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National Council on Crime and Delinquency

Responding to the Growth of the Private Prison Industry in the United States

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In Their Own Words

An excerpt from Corrections Corporation of America (CCA), Letter to Shareholders, 2010:

We believe the outlook for CCA and the private corrections industry remains very positive. Public prisons are overcrowded and increases in the US inmate population are expected to outpace the addition of new prison beds. Historically, the US inmate population has also accelerated in post-recession years, particularly at the state level. Demand for new prison beds from the federal sector remains strong.

... As a result, we believe CCA's inventory of available beds provides significant growth potential for our company and will serve as a major catalyst in driving our future earnings growth. We project that filling our existing bed inventory and beds under development could generate more than a 30% increase in operating income and an additional \$0.60 in future earnings per share. Prison overcrowding threatens the safety of communities across America, and governments recognize that partnering with CCA provides them a secure, cost-effective, and immediate solution.¹

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About NCCD

NCCD promotes just and equitable social systems for individuals, families, and communities through research, public policy, and practice.

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Introduction

Reported crime is at the lowest level in decades, safe alternatives to incarceration are an accepted part of the corrections system, and private prisons have not provided the cost savings and improved conditions of confinement that their proponents promise. Nevertheless, business is booming for prison companies.

Since their start in the 1980s, private prisons have come to hold eight percent of all US state and federal prisoners, including half of federal immigration detainees. A steady flow of inmates has meant huge profits for these companies. Just as steady have been the reports of abuse and neglect, poor management of inmate needs, and poor governmental oversight. Low pay, limited staff training, and other cost-cutting measures—the primary ways private prisons sustain their profits—can lead to unmet inmate needs and security issues, heightening the inherent dangers to staff and inmates in secure settings. Private prison companies spend millions of dollars on lobbying, political campaign contributions, support for legislation favorable to their profits, shaping public opinion, and research likely to support their practices, which leads many to question the prison industry's influence on criminal justice policymaking. There are also significant issues with the government's ability to effectively monitor what goes on at private prisons.

Proponents' claims that private prisons can provide higher-quality and more cost-effective service provisions, improved conditions of confinement, and economic growth in the communities where new facilities are built are neither borne out in research nor in the scores of private facility incident reports across the country. The expectation that competition for contracts among free market players would lead to generally improved efficiency, quality, and cost savings has not been met. Nevertheless, proponents continue to use these claims widely as a basis for pursuing privatization.

This Report

This report describes the findings of interviews with several experts on the study of private prisons, a review of the academic and legal literature on private prisons, and a media review of newspaper and radio stories on private prisons.

Secure, locked facilities designed for adults are the major focus of this paper, although many of the same issues and potential solutions apply to all types of privatization, in corrections and elsewhere. Federal immigration detention and contracted services, such as in-custody health care and programming or post-release supervision and services, are also discussed.

Private Prisons in the United States

Along with the increased number of inmates incarcerated in the United States due to tough-on-crime laws and policies that began in the 1980s and continued into the 2000s, came an increase in the number of inmates held in private, for-profit facilities. Privatization of certain corrections functions, such as health care and service provisions, had been common in the United States for some time, but larger scale facilities wholly managed by for-profit companies began in the mid-1980s.

The secure facilities focused upon in this paper are those where all or most of the inmates remain confined at all times, such as prisons, prison farms, penitentiaries, correctional centers, work camps, and reformatories. A large percentage of private facilities are community-based facilities, such as halfway houses, residential treatment centers, restitution centers, and prerelease centers, where at least some inmates come and go.

- The most recent federal data shows that of the 1.6 million state and federal inmates, approximately 8% (129,336) are held in private prison facilities (about 34,000 in private federal facilities and 95,000 in private state facilities).²

- In 2009, Immigration and Customs Enforcement (ICE) had an average adult daily population of about 32,606, and about half of these detainees were housed in privately run detention facilities.³
- Most of the more than 400 private facilities are minimum- or medium-security, with an average daily population of fewer than 500 inmates.⁴
- Some populations, such as women, the mentally ill, and serious offenders, are less likely to be held in private facilities because they are more expensive to house, making it difficult for prison companies to make profits. A large percentage of juveniles are held in private facilities.⁵

Immigration

Private prison companies have pursued the area of immigration both in the United States and internationally, with huge monetary success. Accompanying that success are numerous documented cases of abuse and neglect and poor conditions of confinement,⁶ exacerbated by long stays awaiting immigration proceedings. On any given day in 2009, US Immigration and Customs Enforcement (ICE) held an average of 32,606 adults in a total of 178 facilities. Just under half of these detainees, 15,942, were housed in 30 private facilities.⁷ Although ICE has developed standards for immigration detention facilities, the standards may not adequately address the conditions and treatment experienced by many immigrant detainees and, in any case, they are not implemented in all facilities.⁸

Major Private Prison Companies

Today, two private companies—Corrections Corporation of America (CCA) and the GEO Group—hold the majority of private prison contracts in the United States. CCA operates over 60 facilities in 19 states and the District of Columbia and manages more than 50% of the nation’s private prison beds. GEO Group (formerly known as Wackenhut Securities and recently merged with Cornell Companies) runs about 60 facilities in 17 states. These are publicly traded companies beholden as much to their boards of directors and stakeholders as to the needs of the prison inmates, prison staff, and the general public. In 2010, the combined revenue of CCA and GEO was more than \$2.9 billion. Other large private prison companies include Management & Training Corporation, Emerald Corrections, LCS Correctional Services, and Civigenics/Community Education Centers, Inc.⁹

How Private Prisons Function

Federal, state, and local governments that seek to privatize correctional services enter into a contractual relationship—“a public-private partnership”—with a private prison company. The government typically announces a Request for Proposals (RFP), which describes the project they wish to pursue and all of the issues prison companies will have to address for their proposal to be considered. Governments primarily seek these contracts because of the ability of private prison companies to build or acquire facility space more quickly than government agencies, providing an easing of overcrowding and a short-term time- and cost-savings compared to the government building its own facilities.

The arrangement can take many forms. Some private facilities hold inmates from one or predominantly one jurisdiction, while others hold inmates from several jurisdictions, including out-of-state and the federal government. Inmates may be held in a facility owned and operated by the company or in a facility owned by the government and operated by the company. Approximately 70% of the facilities CCA manages are company-owned, 30% are government-owned.

The company may manage the entire facility, providing for all of the needs of the inmates, or the government may still manage some aspects of the prison, such as medical services or programming. The company may only run certain elements of correctional services such as inmate health care or probation supervision, although that is not a focus of this report.

Some facilities are built “on spec,” where typically a small, rural town partners with a private prison company to build a facility that will house inmates from other jurisdictions. In this form, the private prison contracts with the locality for the physical facility and related services, and contracts with other jurisdictions to fill beds.

The contract usually stipulates that the government will pay the prison company a daily dollar amount, roughly \$50 to \$75, for each inmate they hold. These amounts are negotiated in the contracting process and can vary according to many factors, including the security level of the inmates, the size and type of facility, and the local costs of inmate services and programming provided, such as food service, mental and physical health care provisions, recreation, education, vocational training, etc.

The development, implementation, and monitoring of private prison agreements represents a complicated and fairly unwieldy process—a fact that contributes to difficulty regulating and monitoring these contracts. In a facility operated in one jurisdiction but holding inmates from several others, the laws and regulations of any number of federal, state, and local jurisdictions may be in play. Arizona alone has three sets of corrections regulations and policies, one for Arizona state prisons, one for private facilities inside and outside Arizona borders contracted with the state to hold Arizona inmates, and another for private prisons in Arizona not contracted to hold Arizona inmates. The third of these is the least restrictive and specific.

The number and variety of organizations and individuals involved can be numerous. In the state or local context,

the process is usually led by a chief executive (governor or mayor) or members of the state legislature, county commission, or city council. State or local justice system officials such as attorneys general, judges, heads of corrections agencies or law enforcement are not typically spearheading the move toward privatization—they may not even support the move—but they and various public employees will play some role in the process. Financiers, attorneys, construction companies, engineers, public utilities, and others will also be involved, especially when a new facility is being constructed.

Prison company executives and staff play a major role as well, not only in representing the prison companies’ interests, but in assisting governments in the complicated process of contracting and implementation. Prison companies often offer to handle much of the paperwork and hoop-jumping on behalf of government entities; they are likely to have more experience with the process and they, of course, have a clear interest in the process moving as quickly and smoothly as possible. They also take part in securing project buy-in from other government representatives and community stakeholders.

Development, maintenance, and oversight of ongoing contracts also involve a variety of public employees. Sometimes private prisons are these employees’ primary responsibility, other times private prisons are just one of several responsibilities. In the federal arena, responsibilities are spread across several wings of the Bureau of Prisons.¹⁰ In the state context, the task is likely spread across more disparate departments. For example, in Arizona, the Private Prisons subprogram of the state Department of Corrections’ Prison Operations Program develops and manages private prison contracts; the Engineering and Facilities Bureau oversees construction and compliance monitoring; the Contract Beds Bureau monitors, evaluates, and supports private prisons; and the Business Administration tracks expenditures.¹¹

Private Prison Performance: A Discussion of the Key Claims Made by Private Prison Proponents

While quick solutions to crowding is the most common reason jurisdictions contract for bed space in private prisons, secondary rationales include cost savings and improved services. Also, states and local jurisdictions seek partnerships with prison companies to establish private facilities as a way to boost their economies. While there is a shortage of high-quality research assessing the success of these secondary aims, what is known does not provide a justification for these decisions.

Do Private Prisons Provide Improved Conditions of Confinement and Inmate Services and Meet Basic Standards of Human Treatment?

Those concerned about private prisons not only question if private prisons provide better care and services than public prisons, but if they consistently meet basic standards. Individual studies have found that, compared to publicly managed prisons, private prisons have a higher proportion of inmate-on-inmate assaults;¹² greater likelihood of inmate misconduct, drug abuse and higher rate of escapes;¹³ lower or unmet standards of care;¹⁴ and have “systemic problems in maintaining secure facilities.”¹⁵ A review of several previous studies showed that the quality of confinement in public and private prison facilities is often comparable, but with public facilities providing slightly better skills training for inmates and reporting slightly fewer inmate grievances.¹⁶

Media accounts have documented numerous incidents of abuse, neglect, violence, escapes, poor conditions, and other alarming events in private facilities. (For a sampling of private prison facilities around the country and their associated media reports, please see the appendix, Grassroots Leadership’s Resource Packet,

2009,¹⁷ M. Deitch, 2003,¹⁸ and the Private Corrections Working Group resource listings.¹⁹) Whether private prisons have more or less scandals than their public counterparts is difficult to assess from media reports, but it is clear: Private prisons do not provide a consistently improved experience for inmates or staff compared to public facilities, and, in many cases, the experience can be worse. Immigration detention centers, where different laws and standards often apply, are of particular concern. (See inset, page 4.)

Economic Claims

Do Private Prisons Provide Cost Savings to Governments?

While local and state governments still turn to prison privatization as a cost-saving measure, the cost effectiveness of private prisons is widely debated, and research on the topic has produced varied results. The verdict is, at best, a draw. Arizona is one of the few states with a state law that requires the regular and intensive assessment of private prison performance. Their most recent study found that private prisons resulted in higher costs to the state compared to public facilities.²⁰ Other studies have found that privatizing facilities has resulted in minimal or no savings²¹ or that privatization can yield modest savings.²² These findings echo what studies of privatization in other industries have shown: The promise of savings touted by proponents of privatization is quite limited, or in fact “elusive.”²³

Researchers caution that costs of public and private prisons cannot be easily evaluated side by side due to numerous factors such as security level and health conditions of inmates, physical characteristics of facilities, indirect costs, and the large number of parties typically involved in maintaining and paying for either type of prison.²⁴ Most contracts allow private facilities to house lower risk and healthier — less costly — inmates than similar public facilities. Prison companies fund much research into cost and other factors; these studies tend to find improvement with private prisons.²⁵

Do Private Prisons Improve the Economic Health of States and Localities?

For a number of years, state, county, and municipal jurisdictions have pursued private prison opportunities as a means to generate economic growth and job creation in their communities. Prison companies foreseeing increased need for bed space, but hoping to avoid owning expensive facilities, look for local governments who will agree to fund new facility construction through bond sales that will be paid back from the proceeds of the prison company's future contracts with other jurisdictions. These partnerships can appeal to smaller jurisdictions, especially when their traditional local industries have fallen off. Private prison companies espouse their potential benefits through campaigns to persuade key leaders and policymakers; they then help those key leaders sell the idea to other government representatives and the public. Much of the early discussion on investment in private prisons takes place behind closed doors, away from opposing viewpoints and the public.²⁶

Recent studies have found that growth and expansion of prisons in general (whether public or private) have had limited positive impact on economic development at the local level.²⁷ In fact, communities in which private prisons are located can experience unfavorable economic effects, especially in already depressed economies. A common dynamic is that a small town or county commits most of its limited resources and infrastructure—labor force, emergency response services, trade services (electricians, plumbers, sanitation, etc.)—to supporting the prison, leaving them dependent on the success of the prison and unable to support other businesses that might want to locate there.²⁸ Further, local governments that sell bonds to fund construction can find themselves on the hook if the prison company fails to secure sufficient contracts to fill beds. At the least, the bond rating for the locality is likely to be lowered if they do have trouble repaying the debt, leaving the local economy in worse shape.²⁹ When the lease is up or abandoned, the aging plant is owned by the government.

Even a healthy state or local government exposes itself to risk if all or part of the public prison structure is dismantled and reliance placed on private structures. Significant challenges may be experienced if the government or contractor then chooses to end the contractual relationship at a later point and the government is left to scramble to redevelop a public system or seek one of the other essentially similar private contractors.³⁰

Texas, which experienced an immense prison building boom in the 1990s especially related to immigration detention, has several examples of private-public partnerships leading to challenges for local jurisdictions. In July 2011, a west Texas 373-bed prison was auctioned off due to a dearth of prisoners, a 424-bed facility in Fort Worth (managed by GEO) has been empty since February 2011, and a new 1,100-bed facility located near Abilene has never housed inmates.³¹

Ultimately, any financial savings gained from privatizing leave the local area and, ultimately, benefit the prison corporation's executives, board of directors, and shareholders as well as the innumerable lobbyists, politicians, and government officials benefitting from the broader private prison industry.³²

Perhaps more importantly from an ethical perspective, jurisdictions that invest in speculative private prison projects can come to be a party to the same conflict of interest as prison companies when they find themselves in the contradictory situation of supporting increased incarceration in order to pay off bonds or bolster their local economy even if crime and arrests drop and effective and safe alternatives to incarceration are available.

Selling Public Assets

Some states try to shore up budget gaps by selling public prison facilities to private companies. Some argue this is a short-sighted remedy, as it will only reap limited and short-term financial benefits, limit future options, and reduce public assets.³³ On the other hand, holding on to the asset may leave the government with the progressively higher costs of maintenance and insurance

and, ultimately, the burden of aging facilities that the private prison company will eventually abandon. Prison companies try to avoid this liability by leasing facilities from city, county, or state governments.

Does the Competitive Nature of the Free Market Encourage Innovation and System Improvement?

Early proponents of privatization argued that the competition inherent in the private market would spawn innovative processes and practices that would lower costs while improving conditions. It was also thought that public prison officials would themselves pursue innovations, or at least pick up on the techniques of their for-profit counterparts and thereby improve the public system.

No True Competition

Dominated as it is by CCA and the GEO Group, the relative lack of competition in the private prison industry makes it difficult for governments to assemble a pool of qualified candidates, and contributes to the likelihood of inadequate performance once a contract is executed.³⁴ If a particular industry only has a few providers, the government's ability to realize cost savings is considerably lessened and it is difficult to effectively replace one provider with another, if the need arises.³⁵

Suppressing Reform

Early on, the rise of private prisons promised to encourage public prison officials to make improvements in cost efficiencies and to be more open to other reforms.³⁶ However, it is more likely that the opposite has occurred as a larger dynamic has taken hold that contributes to a suppression of innovative thinking and reform in the public sphere. When states relieve overcrowding in public facilities through private contracting, stakeholders—state officials, prosecutors, judges, and corrections agencies—lose the impetus to seek innovative ways of reducing the reliance on

incarceration and to save taxpayer money without threatening public safety. Thus, the prison population continues to grow, as do corrections budgets, at least until the newly contracted beds are themselves full.³⁷ The speed and flexibility with which private prison companies can acquire bed space provides, in essence, a permanent pressure release valve that squashes what might otherwise be an opportunity for permanent reform.

Importantly (and ironically), the very reforms that are not given enough consideration can serve the same purpose as private prisons, including the quick easing of crowding, cost-savings, and improved outcomes. These include alternatives to detention for those awaiting trial or immigration procedures;³⁸ and alternatives to incarceration such as community corrections, electronic monitoring, day and evening reporting centers, home custody, restorative justice, and intensive supervision, all of which can be used to reduce the demand for new bed space quickly, permanently, and without jeopardizing public safety.³⁹ These strategies are, in fact, gaining a foothold. In 2010, legislatures in at least 23 states and the District of Columbia passed legislation that has the potential to reduce the prison population while remaining focused on public safety.⁴⁰ In fact, some observers suggest that the fortunes of the private prison companies already may be starting to shift because of these reforms and the continuing drop in crime.⁴¹ Yet not everyone sees the advantages of these alternatives, as privatization is still a popular choice to ease crowding or provide short-term budget solutions, or both.

Parallel Inadequate Systems

Another key issue in having two parallel approaches to corrections—the public and the private—is that the focus becomes a comparison of the two systems, creating a very narrow perspective from which to assess what works, what doesn't work, and how the overall system can be improved. Certainly, as some state laws specify, private prisons should be held to at least public prison levels of health and safety, conditions of confinement, service delivery, cost, transparency and accountability, and other factors, but with this being the limit of expectations, we are simply left with

two systems in need of reform. In a sense, the two systems begin to “play down” to each other’s level of competence (or incompetence) rather than both vying for a truly appropriate and effective response to crime and solutions to the problems that plague both approaches.⁴²

The Profit Motive: Conflict of Interest in Real Terms

A key concern expressed by privatization opponents is the suitability of entrusting prisoner care to profit-motivated corporations.⁴³ Within facilities, this issue can play out in a number of ways, beginning with the core issue of staffing. Beyond facilities, the profit motive leads prison companies to use their significant resources to influence corrections laws and policies in ways that increase their profits through more prisoners being held for more types of crimes and for longer sentences.

Staffing and Services

A critical part of the debate regarding cost savings, as well as conditions and quality of care, focuses on staffing and personnel costs. Since private prisons are generally expected to serve the same function as public prisons but also save public money, prison companies need to make their profit in the small window between their own costs and the costs of public prisons minus some percentage of savings to taxpayers. (Some contracts stipulate that this savings will be at least a certain percentage, often 7%.) The most expensive part of running a prison is staffing; therefore any savings associated with privatization is primarily due to reduced personnel-related costs.⁴⁴ Private prisons tend to employ frontline staff who are non-unionized and low-paid, don’t receive fringe benefits, and lack sufficient training. This contributes to the high rate of staff turnover and the security issues with which privately managed facilities are often fraught.⁴⁵ This suggests that any cost savings achieved by privatization is at the expense of inmate and guard safety. Similarly, cost cutting with regard to services, programming, and facility conditions will increase inmate dissatisfaction and inmate-staff

tension, and increase negative outcomes like grievances and behavioral issues.

Influence on Length of Stay

The potential conflict of interest posed by private prisons being compensated per filled bed can also arise through the influence prison staff can have on the length of time inmates ultimately spend behind bars. As in public prisons, disciplinary action against an inmate is typically initiated by guards and verified by their supervisors. Marks on an inmate’s record may lead to formal proceedings that can, ultimately, reduce the inmate’s chances of early release or extend their initial sentence. Parole decisions also are influenced by inmates’ in-custody record, and parole boards often ask for the opinion of prison officials. While individual prison staff are unlikely to have a direct personal financial incentive for pursuing disciplinary action, the private prison company as a whole directly benefits from longer lengths of stay. The seriousness of this risk is illustrated by the fact that several states have enacted laws and policies that address its likelihood.⁴⁶ That longer prison sentences have not been shown to correlate with recidivism is indication, again, that private prisons do not serve the best interest of the inmates or the public.

The Policy End Run

Advocates are concerned with the risk of policies and practices being defined by costs alone, and put into place without the normal process of debate and approval. For instance, private prison companies reasonably argue that contracts need to give them flexibility to respond to unforeseen challenges or to develop creative practices.⁴⁷ In practice, this open-endedness may allow them to implement practices that go against the intentions of the contract or the best interest of the inmates or the public.

The Political Influence of Prison Companies

Since the modern emergence of private prisons in the mid-1980s, an intricately connected web of political influence has developed alongside the growth of the private prison industry. Because private prisons rely on a steady stream of inmates to fill beds, it is perhaps

not surprising that the private prison industry has been pivotal in helping to shape and promote criminal justice policies that favor incarceration as well as put pro-privatization lawmakers into office.⁴⁸ (See “Gaming the System.”⁴⁹)

By making financial contributions to individual political campaigns, state political parties, and specific ballot measures, private prison companies exert influence over policymaking that helps assure the demand for their services as well as develop and maintain relationships that can help them obtain prison contracts. Between 2000 and 2010, CCA, GEO, and Cornell Companies donated over \$800,000 to candidates for federal office and more than \$6 million to candidates for statewide office. Additionally, in 2010, these three companies donated more than \$1 million to state party committees.⁵⁰ The *New York Times* recently quoted a former chief prison inspector—who happens to favor privatization—in Australia as saying “We have lost control. . . . These big global companies, in relation to specific activities, are more powerful than the governments they’re dealing with.”⁵¹

Prison Company Lobbying

Another key area of concern is the lobbying done on behalf of the private prison industry. Prison industry lobbyists seek to influence sentencing policies as well as the rules and regulations included in government contracts. In 2010, CCA, the GEO Group, and Cornell Companies together spent more than \$1.5 million on federal lobbying.⁵²

Prison Company Influence on Criminal Justice Policymaking and Law

Private prison companies have been influential in the development and passage of state legislation that increases incarceration, including “three strikes” and “truth in sentencing” laws in the mid-1990s.⁵³

More recently, as immigration detention continues to represent a growing market for private prison corporations, the industry has been instrumental in the drafting and enacting of influential state legislation.

A key example of this influence is Arizona’s SB 1070, which drastically increased law enforcement’s options to detain any individual who is perceived to be an undocumented immigrant.⁵⁴ This legislation was developed under the auspices of the nonprofit American Legislative Exchange Council (ALEC), whose membership includes lawmakers and powerful corporations such as, until recently, CCA.⁵⁵ An investigation by National Public Radio found that the majority of the 36 co-sponsors of SB 1070 subsequently received contributions from prison lobbyists or from CCA, the GEO Group, and Management & Training Corporation.⁵⁶

Private prison corporations also mobilize against legislation that would have a negative impact on its industry. This includes the federal Private Prison Information Act, which has been introduced by lawmakers several times in the past decade, including during the 2011–12 legislative session. Reports indicate that CCA has spent millions of dollars to lobby against this legislation, which would require private facilities that house federal inmates to abide by the same Freedom of Information Act guidelines that apply to public federal prisons.⁵⁷

Friends in High Places: Prison Company Relationship Building

There are many examples of close connections between the major prison companies and current or former government officials that have the potential to assist these companies.⁵⁸ A prison company strategy is to add a corrections official—in a consultant role—to a prison company’s board of directors; the consultant advocates for privatization from their vantage point. When the conflict of interest is disclosed, the consultant is hired by the private firm at a generous salary.⁵⁹ A recent case in point is CCA’s 2011 hiring of Harley Lappin, the past director of the federal Bureau of Prisons, to serve as an executive vice president and chief corrections officer for the company.⁶⁰

The profit incentive has also been known to spawn serious corruption. For instance, in Luzerne, Pennsylvania, agents of a private prison company were

found to have paid bribes to local judges to encourage them to commit youth to their two local facilities.⁶¹ In Willacy County, Texas, two county commissioners were found to have accepted bribes in exchange for favoring certain companies involved in building a new private facility.⁶²

The above sections have shown how private prisons are a pervasive but unnecessary part of the US corrections system. It also has been shown how the presence of private prisons makes true reform of the system less likely, and how prison companies use their influence to perpetuate and worsen the laws and policies that have led to the overuse of incarceration in this country. The next section describes how government oversight of private prisons has been inadequate, but shows that contracting (including strong oversight) can be used to curtail the growth and the deficiencies in private prison.

Contracting Oversight and Monitoring

Public-private partnerships hinge on contracts. Contracts are more than promises of future collaboration. A contract provides a jurisdiction with a mechanism to clearly identify the contractor's responsibilities and requirements; to prescribe how this work will be accomplished, compensated, and monitored; and to describe penalties that will be incurred if performance is sub-standard. A comprehensive, sound contracting procedure is a central and crucial feature of an effective prison privatization effort.⁶³ Within the contract should be detailed descriptions of how the contract and the functioning of the private prison will be overseen and monitored by the government. (See elements of a good contract.⁶⁴)

The experience of various jurisdictions has demonstrated that contracts executed with private prison companies are often poorly drafted and may minimize or omit key provisions, which can lead to numerous problems including inadequate contractor performance, absence of transparency, abuse of prisoner rights, and an overall lack of accountability.⁶⁵ Oversight and

monitoring has also proven to be difficult and tends to be lax and ineffective.

Transparency Issues

One key issue of concern for advocates is a general lack of tracking, reporting, and accessibility of data on inmates. Private prison contractors, unlike government agencies, are not typically required to report on the inmates housed in privately run prisons, do not make this data easily accessible to monitors, or are even aware of the documentation and reporting requirements intrinsic to the operation of public agencies.⁶⁶ Further, from a financial perspective, it is in the contractor's best interest to minimize the reporting of data that could provide important—though potentially negative—information about conditions of confinement, such as the number of assaults that take place in the facility, incident reports, and grievances filed, etc.⁶⁷ Laws requiring full transparency and access to data, stronger contracts, and intensive oversight can help alleviate these concerns.

Guaranteed Payments

The daily population of a prison will vary, but prison companies have negotiated for some very favorable terms regarding this fluctuation. Contracts often guarantee a minimum occupancy rate, usually about 95%, and allow private prison operators to overstate costs and maximize revenue. Fees may escalate when the rate is exceeded, and a company may still bill at this rate if occupancy drops.⁶⁸ There are several kinds of payment structures that may be incorporated into a contract besides the per bed approach, including a fixed price, “indefinite delivery/indefinite quantity” approach, which allows that prisons beds will be provided by the contractor on an as-needed basis.⁶⁹

Monitoring

“Even carefully drafted contracts cannot prevent many decisions by private contractors that might yield inhumane conditions of confinement.”⁷⁰ In addition to—and part of—contracting, another critical feature of a private prison operation is designing, implementing,

and maintaining a strong monitoring program.⁷¹ Oversight and monitoring provides a way for the government to measure contract compliance, and must concentrate on the contractor's adherence to contract terms as well as its success in securing the safety of the public, inmates, and staff. Monitoring can and should address all parts of a contract, with key areas including security issues; legal and constitutional requirements; conditions of confinement; medical and mental health services; all aspects of staffing; records and reports; and inmate programming. Monitoring also provides a basis for contract renewals or terminations and for charging fees and other penalties.⁷² It is important to note that monitoring of conditions inside any prison, public or private, is difficult, partly because of the necessarily closed and isolated setting of secure facilities. Privatization, however, adds another complicated layer to that isolation, often one where the private prison company has motivation to resist efforts toward transparency and accountability.

Other Forms of Corrections Privatization

The privatization of various correctional elements, apart from whole facilities, also continues to grow. In these cases, a government agency will contract with a provider to supply a service such as health care or programming for inmates. The reasons for pursuing these contractual relationships are typically cost savings and improvements in the quality and effective delivery of service through the specialization that private groups can develop.

Privatization of Health Care

A 2005 survey of state corrections departments found that 32 states contracted with private companies for some or all of their prison health care services.⁷³ Opponents of privatized health care cite concerns that this profit-driven approach may result in insufficient staffing levels; a lack of appropriate treatment for prisoners, such as delays that are longer than medically indicated in sending inmates to the emergency room;⁷⁴ and oversight issues.⁷⁵

Privatization of Probation and Parole

Other correctional areas experiencing growth in privatization include probation and parole. One reason for the shift from public to private supervision is the growing number of probation caseloads for state probation officers and limited state budgets to address this growth. A 2007 report found that about 10 states contract with private agencies to provide supervision of an estimated 300,000 clients on court-ordered probation, typically for misdemeanor, low risk offenses.⁷⁶

Concerns about privatized probation include the focus on profit making through collection of fees and fines from the offender, with little or no attention paid to an individual's underlying issues such as substance use or unemployment,⁷⁷ as well as an absence of standards for many aspects of the industry, which, among other things, can allow parole or probation officers' compensation to be directly connected to the fees he or she collects.⁷⁸ Recommendations for improving the selection, performance, and accountability of private probation officers include developing more rigorous statewide requirements for the private supervision of probationers, increasing training and educational standards for private agency staff, toughening agency reporting obligations, and evaluating whether private probation providers have achieved stated performance goals. Other areas that could be included in a contract with a private probation provider include details about criminal background checks for individuals working as probation officers and procedures for working with indigent offenders.⁷⁹

Responding to the Expansion of Private Prisons: Action Steps for Advocates

Assess, Understand, Organize, Educate

Slow Down the Process

A consistent element of efforts to establish or expand privatization of corrections is a sense of urgency. Proponents of privatization will stress this "time

factor” as they push to move the complicated process forward at the risk of limiting due process for public comment; careful review of all the various factors contributing to the perceived need, potential impact, long-term costs of the change, and viable alternatives; careful consideration of applicable laws, regulations, and policies; and development of a strong and thorough contract. When behind-the-scenes negotiations finally come to light, stakeholders are already behind the curve as projects already have momentum. In the recent court ruling against GEO in Florida, the judge said, “From the record, it appears that the rush to meet the deadlines in the proviso has resulted in many shortcomings in the evaluation of whether privatization is in the best public interest as it relates to cost and effective service.”⁸⁰

Support Further Studies of Corrections Privatization

Reliable information is crucial to informing a response to the private prison industry. Further research is needed on rates of incidents of abuse or neglect, of victimization, of conditions of confinement, etc.; the ways the profit incentive impacts facility safety and security and the humane treatment of inmates; the influence of prison companies on legislation, regulation, and policies regarding sentencing, parole and probation, detention, immigration policy, and the individuals involved; cost savings; monitoring efforts and practices in private prisons; alternative compensation methods; meaningful responses to contract noncompliance; and privatized correctional services such as medical and mental health care, probation and parole, and programming.⁸¹ Also needed are studies of research methodology as it applies to corrections privatization⁸² and of the relative bias of the various sources of information and research on private prisons, including that funded by prison companies.

Understand Who the Stakeholders Are

This report cannot provide a comprehensive picture of the contracting practices, monitoring, oversight, and problems private prisons create in each state and

locality, nor of the numerous players and stakeholders in the process, the variations in the level of privatization, inmate populations, services provided, state and local law and regulation, etc. However, efforts to impact privatization efforts will require a strong understanding of these and other elements as they apply to individual jurisdictions.

Seek Partners

Not all government representatives involved favor a move toward privatization. The decision to pursue privatization is usually made by the chief executive or policymakers: the governor, mayor, county executive, city manager, legislature, city council, county commissioners, etc. Representatives of related county or city agencies—corrections, probation, law enforcement, the court, district attorney, etc.—are likely to have involvement, but are not necessarily supportive of the move to privatization. Community members, consultants, as well as local, county, state, and national advocacy groups can also play a role. Legislative representatives are often in charge of the contracting process, so it is these individuals whom advocates should target. After stakeholders have been identified, build alliances or coalitions with stakeholder individuals and organizations that have similar goals.

Educate Communities Where Private Prisons are Trying to Locate

Provide information that will balance the prison company’s claims about the promise of good jobs and local prosperity. A communications strategy such as reaching out to the media, writing op-eds, and public presentations may be very useful.

Educate policymakers with available data about the economic impact of prisons, ethical concerns, research and media reports on conditions of confinement, legislative and regulative avenues for keeping prison companies in check, common problems with contracting, and recommendations for strong, thorough contracting.

Successful Efforts in Louisiana and Ohio

In 2011, Arizona, Florida, Louisiana, and Ohio considered privatizing prison facilities, either for the first time or as a continuing correctional approach. These proposals were met with resistance by community members. In Louisiana, Association of Federal, State, County, and Municipal Employees (AFSCME) members protested a proposed plan by Governor Bobby Jindal to sell three state prison facilities to private prison operators; Jindal's proposal was also not supported by the state legislature and did not move forward.⁸³ In Ohio, a proposal by Governor John Kasich to sell five prisons, opposed by AFSCME and the Ohio Civil Services Employees Association, was revised to the sale of one prison to CCA and the turnover of operations of two other prisons to Management & Training Corporation.⁸⁴

Advocate for Sentencing Reform and New Legislation and Regulation

Private prison companies already enjoy a large influence in the corrections field. New, tougher, and more specific laws and regulations can help hold them in check. There are a number of legislative and regulative avenues to be pursued regarding private prisons: Limit power and influence; limit types and scopes of facilities; create standards regarding what laws apply, minimum levels and quality of care, and transparency of company policies and practices; and maximize accountability and responsiveness to issues that arise. Most of these apply to the private prisons, but elected officials also need to be held to the same standard of transparency, accountability, and legality.

Reduce the Demand for Privatization Through Advocacy for Sentencing Reform and Other Laws and Policies Impacting Incarceration Rates

Given that private prisons have not been shown to provide better treatment of inmates or conditions of confinement, better services or programming, better post-release outcomes, improved public safety, or consistent taxpayer dollar savings, perhaps the only remaining argument in favor of private prisons is the relatively quick response to bed space needs. As described above, relying on private prisons to ease crowding comes at the detriment to reform in the

public system. Even with the relative speed with which prison companies work, much effort goes into the development and implementation of a private prison—efforts that would be better spent on reducing the use of incarceration through the existing means described in this report.⁸⁵ Detention and sentencing reform is a critical strategy by which the government can reduce its reliance on incarceration and thereby reduce the need—the demand—for private prisons. Advocates need to demand the revision of the policies and practices that hastened their growth: “tough on crime” statutes, detention decisions, mandatory minimums, truth in sentencing, sentence enhancements, reduced authority of judges vs. increased power of prosecutors, and mandatory time for parole and probation violations. Some states are already pursuing these reforms; a continued emphasis on these issues is a crucial way to downsize the perceived need for prison beds and reduce the profits and therefore the viability of prison companies.

Advocate for Reform of Parole and Probation Policies and Re-entry Strategies

The private prison industry relies on ex-inmates reoffending and returning to prison, and on sentences stemming from probation violations.⁸⁶ Offenders can avoid incarceration if there are more opportunities for skills training while individuals are incarcerated,⁸⁷ re-entry plans, advocacy for state-level policies that

will remove obstacles for former inmates to access supportive services and obtain employment,⁸⁸ and policy reform.

Support Legislation That Seeks to Increase Transparency and Improve Accountability of Private Prison Companies

The Private Prison Information Act deserves support.⁸⁹ Another opportunity for legislative advocacy is in the area of legislation and regulations regarding lobbying, conflicts of interest, and transparency in privatized activities. Also needed is better access to private prisons' financial data in order to track the true costs of running a private prison. (See list of state laws.)

Seek full disclosure of relationships and affiliations by those involved in private prison projects, establish watchdog groups with resources and authority for strong oversight and quick action, pursue laws and regulations that define the ethics and legality of relationships and conflicts of interest, and help jurisdictions develop contracts that provide for real monitoring and serious repercussions when ethics issues and other types of noncompliance arise.

Pursue Legal Action

Recent legal actions to block prison privatization efforts have taken several forms:

- Lawsuits filed by the American Friends Service Committee in Arizona and workers groups in Florida.
- The Teamsters union has filed an ethics complaint against Florida governor Rick Scott, claiming his move to privatize prisons in south Florida is compromised due to the fact he received campaign-related contributions from CCA and the GEO Group.⁹⁰
- The Florida Police Benevolent Association, representing unionized corrections officers, filed a lawsuit claiming that the legislature violated the law by inserting a directive regarding privatization of

corrections department operations in the budget language rather than proposing and passing it as legislation.⁹¹ This claim was upheld in state court, with the judge concluding that private prison proponents had attempted an end run of the normal legislative process and that "the Legislature has by-passed the very safeguards it built into the process that DOC is required to follow."⁹² The value of GEO Group stock fell 5% with the news.⁹³

- While they have, for the most part, not held up in court, suits have been brought challenging the constitutionality of governmental privatization of functions that are "inherently governmental;" that is, that leave the application of US laws and statues at the discretion of a private contractor. (See Lucas Anderson's compilation of applicable laws in each state.⁹⁴)
- Lawsuits regarding abuse or neglect of inmates in private facilities against the private prison companies can target the companies' revenue, although the companies expect and are prepared for a certain number of these suits, just as all corporations insure against such actions. The costs of lawsuits against private prison companies can also be returned to the state or local government in the form of higher contracting fees and overages. Nevertheless, civil suits are an important means for individual restitution, spotlighting problems, and maintaining a check and balance on prison company practices.

Advocate for and Support Stronger Contracting Oversight and Monitoring

Contracts provide an opportunity to address issues not addressed in laws and regulations. Short of stopping a new facility or new contract altogether, advocates can help minimize the harm caused when private prisons use their resources and political clout to negotiate terms strongly in their own favor. There is a growing understanding of what constitutes a solid contract. Advocates need to demand strong contracts with high levels of specificity. Contracts need to reflect policy and values of jurisdiction, and need to foresee and forestall as many issues as possible, such as potential

end runs around policy and increases in costs associated with economic or justice trends. Each element of the contract needs to be linked to a specific method for monitoring and oversight, and to ramifications for noncompliance.

Provide Technical Assistance to Local Government Entities (Such as Counties) to Draft Effective Request for Proposals (RFPs) and Contracts

This can include training by individuals with experience in this field as well as pro bono consultations with attorneys who specialize in contract law. At the outset of the contracting process, experts emphasize the importance of developing a well-constructed RFP. An RFP provides a way for a government agency to state the services they wish to contract for and solicit bids from vendors. The RFP is an important step in the process; a well-crafted and thorough RFP can make sure that proposals put forth by prison companies are themselves thorough, detailed, responsive, and verifiable. An RFP that clearly articulates a jurisdiction's specific needs and provides guidelines for responsive proposals will, in turn, guide the evaluation of RFPs and ultimately help define the content of a contract between a jurisdiction and a private prison operator. Other kinds of training and technical assistance could cover key elements to include in contracts, such as specific provisions related to data keeping, data reporting, and monitoring, as well as a requirement that contractors comply with federal and state law as well as any relevant departmental policies and procedures.⁹⁵ (See sources for sample contracts.)

Performance-based Contracting

One way of requiring private prison contractors to achieve a jurisdiction's desired practices and outcomes, such as data reporting or successful prisoner rehabilitation, is through the application of performance-based contracting. A relatively new trend in the public sector encouraged through federal guidelines such as the Fair Acquisition Regulations, performance-

based contracting allows governments to identify specific outcomes that private prison contractors should achieve and to hinge compensation on meeting these goals.⁹⁶ One performance-based approach gaining popularity is guarantees on the part of the contractor that the government will achieve set levels of cost savings, such as a 7% improvement over the costs in public facilities. Another links payment or incentives to a reduction in reoffending after release.

Meaningful Penalties for Noncompliance

Contracts can include provisions for levying financial penalties against the contractor if contract terms are breached. In practice, however, these often fail to discourage private prison companies from overstepping. Fines are often set at a relatively low level, such that it may be more cost-effective for a prison contractor to cut corners and pay a fine than to comply with the contract terms. Additionally, the process by which fines may be levied is often not clearly spelled out in contracts or consistently applied and monitored.⁹⁷

Contract Should Include Detailed and Workable Plans for Monitoring

This plan should include what will be monitored and how, by whom, how it will be paid for, and how issues uncovered will be responded to.

Provide Counties and Other Jurisdictions With Research/Information on Best Practices for Contracting

This could include examples of key contracting issues (e.g., problems that typically crop up once a prison is being operated by a private company) and suggested language to address these issues.⁹⁸

The Contract Should Establish Minimum Qualifications for Key Staff

Key staff include guards and direct service personnel in facilities, and probation and parole caseworkers. These standards should meet or exceed all applicable federal and state guidelines.

Approaches to Monitoring: More Than Just Accreditation

Private prison monitors typically use several different methods to assess contract compliance, such as reviews of files, reports, logs, and other records (including spot-checking of records for accuracy); onsite observations; interviews with key stakeholders (managers, staff, and inmates); and statistical comparisons to an analogous publicly operated prison.⁹⁹ Monitoring is “a process, requiring constant attention and vigilance. Effective oversight of a prison is thus necessarily a labor-intensive endeavor.”¹⁰⁰ Some monitoring plans fail to allow for what most would consider basic requirements, such as unannounced site visits.¹⁰¹ The monitoring process should also take into account more intangible, unrecorded factors such as a prison’s climate, guard-to-inmate communications, staff decision making, etc., which is described as follows by Collins: “Experienced corrections officials know that a prison may comply chapter and verse with the specifics of a contract and still not be a safe and healthy facility.”¹⁰²

As part of the contract between a jurisdiction and a private prison company, the company is typically required to obtain and maintain accreditation from the American Correctional Association (ACA). An important distinction between ACA accreditation and outcome monitoring is that ACA accreditation focuses on processes and procedures, rather than on outcomes. Experts caution against relying too heavily on ACA accreditation to measure institutional effectiveness and recommend a close linkage between what is called “paper-based” accreditation (e.g., through ACA or other bodies such as the National Commission on Correctional Health Care) and regular, onsite monitoring of contract compliance, service quality, and outcomes.¹⁰³

Affiliation and Expertise of the Monitor

The monitor’s training as well as his or her relationship to the facility is an important concern. While the monitor may be a consultant or subcontractor, this person may be paid by the prison operator, creating a potential conflict of interest. In rural areas, the monitor may be an individual who lives in or is

Successful State Example – Arizona

The recent experience of a private prison in Kingman, AZ, operated by Management & Training Corporation (MTC), illustrates the need for various improvements and additions to standard contracts, including planning related to occupancy and compensation, as well as provisions concerning security and monitoring. After several inmates escaped from Kingman in 2010 and allegedly killed two people, the state transferred more than 200 high risk inmates from the Kingman facility to another prison and determined that additional prisoners would not be sent to Kingman until MTC complied with identified problems, including retraining of corrections officers. This meant that MTC’s guaranteed minimum occupancy rate of 97% was not met for nearly a year. In response to the state’s action, MTC filed a “notice of claim” against the state, seeking approximately \$10 million in revenue that was lost when the state stopped supplying Kingman with inmates. This series of events led the state department of corrections to revamp its RFP process to include stipulations that private prisons will have to provide additional security regardless of the security level of inmates; state monitors will have continuous, unscheduled access to the facility, inmates, and records; and fines of \$25,000 can be levied for certain violations.

otherwise embedded in the community where the prison is situated, leading to possible tension or bias in pointing out problems that could affect many residents' livelihoods.¹⁰⁴ Also, monitors should have expertise in the area(s) they are monitoring. In the case of prison health care services, monitors should be medical providers who work for the state or county and who can knowledgeably evaluate the quality of services that inmates receive.¹⁰⁵

Improve Transparency Through Data Keeping, Reporting, and Access to Data

A critical concern is that private prisons are generally not required to report data to the local or state government with which they contract, or to any oversight body. Information is a powerful tool for advocacy; the lack of useful data not only reduces the accountability of prison companies, thus putting inmates and guards at risk, but weakens opposition to their efforts to expand. Data keeping and reporting practices that make information readily accessible will help facilitate monitoring. It is necessary to build specific requirements for data collection and reporting into the contract.¹⁰⁶ These steps could help to correct the transparency and accountability issues that often appear endemic to the private prison industry.

*Convene a Citizen Oversight Committee That Augments the Functions Performed by the Professional and Government Monitors*¹⁰⁷

Conclusion

For the most part, the way private prison companies run their businesses—keeping costs down, pursuing favorable contracts, influencing laws, policies and public opinion that most support them, maximizing profits—are not out of line with other for-profit enterprises. What sets them apart is their responsibility for a hugely important and difficult undertaking: assuring the humane treatment of prisoners, carrying out the rule of law, and preserving safety in the facilities. They serve a crucial government function, yet they approach the task from a strikingly different perspective than the governments and the public they serve.

While it is important not to oversimplify the many factors that contribute to crime and the corrections populations, even the strongest supporters of “tough on crime” policies would agree that the best case scenario is fewer inmates in custody as long as public safety is not diminished. The public supports efforts to reduce the use of incarceration when those efforts are shown to be practical and effective.¹⁰⁹ This ultimately leaves only those with a financial interest in private prisons supporting filling more beds in secure facilities.

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