous Cobb County is an unintended consequence of Georgia’s sex offender law, which bans the state’s 16,000 sex offenders from living, working or loitering within 1,000 feet of schools, churches, parks and other spots where children gather.”).

185. Vicky Eckenrode, *Law Makes State One of Strictest on Sexual Predators*, ATHENS BANNER-HERALD (Apr. 27, 2006), http://onlineathens.com/stories/042706/news_20060427036.shtml.

186. Editorial, *Sex Offender Law Too Extreme*, AUGUSTA CHRONICLE (July 11, 2006), http://chronicle.augusta.com/stories/2006/07/11/edi_88449.shtml; Editorial, *Real Offender in This Sex Case Is Georgia Law*, ATLANTA JOURNAL-CONSTITUTION, Nov. 20, 2008, at A18.

187. See, e.g., Letter from the Ga. Office of the Child Advocate to Sonny Perdue, Governor, Ga. 2 (Apr. 29, 2008) (urging the Governor to support reforms to Georgia’s sex offender residence law, and explaining that “disrupting offenders’ stability through exclusionary housing and employment provisions is likely to exacerbate the psychosocial stressors that can increase the likelihood of recidivism . . .”) (on file with authors).

188. See Downey, *supra* note 181.

189. For example, the 2006 Georgia sex offender law made it illegal and punishable by ten to thirty years in prison for a person on the sex offender registry to be homeless. See GA. CODE ANN. § 42-1-12(a) (West 2010). After the Georgia Supreme Court found that the law was unconstitutional as applied to homeless sex offenders in *Santos v. State*, 284 Ga. 514 (2008), Georgia’s legislature revised the law. See GA. CODE ANN. § 42-1-12(f) (West 2010). To give another example, in 2008, the Georgia legislature made it illegal and punishable by ten to thirty years in prison for any Georgia sex offender to “volunteer” at church. See GA.

qualifying low-risk individuals who were required to register to petition a court for release from the registration, residence, and employment restrictions.¹⁹⁰

CONCLUSION & RECOMMENDATIONS

The public has the right to information that will permit citizens to hold public officials accountable for the operation of our criminal justice institutions. Absent specific security concerns, this information is not the property of law enforcement, but belongs to members of the public who fund these institutions with their tax dollars. The public needs sufficient information about the operation of our courts, prisons, and jails to permit it to judge the successes and failures of these institutions. There is an increased need for transparency and accountability as the criminal justice system expands and privatizes. We offer the following recommendations to increase transparency and accountability in the criminal justice system.

Strong state open records laws are essential to promoting transparency in the criminal justice system. State legislatures should make it clear that the public has the right to prison incident reports, statistics, reports of suicides and homicides in prison, and other information that shows how prisons are being managed. Such laws should give correctional institutions the right to redact sensitive information, but only when the state can show on a case-by-case basis that release of the information would compromise an investigation, reveal a confidential informant, or otherwise negatively impact institutional security. Open records laws should permit sanctions for failure to disclose public information when government actors violate the open records law.

Private prisons and other private corporations that fulfill government criminal justice functions should be subject to state open records laws.

Individuals and organizations should take part in community court-watching to bear witness to illegal or unfair court practices.

Prisons should be required by law to keep accurate data on in-custody deaths, assaults, sexual assaults, and allegations of excessive force, and such

CODE ANN. § 42-1-15 (West 2010). The legislature failed to define the term “volunteer,” leading law enforcement officials around the state to ban sex offenders from singing in church, playing the church piano, participating in adult Bible study, and engaging in other faith-based activity. *See* Order at 21-23, *Whitaker v. Perdue*, No. 4:06-CV-140-CC (N.D. Ga. Mar. 30, 2009). After a federal district court preliminarily enjoined the law’s enforcement, *see id.* at 31, Georgia’s legislature substantially revised the law. *See* GA. CODE ANN. § 42-1-15(a)(4) (West 2010).

190. GA. CODE ANN. § 42-1-19(a) (West 2010) (permitting certain low-risk individuals to petition a superior court for removal from the registry and/or exemption from residence and employment restrictions); *see also* Bill Rankin, *Lead Plaintiff Removed From Sex Offender Registry*, ATLANTA JOURNAL-CONSTITUTION, Sept. 17, 2010, at B1 (reporting that Wendy Whitaker was removed from the sex offender registry after spending twelve years on the registry for engaging in consensual oral sex when she was seventeen with a boy in her high school class).

data should be compiled and published.

Police departments should keep data on police shootings, in-custody deaths, and allegations of excessive force, and such data should be compiled and published.

Litigation should be used strategically in instances in which criminal justice agencies refuse to produce public documents.

We believe that these steps will encourage a nuanced, evidence-based public debate of the efficacy of our criminal justice institutions. The people entangled in the criminal justice system—many of whom are poor and people of color—are often in no position to challenge the government policies and actions that disproportionately impact them, making public scrutiny of these institutions essential to protecting their rights.