

Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts

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I. INTRODUCTION

In recent decades, the incarceration rate in the United States has skyrocketed, presenting severe fiscal challenges to local governments, states, and the Federal Government.¹ In less than four decades, inmate populations have increased tenfold, from under 200,000 in 1971 to over 2 million in 2008.² The result—overcrowded prisons and jails—generates numerous humanitarian, social, and legal problems which are equally, if not more severe, than the concomitant budgetary challenges.³ Many financially strained governments have found it necessary to adopt innovative corrections policies to reduce the cost of prison administration. The cornerstone of these efforts has been an increased dependency on contracts with private entities for correctional and rehabilitative services.⁴

¹ See NAT'L ASS'N OF GOVERNORS STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT: FISCAL YEAR 2007, at 54 (2008) ("State spending for corrections totaled \$48.6 billion in fiscal 2007, a 9.7 percent increase compared to the previous year Total state corrections spending is estimated to be \$52.6 billion in fiscal 2008, 3.4 percent of total state spending, and an estimated increase of 8.1 percent over the fiscal 2007 level."); PUB. SAFETY PERFORMANCE PROJECT, PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-2011, at 18-22 (2007) [hereinafter FORECASTING] ("[R]esearchers estimate that prison operating costs will increase by at least \$2.5 billion per year to as much as \$5 billion per year by 2011.").

² See PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 5 (2008) [hereinafter BEHIND BARS] (noting 2,319,258 inmates were incarcerated at the beginning of 2008, approximately one for every 99.1 adults); John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189, 190 (2005); see also Wray Herbert, *Behind Bars: We've Built the Largest Prison System in the World. Here's a Look Inside*, U.S. NEWS & WORLD REP., Mar. 23, 1998, at 11, 30 ("In 1971 the prison population was only 200,000, where it had hovered since the 1940s."); Josh Margolin, *The Lessons of Attica Thirty Years Later, The Penal System Is Still in Need of Correction*, NEWARK STAR-LEDGER, Sept. 9, 2001, at P1 (listing government statistics, indicating that there were 198,061 incarcerated inmates in 1971).

³ See *Jensen v. County of Lake*, 958 F. Supp. 397, 406 (N.D. Ind. 1997) (dicta) (stating that prison overcrowding is not per se unconstitutional under the Eighth Amendment, but may lead to dangerous conditions or deprivations of essential sanitation or medical resources that would amount to cruel and unusual punishment); see also Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626(3)(e)(i) (2006) (directing that a court shall enter a prisoner release order where prison overcrowding is a primary cause of violation of an inmate's federal right). In early 1985 many states were under court order to find solutions to prison overcrowding. See Martin Tolchin, *Companies Easing Crowded Prisons*, N.Y. TIMES, Feb. 17, 1985, § 1, at 29.

⁴ See, e.g., LA. REV. STAT. ANN. § 39:1800.2 (2009) ("The legislature hereby finds that . . . contracting for portions of governmental services is a viable alternative considering the fiscal problems facing the state, in addition to the interest on the part of many citizens in reducing the overall size of government."); MONT. CODE ANN. § 53-30-601 (2008) ("It is the policy of the state of Montana to encourage innovative methods to provide the correctional resources necessary to confine persons convicted of crimes. The state recognizes that there may be benefits to confining convicted persons in private correctional facilities operated consistently with public policy.").

Currently, the Federal Government and most states authorize corrections privatization in some form.⁵ Private prison contracts are intended to alleviate prison overcrowding and reduce corrections expenditures while bypassing the need for bonds, increased taxes, or funding referenda.⁶ However, experience has shown that “the number of jailed criminals typically rises to fill whatever space is available,”⁷ and privatization has so far failed to temper prison crowding. Instead, the consistent demand for new prisons and jails has facilitated an increase in governmental spending, and corrections budgets continue to swell along with the prison population.⁸

Aside from its nonsuccess in improving crowded prison conditions, the privatization “remedy” has created additional financial, legal, and moral problems. The first of these problems relates to legitimacy.⁹ When a private company assumes responsibility for the administration of inmate punishment and rehabilitation, it improperly undertakes to perform an inherently public

⁵ The Federal Government and almost all of the states have either authorized private prison contracts by statute or failed to expressly prohibit such contracts. *See infra* app. 1. *But see* Illinois Private Correctional Facility Moratorium Act, 730 ILL. COMP. STAT. ANN. 140/1 to 140/4 (West 2009); N.Y. CORRECT. LAW §§ 120–121 (McKinney 2009).

⁶ *See* Tolchin, *supra* note 3 (quoting then-Senator Alphonse D’Amato (D-N.Y.): “[Prison privatization] certainly could be used as a vehicle to circumvent the voting for bonds . . .”). Widespread voter antipathy towards prison construction bonds and increased taxes, along with the modern incarceration boom, have aggravated serious prison conditions. *See* Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 270 (2001) (“In many U.S. states, governments reached their constitutional debt ceilings, with the consequence that additional capital expenditure on infrastructure projects could only go ahead after voter approval for the issue of state bonds. Prisons were not high on voters’ priority lists, and prison construction bond proposals were voted down. The point was reached where politicians, valuing their political skins, were reluctant even to put up such proposals.”); *see also* Rachel Christine Bailie Antonuccio, Note, *Prisons for Profit: Do the Social and Political Problems Have a Legal Solution?* 33 J. CORP. L. 577, 579 (2008) (noting that during the late 1980s and 1990s, “state and federal legislators were unreceptive to legislation involving new taxes and construction bonds, the most utilized methods of financing state and local prisons”).

⁷ Ira P. Robbins, *Privatization of Corrections: A Violation of U.S. Domestic Law, International Human Rights, and Good Sense*, 13 HUM. RTS. BRIEF 12 (2006). When prisons in a given jurisdiction reach critical levels of overcrowding, prosecutors and sentencing judges may rely more on punishment or rehabilitation measures that do not involve prison time. *See* Kerry L. Pyle, Note, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. REV. 151, 159 (1997). However, when new prisons are built, temporarily relieving the overcrowding situation, criminal defendants are again subject to harsh sentences until the newly built facility or facilities are filled. *See id.*

⁸ Despite partial prison privatization in most states and at the federal level, corrections expenditures continue to increase almost uniformly with increases in the prison population. FORECASTING, *supra* note 1, at iv. In 1980 total national spending on corrections was approximately \$9 billion. In 2005 total corrections spending had grown to over \$60 billion, with a projected increase of \$27.5 billion by 2011. *See id.*

⁹ *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 441–42 (2005).

discretionary function at the expense of inmates' fundamental liberty interests.¹⁰ Another problem stems from what private prison advocates claim to be privatization's greatest virtue: the free market model. Private prison companies and their supporters claim that competition and market forces promote greater corrections service performance at a comparatively low cost and that this benefit accrues to contracting governments.¹¹ However, these purported benefits are often imperceptible and where they are evident they fail to justify the humanitarian and social problems that arise under privatization schemes.

Privatization overall negatively impacts the treatment, rehabilitation, and care of prisoners, indicating that the market-driven business model is fundamentally incompatible with an effective and humane corrections system.¹² There are several reasons for this tension. First, private prison companies are primarily profit-seeking entities, working to reduce costs wherever possible. Cost-cutting measures promote inferior contract performance, undue safety risks, and poor delivery of inmate services.¹³ The profit motive also encourages private prison companies to disregard the principles of inmate rehabilitation and criminal deterrence; if advanced, these principles would undermine profits and reduce the demand for these companies' services.¹⁴ Finally, to expand their markets, private prison operators are exhorted to advance harsh criminal

¹⁰ See *id.* ("Before seeking to ensure efficient incarceration, therefore . . . it must first be determined if the particular penal practice at issue is even legitimate."); see also 730 ILL. COMP. STAT. ANN. 140/1, 140/2 ("[T]he management and operation of a correctional facility or institution involves functions that are inherently governmental.").

¹¹ In 1992 President George H. W. Bush issued Executive Order No. 12,803 encouraging state and local governments to contract with the private sector because "private enterprise and competitively driven improvements are the foundation of our Nation's economy and economic growth." 57 Fed. Reg. 19,063, 19,063 (Apr. 30, 1992); see also ADRIAN T. MOORE & TOM ROSE, PRIVATE PRISONS: QUALITY CORRECTIONS AT A LOWER COST 10–19 (1998), available at <https://www.policyarchive.org/bitstream/handle/10207/6161/ps240.pdf?sequence=1>.

¹² For extensive analysis of prison privatization and its effects on inmates, see ANDREW COYLE ET AL., CAPITALIST PUNISHMENT (2003); Judith Greene, *Bailing Out Private Jails*, 12 AM. PROSPECT 23, Sept. 2001, at 23, 23; and Robbins, *supra* note 7.

¹³ See COYLE ET AL., *supra* note 12, at 39–74; Greene, *supra* note 12, at 23–24; Robbins, *supra* note 7.

¹⁴ See COYLE ET AL., *supra* note 12, at 48–55; Robbins, *supra* note 7, at 12, 14; see also *Senator Seeks End to Privately Run Prisons*, 7 FED. HUM. RESOURCES WK. 23, Sept. 25, 2000 (quoting Sen. Russell Feingold: "The profit motive clearly has a dangerous and harmful effect on the security of private prisons, but the profit motive also shortchanges the inmates of the rehabilitation, education and training they need.").

sentencing policies and to dilute early-release, parole, and good-behavior programs within their facilities.¹⁵ All of these market-based incentives, as applied to the field of corrections, operate to the detriment of the Government, prison inmates, and society as a whole.¹⁶

In Illinois and New York, legislators have rightfully abolished private prison contracts.¹⁷ This Note will detail why the Federal Government and all other states should follow suit and avoid further abdications of prison administration responsibilities for the sake of short-term financial savings. Part II will discuss the history and development of private prisons in the United States, accounting for the recent surge in incarceration rates and the impetus behind the modern privatization trend. Part III will argue that prison privatization improperly and illegally encroaches on inherently governmental functions, and that it is fundamentally incompatible with the goals of an effective and humane penal system. Part IV will recount and analyze various problems unique to private prisons, concluding that these problems far outweigh the purported benefits associated with outsourcing. Finally, Part V will address the measures New York and Illinois have adopted to avoid the problems associated with private prisons. It also will discount contract modification as a viable alternative solution. This Part will conclude that the Federal Government and those states that continue to outsource prison administration must reclaim their inherently governmental responsibilities and enact legislation prohibiting all private prison administration contracts.

¹⁵ See WESTERN PRISON PROJECT, *THE PRISON PAYOFF: THE ROLE OF POLITICS AND PRIVATE PRISONS IN THE INCARCERATION BOOM* vii (2000) (discussing the efforts made by private prison companies to encourage strict criminal sentencing legislation).

¹⁶ COYLE ET AL., *supra* note 12, at 54.

¹⁷ Illinois Private Correctional Facility Moratorium Act, 730 ILL. COMP. STAT. ANN. 140/1 to 140/4 (West 2009) (“[T]he State shall not contract with a private contractor or private vendor for the provision of services relating to the operation of a correctional facility or the incarceration of persons in the custody of the Department of Corrections”); N.Y. CORRECT. LAW §§ 120–121 (McKinney 2009) (“[T]he private operation or management of a correctional facility . . . is prohibited.”).

II. BACKGROUND

A. Historical Perspectives and the Growth of the Private Prison Industry

The modern prison privatization trend has significant historical precedent. State and local governments have contracted with private entities to administer various aspects of penal administration since the early colonial days.¹⁸ In the eighteenth and nineteenth centuries, many private businesses employed prisoners as a source of cheap manual labor.¹⁹ Inmate labor practices continued until the early twentieth century, despite a troubling pattern of prisoner abuses that arose under the watch of private prison companies.²⁰ By the 1920s, for-profit prison labor programs were largely eradicated in response to protests from labor reform advocates and claims from competing industries that prison labor constituted unfair competition.²¹

In the 1970s and 1980s, private interests once again assumed control of various prison administration functions.²² This re-privatization began as a piecemeal shift involving inmate food and medical care services, but quickly accelerated to the point where the Federal Bureau of

¹⁸ See JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 9–13 (2001); Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 252 (1995).

¹⁹ See AUSTIN & COVENTRY, *supra* note 18, at 10–11; Casarez, *supra* note 18, at 252.

²⁰ See AUSTIN & COVENTRY, *supra* note 18, at 11; 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 17:2 (3d ed. 2008).

²¹ See AUSTIN & COVENTRY, *supra* note 18, at 11; Casarez, *supra* note 18, at 253. Modern prison labor programs in public facilities are generally viewed as rehabilitative, vocational-training measures, rather than a source of revenue for private business. See FAR 8.601(b). Under FAR 8.602, the Government must give preference to products made by prisoners (under a public entity known as Federal Prison Industries (FPI)) if such goods are comparable to those available from the private sector and if they “best meet the [G]overnment’s needs in terms of price, quality, and time of delivery.” Arguments against this preference policy are similar in substance to those levied at the private prison labor programs during the early twentieth century. See, e.g., Press Release, Rep. Peter Hoekstra, House Passes FPI Reform Legislation (Sept. 14, 2006), available at <http://hoekstra.house.gov/News/DocumentSingle.aspx?DocumentID=50071> (“Fundamental reform of FPI is simply an issue of fairness. Private sector firms and their law-abiding workers should have the opportunity to compete for contracts they fund with their tax dollars.”).

²² See Casarez, *supra* note 18, at 253–54.

Prisons and some states were outsourcing operations functions for entire jails and prisons.²³ In 1984, Corrections Corporation of America (CCA), currently the largest private prison contractor in the United States,²⁴ contracted with the state of Tennessee to run its Hamilton County facility.²⁵ Since then, the private prison industry has grown considerably, operating prisons, juvenile centers, and other correctional facilities under contract with the Federal Government and many state and local governments.²⁶ By 1996, thirteen states had outsourced some portion of their penal systems²⁷ and by 2004, thirty-four states had embraced the privatization trend.²⁸ Despite considerable skepticism from legal and policy commentators and evidence that the purported benefits of privatization are generally unavailing,²⁹ only New York and Illinois have enacted legislation expressly barring private prison contracts.³⁰

The recent surge in corrections privatization is largely a product of the Government's choice to build new facilities to accommodate large inmate populations, rather than address the root causes of overcrowding.³¹ Drastic rises in incarceration rates are attributable not to

²³ See AUSTIN & COVENTRY, *supra* note 18, at 12; Casarez, *supra* note 18, at 254.

²⁴ See *Corrections Corp. of America Names New President, Chairman*, NASHVILLE BUS. J., July 24, 2008, available at <http://nashville.bizjournals.com/nashville/stories/2008/07/21/daily41.html>. Corrections Corporation of America (CCA) continues to perform well, with a 16% increase in fourth-quarter earnings between 2007 and 2008, due in part to a 4.1% increase in inmates and a 5.2% increase in per-diem rates charged to the Government. See *CCA Halts Construction of Trousdale Prison*, NASHVILLE BUS. J., Feb 11, 2009, available at <http://nashville.bizjournals.com/nashville/stories/2009/02/09/daily18.html>.

²⁵ At one point, CCA unsuccessfully attempted to contract for the administration of Tennessee's entire penal system for over \$200 million. See Eric Bates, *Private Prisons*, NATION, Jan. 15, 1998, at 11.

²⁶ See Stephanie Chen, *Larger Inmate Population Is Boon to Private Prisons*, WALL ST. J., Nov. 19, 2008, at A4 (asserting that in 2007, private prisons housed approximately 7.4% of all state and federal prisoners).

²⁷ James Blumstein et al., *Do Government Agencies Respond to Market Pressures?* 15 VA. J. SOC. POL'Y & L. 446, 454 (2008).

²⁸ See *id.*

²⁹ See, e.g., COYLE ET AL., *supra* note 12; SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION 5, available at http://www.sentencingproject.org/doc/publications/inc_prisonprivatization.pdf (last visited Aug. 23, 2009) (arguing that "[c]laims of significant cost-savings and improved efficiency from private prisons have not proven true"); WESTERN PRISON PROJECT, *supra* note 15; Casarez, *supra* note 18 (addressing the lack of accountability and oversight in private prisons); Dolovich, *supra* note 9; Robbins, *supra* note 7; Douglas W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1475 (1986) (calling for comprehensive safeguards to protect inmates' constitutional rights in private prisons); Greene, *supra* note 12.

³⁰ See *infra* app. 1.

³¹ See Greene, *supra* note 12 ("For close to a decade, [private prison] business boomed and its stock prices soared because state legislators across the country thought they could look both tough on crime and fiscally conservative if

increased criminal activity—as indicated by statistics demonstrating that property and violent crime rates have generally fallen since the early 1970s³²—but rather to various items of “get tough” legislation at the federal and state levels, such as minimum mandatory sentencing guidelines,³³ three-strikes laws,³⁴ and the War on Drugs.³⁵ Thanks largely to these measures, there are currently over 2.3 million Americans behind bars, accounting for approximately one percent of adult Americans.³⁶ Instead of repealing ineffective and costly criminal laws, which may be a politically unpopular solution, many lawmakers continue to support new prison construction as a means to accommodate the influx of prisoners convicted and sentenced under these draconian measures.³⁷

they contracted with private companies to handle the growing multitudes being sent to prison under new, more severe sentencing laws.”).

³² See Bureau of Justice, U.S. Dep’t of Def., Bureau of Justice Statistics—Property Crime Rates Continued to Decline, <http://www.ojp.usdoj.gov/bjs/glance/house2.htm> (last visited Aug. 23, 2009); Bureau of Justice, U.S. Dep’t of Def., Bureau of Justice Statistics—Serious Violent Crime Levels Declined Since 1993, <http://www.ojp.usdoj.gov/bjs/glance/cv2.htm> (last visited Aug. 23, 2009). Federal Bureau of Investigation statistics also indicate a continuing general downward trend in violent crime and property crimes. See U.S. FED. BUREAU OF INVESTIGATION, PRELIMINARY SEMIANNUAL CRIME REPORT: JANUARY TO JUNE 2008 (2009), available at <http://www.fbi.gov/ucr/2008prelim/index.html> (“Preliminary figures indicate that, as a whole, law enforcement agencies throughout the Nation reported a decrease of 3.5 percent in the number of violent crimes brought to their attention for the first six months of 2008 when compared with figures reported for the same time in 2007 The number of property crimes in the United States from January to June of 2008 decreased 2.5 percent when compared with data from the same time period in 2007.”).

³³ See Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1716–17 (2006) (“The extent of the U.S. carceral state continues to dwarf the imprisoned population of Europe European countries have resisted adopting legally binding sentencing guidelines like those widely used in the United States.”).

³⁴ See generally Michael Vitello, *Three Strikes: Can We Return to Rationality?* 87 J. CRIM. L. & CRIMINOLOGY 395 (1997).

³⁵ See, e.g., Gottschalk, *supra* note 33, at 1737 (“In the 1980s, about two-thirds of the growth in incarceration was attributed to locking up more non-violent offenders, notably substance abusers.”); Robert G. Lawson, *Difficult Times in Kentucky Corrections—Aftershocks of a “Tough on Crime” Philosophy*, 93 KY. L.J. 305, 351 (2005) (“Since 1980, the number of drug offenders in state prisons has increased thirteen-fold, and drug offenses comprise one-fifth of all state prisoners. Most of these persons are not high-level actors in the drug trade, and most have no prior criminal record for a violent offense.”).

³⁶ BEHIND BARS, *supra* note 2.

³⁷ Lawson, *supra* note 35, at 318–19 (“The label ‘penal populism’ has been used by some authorities to describe the country’s turn toward punitive penology. It reared its head when rehabilitation began to lose supporters, was never presented ‘as a package for public debate,’ gained unstoppable momentum during the last two decades of the twentieth century, and has only recently shown some signs of exhaustion. It deserves most of the credit, or most of the blame, for a criminal justice system that has ‘produced a wave of building and filling prisons virtually unprecedented in human history,’ and for rates of incarceration that qualify as disgraceful when measured against world standards.”) (quoting Marie Gottschalk, *Black Flower:*

An expanding carceral system requires difficult budgetary choices.³⁸ However, contracting with the private sector to not only build, but also administer, prison facilities allows the Government to address the overcrowding problem, without facing the politically unpopular specter of prison bonds or tax increases. In the long run, this short-term fix only aggravates governmental corrections expenditures and creates additional economic and social problems.

B. The Debate over Prison Privatization

Compelling arguments against private prisons are abundant. Privatization critics argue that prison administration is a discretionary function that should only be performed by public actors.³⁹ These critics note that, because prison managers and guards exercise considerable discretion over matters relating to inmate life, liberty, and property, the private exercise of this discretion is morally problematic and inconsistent with legal and constitutional prohibitions on the delegation of inherently governmental activities.⁴⁰

Privatization critics also note that the profit-based business model encourages private prison operators to minimize expenditures for inmate services and prison staffing, thereby impairing safety and undermining prisoners' basic human rights.⁴¹ Finally, privatization critics argue that because private prison companies generate revenue on a per-prisoner, per-diem rate, they have an incentive to encourage high recidivism rates and lengthy prison sentences.⁴² This

Prisons and the Future of Incarceration, 582 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 196, 198 (2002), and MARC MAURER, RACE TO INCARCERATE 9 (1999)).

³⁸ See *supra* note 1 and accompanying text. Often, voters must approve bonds to finance new prisons, and these measures are frequently rejected. See *supra* note 6 and accompanying text.

³⁹ See, e.g., Robbins, *supra* note 7; Warren L. Ratliff, Note, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 373 (1997).

⁴⁰ See, e.g., Robbins, *supra* note 7; Shymeka L. Hunter, Note, *More Than Just a Private Affair: Is the Practice of Incarcerating Alaska Prisoners in Private Out-of-State Prisons Unconstitutional?* 17 ALASKA L. REV. 319 (2000); Ratliff, *supra* note 39.

⁴¹ See, e.g., COYLE ET AL., *supra* note 12, at 39–47; Robbins, *supra* note 7, at 12–15.

⁴² See, e.g., SENTENCING PROJECT, *supra* note 29, at 4; Robbins, *supra* note 7, at 12, 15.

incentive manifests itself in the decision by the private prison companies to eschew rehabilitation programs and to lobby in favor of harsh criminal sentencing measures. Such critiques of the privatization trend all share in common the understanding that a for-profit private business model is fundamentally incompatible with the purposes and goals of an effective and humane penal system.

Supporters of prison privatization argue that market-based competition provides a benefit to the Government and to the field of corrections because it encourages superior contract performance and the development of innovative practices.⁴³ Privatization supporters claim that by reducing bureaucracy and by competing with other firms for contracts, private prison companies perform corrections services at a higher standard and at a cheaper rate.⁴⁴ Privatization supporters argue that allegations of poor safety records, inmate mistreatment, and a lack of accountability in private prisons are unfounded or exaggerated, and that competition among corrections service providers generates long-term benefits to public and private carceral institutions.⁴⁵

Unfortunately, experience has shown that the purported benefits are logically and empirically unfounded. Far from promoting cost-effective and competitive⁴⁶ practices, the problems arising under prison privatization generate various indirect financial costs, and detrimentally affect inmate treatment, care, and rehabilitation.⁴⁷

⁴³ See, e.g., MOORE & ROSE, *supra* note 11, at 17; Blumstein et al., *supra* note 27, at 452.

⁴⁴ See MOORE & ROSE, *supra* note 11, at 17; Blumstein et al., *supra* note 27, at 449 n.14; TheCCA360.com, True Facts About Corrections Corporation of America (CCA) and Privatization, <http://www.thecca360.com/facts.php> (last visited Aug. 23, 2009) [hereinafter Facts About Privatization] (“Given state or federal governments’ ability to cancel contracts with private companies if standards are not met, private operators are accountable for their operations in ways that public systems are not.”).

⁴⁵ See Facts About Privatization, *supra* note 44.

⁴⁶ The private prison industry is largely an oligopoly, dominated by a few firms, and therefore the idea that market competition will encourage greater performance is tenuous at best. See Alfred C. Aman Jr., *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511, 536 (2005). Concentration of the “market” in relatively few companies is likely to remain at present levels or even increase, given the effects of long-term contracts allowed by many of the enabling state statutes. *Id.*

⁴⁷ See COYLE ET AL., *supra* note 12; Robbins, *supra* note 7, at 12–15; Greene, *supra* note 12.

III. PRISON ADMINISTRATION IS AN INHERENTLY GOVERNMENTAL FUNCTION

Delegating public responsibilities for inmate treatment and rehabilitation to private businesses implicates a concern that “governmental power—power coercive in nature—will be used to further the private interests of the private actor, as opposed to some different public interest.”⁴⁸ Assigning the duties of inmate care—including the provision of food, clothing, sanitary supplies, medical care, and disciplinary authority—to profit-seeking entities entails obvious legal and moral questions. The constitutional doctrine of nondelegation prohibits the Government from assigning certain functions to financially interested private actors.⁴⁹ Similarly, the Federal Acquisition Regulation (FAR) and the Office of Management and Budget’s revised A-76 Circular also protect certain “inherently governmental functions” from privatization.⁵⁰ Under these legal guidelines, prison administration—a discretionary duty that directly impacts inmates’ liberty—may not be outsourced to the private sector.

A. Due Process Requirements and the Nondelegation Doctrine Forbid Private Prison Administration

Incarceration, which renders every aspect of prisoners’ physical and mental health, safety, education, and socialization subject to the control of prison guards and their superiors, directly affects inmate liberty interests.⁵¹ The Supreme Court has found that under the Due

⁴⁸ David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 659 (1986).

⁴⁹ See *Tumey v. Ohio*, 273 U.S. 510, 510 (1926).

⁵⁰ FAR 7.503(a) (“Contracts shall not be used for the performance of inherently governmental functions.”); Revision to Office of Management and Budget Circular No. A-76, 68 Fed. Reg. 32,134, 30,138 (May 29, 2003) (“Inherently governmental activities must be performed by public employees.”).

⁵¹ “Incarceration is among the most severe and intrusive manifestations of power the state exercises against its own citizens. When the state incarcerates, it strips offenders of their liberty and dignity and consigns them for extended periods to conditions of severe regimentation and physical vulnerability.” Dolovich, *supra* note 9, at 441.

Process Clauses of the Fifth and Fourteenth Amendments, the Government may not delegate discretionary governmental functions to private entities with a financial stake in the way such discretion would be applied.⁵² The controls exercised by prison employees are inherently discretionary and the manner in which they are applied cannot be influenced by the pecuniary aims of the operator without offending prisoner due process rights. Like their public counterparts, private prison guards are often called upon to decide appropriate punishments for inmate misconduct.⁵³ Many of these guards have stock in their employer-company or receive some other profit-sharing benefits,⁵⁴ giving them a direct interest in the outcome of their professional decisions. Thus, they benefit when prisoner sentences are lengthened and their good-time credits reduced.⁵⁵ This conflict, unique to private prisons, is illustrative of why certain quasi-judicial functions are nondelegable under due process requirements.⁵⁶

⁵² See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (“But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . The answer is obvious. Such a delegation of legislative power is unknown to the law”); *Tumey*, 273 U.S. at 523 (“[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”).

⁵³ See *Harding*, *supra* note 6, at 276.

⁵⁴ See *Aman*, *supra* note 46, at 541.

⁵⁵ MICHAEL WELCH, PUNISHMENT IN AMERICA: SOCIAL CONTROL AND THE IRONIES OF IMPRISONMENT 291 (1999) (“The New Mexico Corrections Department found that inmates at the CCA facility lost ‘good time’ eight times more frequently than prisoners in a state institution In Tennessee, CCA guards say privately that they are encouraged to send balky inmates to administrative segregation; by placing prisoners in the ‘hole,’ the company earns an extra \$1,000 because 30 days are added to the sentence.”). Many states’ enabling statutes forbid private prison companies from calculating sentence credits without governmental oversight. See, e.g., COLO. REV. STAT. ANN. § 17-1-203(1)(d) (West 2008); ARIZ. REV. STAT. ANN. § 41-1609.01(P)(2) (2009). However, these clauses cannot effectively prevent private companies from exercising undue influence over inmates’ liberty; without a constant, omniscient governmental presence within prisons, there is no way to ensure that private interests do not influence decisions affecting inmates’ punishments or rewards. See *Dolovich*, *supra* note 9, at 492.

⁵⁶ Cf. *Carter v. Carter Coal*, 298 U.S. 238, 311–12 (1936) (“[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment that it is unnecessary to do more than refer to decisions of this court which foreclose the question.”) (citing *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 537).

B. The Office of Management and Budget A-76 Circular and the Federal Acquisition Regulation Prohibit Delegation of “Inherently Governmental Functions”

In 1966 the Office of Management and Budget published Circular A-76, providing that federal agencies must rely on private sector sources for service provision when it is cost-effective and would not adversely impact governmental operations.⁵⁷ Several exceptions to this policy apply, including instances where no satisfactory commercial source is available for a particular service, where in-house performance would cost less than outsourcing, or where the service requires an exercise of discretion in applying governmental authority.⁵⁸ The Federal Activities Inventory Reform Act of 1998 revised the A-76 process and defined “inherently governmental functions” as “activities that require the exercise of discretion in applying Federal Government authority.”⁵⁹ Thus, inherently governmental functions were specifically excluded from the A-76 policy of private sector source preference.⁶⁰

Relevant sections of the FAR also prohibit delegations of certain governmental functions.⁶¹ Under the FAR, an “inherently governmental function” is defined as a function that is so intimately related to the public interest as to mandate performance by Government employees An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government An inherently governmental function involves,

⁵⁷ Office of Management and Budget, Circular A-76, Performance of Commercial Activities (1966), *amended by* 61 Fed. Reg. 14,338 (Apr. 1, 1996), *further amended by* 68 Fed. Reg. 32,134 (May 29, 2003).

⁵⁸ *Id.*

⁵⁹ 31 U.S.C. § 501 (2006).

⁶⁰ 61 Fed. Reg. at 14,340 (Apr. 1, 1996) (“Inherently governmental functions are not commercial in nature, are not subject to the Circular and cannot be converted to contract performance.”).

⁶¹ FAR 7.503(a).

among other things, the interpretation and execution of the laws of the United States so as to . . . (iii) Significantly affect the life, liberty, or property of private persons.⁶²

In the course of their duties, prison employees frequently decide whether to administer punishment in response to inmate misconduct. Procurement regulations rightfully require such quasi-judicial decisions, which affect the “life, liberty, or property of private persons,”⁶³ to be made by governmental actors.⁶⁴ Only the Government may legitimately decide, for example, whether an inmate is up for parole or eligible for a sentence reduction because of good behavior. Likewise, the decision whether to apply corporal punishment or to cite an inmate for misbehavior is a decision “intimately related to the public interest” that “significantly affect[s] the life, liberty, or property of private persons.”⁶⁵ These discretionary duties are clearly within the ambit of Circular A-76 and the FAR definitions of “inherently governmental function[s].” As such, they are protected from private sector delegation.

C. Delegating Prison Administration Is a Poor Policy Choice

The argument against prison privatization as a policy matter is clear. Outsourcing decisions over matters with drastic and irreversible implications for inmates’ lives to profit-seeking businesses with an interest in minimizing expenditures and maximizing punishment is immoral and incompatible with fundamental notions of justice. Illinois lawmakers have barred private prison contracts within their state, finding that the “management and operation of a

⁶² FAR 2.101.

⁶³ *Id.*

⁶⁴ *Cf.* Memorandum from Amy L. Comstock, Dir. of the Office of Gov’t Ethics, to Designated Agency Ethics Officials, Regarding Inherently Governmental and Commercial Ethics Official Activities 1, 4, 5 (June 30, 2003), available at http://www.usoge.gov/ethics_guidance/opinions/advop_files/2003/03x4.pdf (concluding that essential activities performed by ethics officials are inherently governmental for purposes of A-76 requirements).

⁶⁵ FAR 2.101.

correctional facility or institution involves functions which are inherently governmental.”⁶⁶ After experimenting with the privatization “solution” for several years, New York State also enacted its own statutory prohibition on private prison contracts, agreeing with Illinois that “coercive police powers” are “distinguishable from privatization in other areas of government.”⁶⁷ At the federal level, Senator Russell Feingold (D-Wis.) and Representative Ted Strickland (D-Ohio) recognized the detrimental effects of private prisons and, in 2001, introduced the Public Safety Act, which sought to not only prohibit federal contracts with private prison companies, but also to eliminate certain federal grants to states using private prisons.⁶⁸ In support of this bill, Senator Feingold correctly noted that prison administration functions “should not be delegated to a private company that is not accountable to the people.”⁶⁹ To legitimize corrections and rehabilitation functions, it is imperative that Congress and the states follow the example set by Illinois and New York by enacting complete prohibitions on all prison privatization contracts.

⁶⁶ 730 ILL. COMP. STAT. ANN 140/1 to 140/4 (West 2009).

⁶⁷ *Id.*

⁶⁸ S. 842, 107th Cong. § 2(9) (2001); H.R. 1764, 107th Cong. § 2(9) (2001) (“The imposition of punishment on errant citizens through incarceration requires State and local governments to exercise their coercive police powers over individuals. These powers, including the authority to use force over a private citizen, should not be delegated to another private party.”). The Public Safety Act was referred to the Senate Judiciary Committee and the House Subcommittee on Crime; no further action was taken. *See* S. 842.

⁶⁹ *Senator Seeks End to Privately Run Prisons*, *supra* note 14.

IV. THE PROFIT MOTIVE DETRIMENTALLY IMPACTS INMATE CARE, REHABILITATION, AND CRIMINAL SENTENCING POLICY⁷⁰

Private prison companies operate under a profit motive, which encourages minimal spending for inmate services, support of harsh criminal penalties, and a dearth of effective rehabilitation programs in the facilities they operate.⁷¹ These perverse incentives, which are empirically palpable, further support the contention that a for-profit business model is incompatible with effective and humane prison administration.

A. Cost-Cutting Measures Lead to Decreased Quality of Care

To increase profit margins, many private prison companies implement cost-cutting measures that detract from essential inmate services. These service impairments frequently lead to foreseeable yet tragic situations.⁷² “[T]he private sector is a more dangerous place to be incarcerated”⁷³ partially because private prison companies often accede to their profit-maximizing incentive at the expense of safety interests and prisoners’ basic human rights.

⁷⁰ This Note does not defend the record of federal, state, and local governments in terms of public penal administration. The gross human rights and civil rights violations that occur in prisons are by no means limited to the private sphere. “[C]onditions in many prisons—public and private alike—fall far short of satisfying society’s obligations to those it incarcerates.” Dolovich, *supra* note 9, at 442. However, to reform prison policy and administration overall, it is imperative that private actors with a financial stake in maintaining high incarceration rates and lengthy criminal sentences do not improperly influence the formation of policies that instead ought to serve the public interest.

⁷¹ See COYLE ET AL., *supra* note 12; WESTERN PRISON PROJECT, *supra* note 15; Robbins, *supra* note 7 (“Critics argue that as a matter of policy it is inappropriate to operate prisons with a profit motive, which provides no incentive to reduce overcrowding (especially if the company is paid on a per-prisoner basis), to consider alternatives or to deal with the broader problems of criminal justice.”).

⁷² See, e.g., COYLE ET AL., *supra* note 12, at 30–37; Greene, *supra* note 12, at 23–24.

⁷³ Curtis R. Blakely & Vic W. Bumphus, *Private & Public Sector Prisons—A Comparison of Select Characteristics*, 68 FED. PROBATION 27, 30 (2004).

In comparison to their public counterparts, private prison guards receive lower pay and fewer benefits.⁷⁴ This leads to high turnover among private correctional officers, meaning that at any given time there are more guards in private prisons who are new to their facility or to the field of corrections in general than in public prisons.⁷⁵ Private prison guards receive thirty-five percent fewer service training hours than public prison employees.⁷⁶

The implications for safety under these policies are obvious. For example, it was found that guards in a private facility in Ohio had not received weapons training although they were instructed to carry firearms while on patrol.⁷⁷ In a private Texas facility, “guard training” seminars consisted of watching videos in which prisoners were beaten, stun-gunned, stripped naked, and subjected to unleashed dogs.⁷⁸

The most effective means of lowering prison operating costs is to ensure that the ratio of prisoners per guard is as high as possible.⁷⁹ On average, private prisons employ fifteen percent fewer guards per prisoner than public prisons,⁸⁰ a policy that places both guards and inmates at an increased risk of danger. In 2005, after an inmate riot in a private Colorado facility where thirteen correctional officers were injured, a state investigation found that there were only thirty-three officers overseeing 1,100 inmates when the riot began.⁸¹

The gravity of the profit incentive is manifest in many other dangerous and inhumane cost-saving practices adopted by private prison operators. For example, in Youngstown, Ohio, a

⁷⁴ See *Low Wages Incite COs to Size Up Their Jobs: Earnings, Especially at Private Prisons, Hover at Poverty Line*, CORRECTIONS PROF., Nov. 19, 1999, at 10.

⁷⁵ See Blakely & Bumphus, *supra* note 73, at 29 (stating that in 1998 private prisons experienced turnover rates almost three times higher than public prisons).

⁷⁶ See Robbins, *supra* note 7, at 13; see also Blakely & Bumphus, *supra* note 73, at 29.

⁷⁷ See COYLE ET AL., *supra* note 12, at 33.

⁷⁸ *Id.*

⁷⁹ See Blakely & Bumphus, *supra* note 73, at 29.

⁸⁰ See *id.* (“[T]he private sector reports an average 6.7 inmates per correctional officer and 3.7 inmates per staff member. The public sector, in comparison, reported an average 5.6 inmates per correctional officer and 3.1 inmates per staff member.”); Robbins, *supra* note 7, at 13.

⁸¹ See *CCA Bids on Colorado Contracts*, CORRECTIONS PROF., Mar. 24, 2006, at 15.

medium-security prison operated by CCA was found to have reclassified maximum-security, high-risk prisoners arriving from Washington, D.C., as medium-security inmates to avoid incurring costs associated with raising the security level of the prison.⁸² Within the next eighteen months, two Youngstown inmates were stabbed to death and forty-four other assaults were recorded.⁸³ In a private facility in Elizabeth, New Jersey, it was found that cost-cutting measures led to serious shortages of food and sanitary supplies and the prisoners were routinely abused by the staff.⁸⁴ In 2001, a Department of Justice study found sixty-five percent more inmate-on-inmate assaults and forty-nine percent more inmate-on-staff assaults in private facilities than in government-operated prisons.⁸⁵ This trend is especially significant considering that private prisons are generally used to house inmates from lower security classifications.⁸⁶ As an inevitable product of private prison companies' cost-cutting incentives, these findings further demonstrate that the for-profit private business model is incompatible with safe and effective prison administration.

⁸² See JOSEPH I. HALLINAN, *GOING UP THE RIVER: TRAVELS IN A PRISON NATION* 180 (2001) (Youngstown “was not supposed to accept maximum-security inmates. But when they arrived, CCA did not object” because doing so would have cost the company \$14,659 per day in lost revenue.).

⁸³ For more information on the conditions at Youngstown, see Mark Tatge, *Employees Criticize Privately Run Facilities*, CLEV. PLAIN DEALER, Aug 30, 1998, at 18A, and Cheryl W. Thompson, *Ohio Issues Restraining Order for Prison Firm*, WASH. POST, Nov. 19, 1998, at B4.

⁸⁴ See Dolovich, *supra* note 9, at 498.

⁸⁵ AUSTIN & COVENTRY, *supra* note 18, at 48; Fox Butterfield, *Justice Dept. Shows Trouble in Private U.S. Jails Preceded Job Fixing Iraq's*, N.Y. TIMES, June 6, 2004, at A18.

⁸⁶ See Dolovich, *supra* note 9, at 503.

B. The Profit Motive Imposes Severe Social and Economic Costs

1. Harsh Criminal Laws Benefit the Private Prison Industry

The growth of private prison companies depends on rising incarceration rates and strict criminal sentencing laws.⁸⁷ As “clients” of the private prison system, inmates are the main source of revenue to the companies responsible for their treatment and rehabilitation. To generate steady profits, these companies require a continual supply of new clients (first-time convicts) and a base of frequent, dependable clients (recidivist convicts). Fortunately for the private prison industry, these twin goals have been made possible by high criminal recidivism rates⁸⁸ and the widespread adoption of “get tough” mandatory sentencing laws.⁸⁹

Private prison companies are not simply passive recipients of these windfall-generating phenomena. Instead, recognizing the benefits they receive from strict sentencing laws and high recidivism rates, they actively seek to ensure that these trends continue despite harmful effects on the inmates, the Government, and society as a whole.⁹⁰ Lobbying efforts, both direct and indirect, reflect private prison companies’ policy preferences in terms of criminal sentencing measures.⁹¹ The private prison lobby is active at the federal level and in many states, bankrolling favorable candidates’ political campaigns and supporting “think tank” policy initiatives.⁹² For example, during the 1998 election cycle, private prison companies contributed more than

⁸⁷ In their March 1997 filing with the Securities and Exchange Commission, CCA noted that “the rate of construction of new facilities and the Company’s potential for growth will depend on a number of factors, including crime rates and sentencing patterns in the United States.” SENTENCING PROJECT, *supra* note 29, at 4.

⁸⁸ A study of individuals released from prison in 1994 found that 67.5% were rearrested within three years. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

⁸⁹ See NAT’L CRIMINAL JUSTICE COMM’N, THE REAL WAR ON CRIME 13–15 (Steven R. Donziger ed., 1996) (detailing anticrime legislative enactments in the 1980s and 1990s); Darley, *supra* note 2, at 190–91; Gottschalk, *supra* note 33; Lawson, *supra* note 35; Vitello, *supra* note 34; Hunter, *supra* note 40, at 322–23.

⁹⁰ See WESTERN PRISON PROJECT, *supra* note 15 (“[A] major factor in the current incarceration boom is the influence of private prison corporations with vested financial interests in increasing rates of imprisonment.”).

⁹¹ See *id.*

⁹² See *id.*

\$540,000 to 361 candidates in twenty-five states, eighty-seven percent of whom won their elections.⁹³ In 2000, approximately forty percent of state legislators were members of the American Legislative Exchange Council (ALEC), a policy advocacy group that promotes model legislation such as minimum mandatory sentencing requirements and three-strikes, habitual offender statutes.⁹⁴ ALEC receives the majority of its funding from corporate interests, including large contributions from private prison companies such as CCA.⁹⁵

Aside from these traditional advocacy methods, some private prison companies have pursued underhanded and illegal tactics in their attempts to influence lawmakers. In 2003, a probe by the New York State Lobbying Commission found that Correctional Services Corporation (CSC) had illegally provided free chauffer-driven transportation to several state lawmakers for at least a four-year period.⁹⁶ In Alaska, the founder of several private halfway houses was recently sentenced to six months in federal prison for paying a legislative candidate at least \$20,000 to support construction of a new private facility in the state.⁹⁷

Instances of self-serving bribery are not limited to schemes that seek to affect broad policy change or embed a general preference for corrections privatization. In early 2009, it was discovered that a private juvenile detention center paid two Pennsylvania judges \$2.6 million

⁹³ *Id.* at 8–9. Wackenhut Corrections Corporation, which operates several private prisons in California, contributed \$53,000 to Governor Arnold Schwarzenegger’s 2003 gubernatorial campaign, during a time when its Central Valley, California, prison was slated to be closed at the end of that year. *Schwarzenegger Takes Donation from Florida Prison Firm*, CORRECTIONS PROF., Dec. 12, 2003, at 15. CCA, which was awarded contracts by the state of Kentucky, contributed \$10,000 to a private fund to pay for repairs to the Kentucky governor’s mansion. *Private Prison Company Donated to Governor’s Mansion Fund*, CORRECTIONS PROF., May 27, 2005, at C1. The GEO Group, which operates private prisons in New Mexico, contributed more than \$40,000 to New Mexico Governor Bill Richardson’s 2006 reelection campaign and an additional \$15,000 for his January 2007 inauguration. Steve Terrell, *Roundhouse Roundup: Richardson Donor List Has Familiar Look*, SANTA FE NEW MEXICAN, Aug. 9, 2007, at C1.

⁹⁴ See WESTERN PRISON PROJECT, *supra* note 15, at 3.

⁹⁵ *Id.* at 3–4.

⁹⁶ *CSC Probed for Favors to N.Y. Legislators*, CORRECTIONS PROF., Feb. 14, 2003, at 10; James C. McKinley Jr., *Company Gets Record Fine for Its Giving to Lawmakers*, N.Y. TIMES, Feb. 27, 2003, at B1. In 2007, having experienced the problems inherent in prison privatization, New York enacted N.Y. CORRECT. LAW §§ 120–121 (McKinney 2009), prohibiting government contracts with private prison providers.

⁹⁷ Lisa Demer, *Weimar Sentenced to Six Months*, ANCHORAGE DAILY NEWS, Nov. 13, 2008, at A1.

over five years to reject pleas for leniency and alternative punishments for hundreds of teens.⁹⁸ In exchange, the local public facility was shut down by one judge, who controlled the budget, and the teens were then sentenced by the other judge to serve time in PA Child Care, a private company's facility.⁹⁹ Although these accounts do not reflect the bulk of the private prison industry's lobbying efforts, they are not extraordinarily rare.¹⁰⁰ The tensions between private prison companies' financial interests and legitimate penal functions are evident. The financial success achieved by private prison companies comes at a steep cost to the inmates, their families, the Government, and society as a whole.

2. Harsh Criminal Laws Do Not Reduce Crime Rates or Benefit Society

Available evidence largely refutes the contention that tough criminal measures benefit society by reducing crime rates and deterring criminals.¹⁰¹ Removing criminal offenders—many of whom are imprisoned for drug charges or other nonviolent offenses—from society for long periods of time and placing them in crowded, dangerous, and unhealthy conditions with other criminals often has negative aggregate effects on recidivism rates.¹⁰²

⁹⁸ John Schwartz, *Slates Cleaned for Youths Sentenced Fraudulently*, N.Y. TIMES, Mar. 27, 2009, at A13.

⁹⁹ *Id.* When the corruption came to light, the judges were sentenced to eighty-seven months in federal prison. The teens who had been sentenced by them were released, and their records were expunged. *Id.*

¹⁰⁰ See, e.g., Greene, *supra* note 12 (“[I]n Oklahoma, the addiction treatment manager at CCA’s Tulsa Jail resigned. The warden, she said, had directed her to make a ‘sales pitch’ to local judges, urging them to sentence offenders to a treatment program in the jail even though the program had been eviscerated in order to cut operating expenses.”).

¹⁰¹ See David Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket’s Hanging*, 4 AM. L. & ECON. REV. 295, 302–04 (2002) (finding that the vast majority of violent offenders are not deterred or influenced by, or are unaware of, existing punishments for their crimes); Darley, *supra* note 2, at 193–95.

¹⁰² See Thomas Orsagh & Jong-rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. QUANTITATIVE CRIMINOLOGY 155, 161 (1988) (stating that for some offense classes, longer sentences lead to an increase in recidivism).

Lengthy prison sentences impair inmates' ability to obtain legitimate employment once they are released, increasing their incentive to revert to criminal behavior.¹⁰³ Long periods of incarceration weaken inmates' family ties, alienate them from positive social influences, and increase the likelihood that they will contract AIDS or other drug-resistant diseases.¹⁰⁴ The purported social or rehabilitative benefits of "get tough" sentencing measures are largely nonexistent; excessively punitive criminal laws advantage only those in the private prison industry.

3. Effective Rehabilitation Programs Decrease Recidivism Rates, Impacting Private Prison Companies' Revenue

In 2005, researchers Patrick Bayer and David Pozen found that in juvenile corrections systems, "[r]elative to all other management types, for-profit management leads to a significant increase in recidivism."¹⁰⁵ The difference in quality among inmate rehabilitation programs in public and private prisons illustrates yet another symptom of the divergent motivations affecting public and private prison operators.¹⁰⁶ "A for-profit prison operator [has] almost no contractual incentive to provide rehabilitation opportunities or educational or vocational training that might

¹⁰³ *Id.* at 158 ("As the sentence becomes longer, expected legitimate earnings and employment opportunities decrease because of the loss of contact with the job market, expected earnings and employment in illegitimate activity increase . . . and the distaste or unwillingness to engage in 8 hours per day, 5 days per week work activity increases as one becomes accustomed to the inactivity of prison life. All of these effects enhance postprison criminal propensities.").

¹⁰⁴ See Darley, *supra* note 2, at 193.

¹⁰⁵ Patrick Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public versus Private Management*, 48 J.L. & ECON. 549, 549 (2005).

¹⁰⁶ Robbins, *supra* note 7, at 15 ("A private jail in Texas was investigated for diverting \$700,000 from a drug-treatment program, while inmates with substance-abuse problems received no treatment whatsoever. In Minnesota a private facility neglected to establish a substance abuse treatment program even though the contract required it. The nearby public prison, by contrast, provided its chemically dependent inmates with full-day therapeutic sessions five times a week.").

benefit inmates after release, except insofar as these services act to decrease the current cost of confinement.”¹⁰⁷

Programs common to public facilities such as substance addiction treatment, vocational education, and sentence credits for good behavior are largely nonexistent in private prisons.¹⁰⁸ Where private companies do establish rehabilitation programs, often as the result of contractual requirements, they maintain a financial interest in ensuring that they are poorly administered.¹⁰⁹ Successful rehabilitation efforts would encourage private prison companies’ best “clients” to leave early and to fail to return. Also, the costs of implementing and administering effective programs would undercut a private prison’s immediate bottom line.¹¹⁰

The findings of the Bayer and Pozen study demonstrate how private prison companies encourage recidivism by actively neglecting or discouraging rehabilitative programs. Instead of encouraging inmates to leave prison free of addiction, with quality vocational training, and a desire to become productive citizens, the profit motive behind private prison companies seeks to ensure that the inmate returns to prison as quickly as possible.

C. The Purported Short-Term Economic Benefits of Prison Privatization Are Offset by Long-Term Economic Costs

Advocates of prison privatization argue that as a product of market competition and the efficiency of the private sector, private prisons are cheaper to operate than their public counterparts.¹¹¹ However, in a 1996 study, the General Accounting Office found that studies

¹⁰⁷ Bayer & Pozen, *supra* note 105, at 552.

¹⁰⁸ See *The Road to Reduced Recidivism—The Ground Privateers Fear to Tread*, CORRECTIONS PROF., Mar. 24, 2000, at 8.

¹⁰⁹ See Robbins, *supra* note 7, at 14–15.

¹¹⁰ See *id.* at 14 (“Private prisons have a double disincentive to aid in the rehabilitation of their charges: by skimping on programs they save money immediately and, by letting prisoners serve out their terms without access to proper rehabilitation programs, they increase the likelihood that those prisoners will become ‘repeat customers.’”).

¹¹¹ See, e.g., MOORE & ROSE, *supra* note 11, at 15–17.

comparing costs of private and public prisons “do not offer substantial evidence that savings have occurred” under privatization contracts.¹¹² In 2005, it was found that the state of Arizona actually paid private contractors \$11 per prisoner per day *more* than the average daily costs of state-operated prisons, totaling approximately \$4.1 million in extra spending by the state per year.¹¹³

Aside from immediate financial concerns, lawmakers should consider the long-term indirect financial costs that arise out of privatization arrangements. Increased criminal recidivism among inmates in private institutions presents perhaps the largest hidden financial cost of privatization. The Bayer and Pozen study comparing private and public juvenile facilities found that a “cost-benefit analysis implies that the short-run savings offered by for-profit facilities over nonprofit facilities are reversed in the long run due to increased recidivism rates.”¹¹⁴ This conclusion holds even when one ignores the noneconomic harms associated with high recidivism rates and only accounts for direct financial costs.¹¹⁵

Another indirect cost of privatization arises from compliance monitoring and enforcement procedures that are necessary to ensure minimal compliance with contractual requirements. Privatization advocates claim that a lack of redundant bureaucracy in private prisons brings down their overall operating costs relative to public prisons.¹¹⁶ However, rather than reducing levels of red tape that would otherwise exist in a purely public system, private prison systems require costly monitoring and enforcement procedures to keep the symptoms of

¹¹² U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-96-158, PRIVATE AND PUBLIC PRISON: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE 3 (1996).

¹¹³ See *Private Prison Mandate Questioned in Arizona*, CORRECTIONS PROF., Aug. 5, 2005, at 15.

¹¹⁴ Bayer & Pozen, *supra* note 105, at 582.

¹¹⁵ See generally *id.*

¹¹⁶ See MOORE & ROSE, *supra* note 11, at 5.

profit maximization in check as much as possible. This necessitates an additional layer of bureaucracy and aggravates governments' overall corrections expenditures.¹¹⁷

Finally, the costs associated with legal challenges stemming from the actions of private prison employees aggravate contracting governments' corrections budgets even further.

Although the Government enjoys qualified immunity¹¹⁸ against lawsuits arising under 42 U.S.C. § 1983, the Supreme Court has held that this immunity does not extend to employees of private prison companies.¹¹⁹ Litigation expenses, settlement agreements, and adverse court judgments against private prison operators and their employees augment the Government's expenses by way of contract pricing increases and a higher degree of liability exposure than would exist under a purely public system.¹²⁰ These additional indirect financial costs seriously undermine the economic argument in favor of private prison contracts and demonstrate why the privatization "solution" has so far failed to ease governments' corrections budgets.

V. STATUTORY PROHIBITIONS ON PRIVATE PRISON CONTRACTS

Despite the social and economic costs associated with prison privatization, the Federal Government and most states continue to outsource their prison administration responsibilities to

¹¹⁷ See Am. Fed'n of State, County & Municipal Employees (AFSCME), *The Record—For-Profit Private Prisons Do Not Provide Measurable Cost Savings*, <http://www.afscme.org/publications/2556.cfm> (last visited Aug. 23, 2009).

¹¹⁸ The Supreme Court has "accorded certain government officials either absolute or qualified immunity from suit if the 'tradition of immunity was so firmly rooted in the common law and was supported by . . . strong policy reasons . . .'" *Wyatt v. Cole*, 504 U.S. 158, 163–64 (1992) (quoting *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)).

¹¹⁹ See *Richardson v. McKnight*, 521 U.S. 399, 399 (1997). *But see* *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 61 (2001) (declining to extend availability of *Bivens* actions to private prison companies under contract with the Federal Government).

¹²⁰ See S. 842, 107th Cong. § 2(6) (2001) ("[Q]ualified immunity that shields State and local correctional officers does not apply to private prison personnel, and therefore exposes State and local governments to liability for the actions of private corporations."); H.R. 1764, 107th Cong. § 2(6) (2001) (stating same).

some degree.¹²¹ As of early 2009, only Illinois and New York have barred private prisons by statute.¹²² Congress and all other states, including those that have not yet actively pursued privatization but do not expressly forbid private prison contracts, should enact similar legislation and thereby avoid the economic and social harms associated with privatization schemes.

A. Particularized Contract Terms and Aggressive Monitoring Programs Are Inviable Alternative Solutions

Some commentators have proposed contract modification along with increased compliance monitoring and enforcement as alternative solutions to a complete prohibition on private prison contracts.¹²³ Along similar lines, it may be argued that more rigorous accreditation standards by the American Correctional Association (ACA) would enhance contractors' performance and accountability.¹²⁴ Under these proposed solutions, private prisons would ostensibly operate under the same standards applicable to public prisons while continuing to supply the purported cost benefits of privatization. However, increasingly particularized contract terms and aggressive monitoring or enforcement procedures cannot sufficiently abate the symptoms of profit maximization in private prisons.¹²⁵ A rise in the quality or frequency of performance monitoring visits would immediately increase costs, to either the Government or the

¹²¹ See *infra* app. 1.

¹²² 730 ILL. COMP. STAT. ANN 140/1 to 140/4 (West 2009); N.Y. CORRECT. LAW §§ 120–121 (McKinney 2009).

¹²³ See Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 170–71 (2000) (“To some extent, objections to contracting out might be ameliorated by careful attention to contract design. Contracts could specify tasks more clearly, detail procedures more thoroughly, and clarify responsibilities.”).

¹²⁴ See Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383, 414 (2006).

¹²⁵ See Dolovich, *supra* note 9, at 492 (“Certainly, those contracts that provide for full-time on-site monitors are an improvement over those that allow for only occasional visits: the average permanent on-site monitor spends an average of 7.25 hours per day, working five days a week, in the monitored facility. But still, given the scope of prison contracts and the range and extent of the interactions and activities within any given prison, it seems unlikely that comprehensive and meaningful oversight can be achieved by a single monitor spending an average of thirty-six hours a week on-site.”); Freeman, *supra* note 123, at 171 (“[T]here is a limit to technocratic solutions. No matter how careful the [contract] drafter, some tasks are difficult to specify in contractual terms . . .”).

contractor (who would eventually pass that cost on to the Government by way of increased contract pricing).¹²⁶ The degree of governmental oversight that would be necessary to ensure that private prison companies actually adhere to demanding and particularized contract or accreditation requirements would be so great as to increase costs to the point where neither the Government nor the contractor would agree to such terms.¹²⁷ Because private enterprises must turn a profit or shut down business, the Government cannot expect to save money by outsourcing prison administration and also require their contractors to adhere to a high quality of prison administration.

Increased costs aside, contractual noncompliance cannot be completely remedied by aggressive governmental monitoring and oversight. Private prison companies have an incentive and an ability to conceal information that reflects poorly on their contract performance.¹²⁸ These companies are able to control access to information within the prisons they administer, and only a constant and omniscient governmental presence within the prison walls could ensure that a demanding contract's performance standards are met.¹²⁹ Thus, given the overarching financial motivations that impel the actions of private prison companies, the only way to avoid the problems associated with corrections privatization is to prohibit prison administration contracts absolutely.

¹²⁶ See Dolovich, *supra* note 9, at 492–93.

¹²⁷ See *id.* at 477 n.147 (“Even assuming such contractual completeness is possible, it could also work to the states’ disadvantage. For instance, states could conceivably stipulate a minimum investment in the training and remuneration of the prison labor force. Doing so, however, would increase the cost of the contracts considerably, something cost-conscious state officials would wish to avoid.”).

¹²⁸ See *id.* at 491–92.

¹²⁹ See *id.* (“Given the enormity of the task of overseeing contractual performance under circumstances of ‘hidden delivery’ in crowded and bustling institutions, it seems plain that systems under which monitors make only occasional on-site visits are inadequate to the task—even assuming, as the data suggest, multiple monitors per visit.”).

B. Current Legislative Prohibitions on Government Contracts with Private Prison Corporations

In 1990, Illinois lawmakers enacted the Private Correctional Facility Moratorium Act and amended their state charter to prohibit contracts with private parties for the operation of state prisons.¹³⁰ Likewise, in 2007, the State of New York passed Correction Law §§ 120–121, under which the “private operation or management of a correctional facility . . . is prohibited.”¹³¹ These statutory prohibitions effectively legitimized operation of the Illinois and New York penal systems under due process requirements by ensuring that public, financially uninterested actors perform the discretionary tasks associated with prison administration.¹³²

The effects of the Illinois and New York moratoriums refute private prison advocates’ claims that corrections budgets will suffer if governments regain control of their prisons. In 2006 and 2007, Illinois’s corrections expenditures as a percent of total state expenditures were below the national average.¹³³ In 2007, soon after New York abolished private prison contracts, its corrections budget was also below the national average.¹³⁴ Indeed, the three states with the highest percentages of corrections expenditures in 2007 were California, Florida, and Michigan,¹³⁵ all of which authorize (and frequently utilize) private prisons.¹³⁶

¹³⁰ Illinois Private Correctional Facility Moratorium Act, 730 ILL. COMP. STAT. ANN. 140/1 to 140/4 (West 2009).

¹³¹ N.Y. CORRECT LAW § 121 (McKinney 2009); *see also* N.Y. State Sen. Michael Nozzolio press release, Aug. 1, 2007, *available at* <http://www.nysenate.gov/news/nozzolio-bill-signed-law-prohibits-profit-prisons-new-york> (quoting Senator Nozzolio: “Public safety should never be linked to private sector motives.”).

¹³² *See infra* Part III.

¹³³ *See* STATE EXPENDITURE REPORT, *supra* note 1, at 57 (In 2006, while the national average of corrections expenditures was 3.3% of state budgets, Illinois’ percentage was 2.6%; in 2007, when the national average was 3.4%, Illinois’s average was 2.9%).

¹³⁴ *See id.* (New York’s corrections expenditures in 2007 constituted 3.0% of the total state budget, whereas the national average was 3.4%).

¹³⁵ *See id.* (noting that in 2007 Michigan spent 5.3% of its yearly budget on corrections, California spent 4.8%, and Florida 4.4%, while the national average was 3.4%).

¹³⁶ CAL. PENAL CODE § 6256 (West 2009); FLA. STAT. ANN. § 994.715(1) (West 2009); MICH. COMP. LAWS ANN. § 791.220g(5) (West 2009).

The argument that privatization reduces the pressure on states' corrections budgets is disingenuous. Evidence indicates that reclaiming governmental authority over prisons that are currently under private control will not require a drastic increase in governmental corrections spending. To the contrary, abolishing private prisons will promote long-term cost savings by virtue of corrections policies free from the influence of companies whose existence depends on a continually expanding carceral state.¹³⁷

VI. CONCLUSION

There are many legal, moral, and policy arguments in support of a total prohibition on private prisons. Oversight of inmate care and rehabilitation should be conducted only by accountable government actors, and it is a clear violation of due process to abdicate that responsibility to entities whose interests are opposed to the goals of effective prison management. Private prison companies cannot be expected to adopt policies that would harm their financial well-being, and it is impossible to draft (much less agree to) contract requirements that could account for and control every act or decision that requires prison operators' discretion and judgment.

Thus, governments must regain complete authority over penal administration by way of statutory prohibitions on contracts with private prison companies. Once they have reclaimed their proper role in corrections administration, it will then be incumbent upon these governments to address the policies that created the prison overcrowding crisis in the first place. Excluding profit-driven interests from the realm of penal administration will legitimize the public debate

¹³⁷ Given the divergent incentives between public and private corrections operators, removing private prison companies from the criminal policy decision-making process will encourage corrections "downsizing," whereas the continued existence of the private prison industry will always promote industry "growth."

over the effectiveness and propriety of criminal laws, increasing the likelihood that sentencing and corrections policies will be adopted with the interests of the public, and not of prison companies, in mind.

APPENDIX

States' Statutes Regarding Contracts with Private Prison Contractors

Jurisdiction	Authorizes/Prohibits Private Prisons?	Statute(s) & Relevant Text
Federal Government	No statute	No statute
Alabama	No statute	No statute
Alaska	Authorizes	ALASKA STAT. § 33.30.031 (2008)
Arizona	Authorizes	ARIZ. REV. STAT. ANN. § 41-1609(B) (2008)
Arkansas	Authorizes	ARK. CODE ANN. § 12-50-106(a) (2008)
California	Authorizes	CAL. PENAL CODE § 6256 (West 2009)
Colorado	Authorizes	COLO. REV. STAT. ANN. § 17-1-201(1) (West 2008)
Connecticut	Authorizes	CONN. GEN. STAT. ANN. § 18-86b(a) (West 2008)
Delaware	No statute	No statute
District of Columbia	Authorizes	D.C. CODE § 24-261.01(5) (2009)
Florida	Authorizes	FLA. STAT. ANN. § 994.715(1) (West 2009)
Georgia	Authorizes	GA. CODE ANN. § 24-4-60(b) (2009)
Hawaii	Authorizes	HAW. REV. STAT. § 353-16.36 (2008)
Idaho	Authorizes	IDAHO CODE ANN. § 20.209(2) (2008)
Illinois	Prohibits	730 ILL. COMP. STAT. ANN. 140/1–140/4 (West 2009)
Indiana	Authorizes	IND. CODE ANN. § 31-9-2-115(a) (West 2009)
Iowa	No statute	No statute
Kansas	Authorizes	KAN. STAT. ANN. § 75-52,133 (2008)
Kentucky	Authorizes	KY. REV. STAT. ANN. § 197.505(1) (West 2009)
Louisiana	Authorizes	LA. REV. STAT. ANN. § 39:1800.2 (2009)
Maine	No statute	No statute
Maryland	No statute	No statute
Massachusetts	No statute	<i>See</i> MASS GEN. LAWS ch. 7, § 52 (2009) (“The general court hereby finds and declares that using private contractors to provide public services formerly provided by state employees does not always promote the public interest[.]”)
Michigan	Authorizes private youth facilities	MICH. COMP. LAWS ANN. § 791.220g(5) (West 2009)
Minnesota	Authorizes	MINN. STAT. ANN. § 241.021(a) (West 2008)
Mississippi	Authorizes	MISS. CODE ANN. § 47-4-1 (2008)
Missouri	No statute	No statute
Montana	Authorizes	MONT. CODE ANN. § 53-30-601 (2008)
Nebraska	Authorizes	NEB. REV. STAT. § 47-802(1)–(2) (2009)
Nevada	Authorizes	NEV. REV. STAT. § 209.141 (2009)
New Hampshire	Authorizes	N.H. REV. STAT. ANN. § 21-H:8(VI) (2009)
New Jersey	Authorizes	N.J. STAT. ANN. §§ 30:4-91.9 (West 2009)
New Mexico	Authorizes	N.M. STAT. ANN. § 31-20-2(G) (West 2008)

New York	Prohibits	N.Y. CORRECT. LAW §§ 120–121 (McKinney 2009)
North Carolina	Authorizes	N.C. GEN. STAT. ANN. § 148-37(c) (West 2009)
North Dakota	Authorizes	N.D. CENT. CODE § 12-44.-02 (2009)
Ohio	Authorizes	OHIO REV. CODE ANN. § 341.35 (West 2009)
Oklahoma	Authorizes	OKLA. STAT. ANN. tit. 11, § 34-105(A) (West 2009)
Oregon	No statute	No statute
Pennsylvania	Authorizes	61 PA. STAT. ANN. §§ 1082–1083 (West 2008)
Rhode Island	Authorizes	No statute
South Carolina	No statute	No statute
South Dakota	Authorizes	S.D. CODIFIED LAWS § 24-11-39 (2009)
Tennessee	Authorizes	TENN. CODE ANN. § 41-24-103(a) (2009)
Texas	Authorizes	TEX. GOV'T CODE ANN. § 495.001(a) (Vernon 2009)
Utah	Authorizes	UTAH CODE ANN. § 64-13d-103(1) (2009)
Vermont	No statute	No statute
Virginia	Authorizes	VA. CODE ANN. § 53.1-262 (2009)
Washington	No statute	No statute
West Virginia	Authorizes	W. VA. CODE § 25-5-4(d) (2009)
Wisconsin	Authorizes	WIS. STAT. ANN. § 301.08(1)(a) (West 2008)
Wyoming	Authorizes	WYO. STAT. ANN. § 7-22-102(a) (2009)