

MAKING PRISONS COMPETE:

HOW PRIVATE PRISONS ENHANCE PUBLIC SAFETY AND PERFORMANCE

By Geoffrey F. Segal & Alexander McCobin*

The American public is growing increasingly frustrated with the escalating cost of managing our vast prison system. Facilities are experiencing increased failures in safety, education, and health and training services. There is rising concern over the rates at which inmates are returning to jail, rather than successfully reentering the community. Institutional barriers and resistance to change among existing, public, bureaucratic management cultures have prevented correctional systems from adopting the most effective management practices and inmate rehabilitation programs.

Furthermore, spending on corrections continues to climb, eating up more tax dollars and limited resources. In many ways, spending on corrections prevents public investments in other critical infrastructure, such as transportation and water; both of which need hundreds of billions, if not trillions, in investment over the next twenty years. State governments spent \$42.9 billion on corrections in 2005, and it is estimated that federal and state governments will need as much as \$27 billion in new spending over the next five years. Additionally, spending is estimated to increase by 6.5% over the Fiscal 2005 level.¹

Percentage of State Government Spending on Corrections (All Sources) ²	
2001	3.7
2002	3.6
2003	3.5
2004	3.5
2005	3.5
2006	3.6

While corrections remain a fairly small percentage of total government spending (see Table x and y), the size of state spending has reached a level where any growth in spending on corrections represents a substantial nominal sum. Over the past five years nominal state spending year to year has experienced significant growth, including an estimated 8.1% increase in Fiscal 2006.⁴

Exacerbating this problem is the fact that larger numbers of people are being sent to prison. At the end of June 2006, 2,245,189 inmates were incarcerated in federal, state, or local facilities; representing an increase of nearly 3% over the previous year.⁵ Unless sentencing reform takes hold quickly, incarceration numbers will only go up, driving costs higher, and placing further pressure on already limited government budgets.

Indeed, prisons have become part of the problem. As commentators have long recognized, prisons provide little in the way of rehabilitation, serving largely as warehouses for criminals,

many of whom return soon enough to American streets. More alarmingly, some evidence suggests that many prisons serve as training grounds for criminals where younger, less experienced, and less violent prisoners learn the tools of the trade from more hardened criminals.⁶

Speaking of the Commission on Safety and Abuse in America's Prisons, U.S. Senator Tom Coburn correctly noted that "the experiences inmates have in prison—whether violent or redemptive—do not stay within prison walls, but spill over into the rest of society. Federal, state, and local governments must address the problems faced by their respective institutions and develop tangible and attainable solutions."⁷ For these reasons—the prison system's fiscal burden, the growth of the prison population, and the abject failure of the prison system to enhance public safety—reform is urgently needed.

I. A BRIEF HISTORY OF PRIVATE PRISONS

Private prisons are not new to the U.S., or the world, for that matter. The first private prison opened in 1985. Since then, some thirty-four states and the federal government have begun

Percentage of State Government General Fund Spending on Corrections ³	
2001	7
2002	6.9
2003	7
2004	7
2005	7.2
2006	7

contracting with private companies.⁸ The United Kingdom has an official policy that all new prisons will be commissioned from the private sector. Germany, France, Japan, Israel, Brazil, and Netherlands, to name a few countries, have all opened in recent years, or will open, new private prisons in the not-too-distant future.⁹ According to the Association of Private Correctional and Treatment Organizations, there are more than 250 private facilities, or more than 157,000 functioning beds under private operation—representing 7% of the U.S. prison population. While the growth has slowed, private prisons have continued to enjoy a modest increase in number of facilities and rated capacity.

II. ECONOMICS OF PRIVATE PRISONS

The economics of private prisons are simple: private prisons save money. A comprehensive review of the privatization literature by the Reason Foundation examined twenty-eight research reports that compared cost data for private prisons to government-operated facilities. Of those studies, twenty-two (79%) found significant budget savings, conservatively estimated to be between 5 and 15%, due to privatization.¹⁰

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More importantly, private prisons have a competitive effect that helps control corrections spending. Two recent studies highlight the importance of competition in the field of corrections. Two professors from Vanderbilt University found that the use of private prisons in a state resulted in the reduction of daily incarceration costs for the public corrections system by 4.45% annually.¹¹ The Rio Grande Foundation in New Mexico compared per-prisoner department of corrections budgets across forty-six states. By measuring an entire department's spending rather than just a particular prison's spending, the study accounts for the cost savings public prisons can achieve in response to private competition. The study uses the percentage of prisoners under private management as its measurement of the extent of private prisons in each state.

Holding other factors constant, this study found that states with 5% of their prison population in private prisons spent about \$4,804 less per prisoner in 2001 than states without any private prisons. As the extent of private participation increases, so do savings.¹² New Mexico, for example, has 45% of its prison population under private management; it spent \$9,660 less per prisoner in 2001 than did counterpart states without any private prisons. New Mexico has gone farther down the private prison road than any other state, saving \$51 million in 2001 alone, according to the Rio Grande study.¹³

This experience is only solidified with real world experience and data. As one of the largest users of private corrections, the state of Texas provides us a unique look at the long-term benefits of competition to a correctional system. For more than a dozen years the Texas Criminal Justice Policy Council and now the Texas Legislative Budget Board have conducted a biannual review of the average cost per day of government facilities and the average contract price at private facilities. The first study was published in 1991. Subsequent studies have been conducted every other year since, with the latest published in 2007.¹⁴ This data represents the best longitudinal evidence of the benefits of competition. During that sixteen-year period, Texas' in house per diem cost has gone down, *i.e.*, they have gotten more efficient—on both the contracts themselves and avoiding costs—because competition has made them.

In addition, a wealth of studies performed by government agencies, universities, auditors, and research organizations have examined the relative quality of private prisons compared with government-run prisons. A 2002 Reason Foundation paper reviewed all available studies comparing public and private facilities.¹⁵ Seventeen studies were identified that used various approaches to measure the relative quality of care at correctional facilities managed by government versus private firms. Fifteen of the studies examined by the Reason Foundation demonstrate that quality at private facilities is as-good or better than at government-run facilities.

The major charge against privatization is that, by reducing costs, quality and security are sacrificed. Yet, there is clear and significant evidence, as demonstrated by more than a dozen comparison studies, that private facilities provide at least the level of service that government-run facilities do. Private correctional facilities have fared well against government-run facilities in almost all measures of quality, including a wide range of quality comparison studies.

III. LEGAL ISSUES AND PRIVATE PRISONS

With the increasing use of private prisons both domestically and abroad, the legal and judicial issues affecting private prisons in the U.S. today are increasingly important. The first legal issue private prisons face is simply whether they are legal. Federal, state, and local officials have all recognized the need for legal authority to delegate correctional responsibilities to non-governmental entities. It is possible to define imprisonment as a uniquely governmental function that cannot be delegated. However, this interpretation is rare. The responsibility for *sentencing* individuals to be confined is certainly a purely governmental function, but the mechanics of holding someone in confinement are not.

At the federal level, this is recognized in the language of 18 U.S.C. Sec. 4082(b), which remands all federal offenders to confinement in "any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise." The Bureau of Prisons has interpreted this to mean there is authority to contract with private prisons.

State and local governments deal with the legal authority to contract for correctional services in their own ways. States that currently have a private prison in operation or under construction obviously have legal authority to do so, as have a number of states that do not yet have a private facility. One very common method state and local governments use to assure legal authority is to pass enabling legislation. Others seek a determination by the state attorney general that there is no law forbidding contracts for private prisons.

Perhaps the second most important legal issue concerns inmate treatment and rights. Court rulings in *Richardson v. McKnight*¹⁶ and *Correctional Services Corp. v. Malesko*¹⁷ have held private prisons to at least as high a standard as public prisons (at least in the context of qualified immunity). Put simply, lawsuits may be brought against private prison guards by inmates. However, inmates are not able to sue the private prison for violations of their civil rights.¹⁸

A more recent legal issue has developed as states try to cope with overcrowding and escalating costs. States like California, which lack explicit authority to operate private prisons in-state, send, or attempt to send, inmates to private prisons in other states. The conditions inside California's prison system illustrate the important role private prisons play.

The California Department of Corrections and Rehabilitation has exceeded its maximum inmate capacity, to the point where its prison system housed 172,000 inmates for a 100,000 inmate design.¹⁹ More than 15,000 inmates have been placed in prison areas never designed for housing including gymnasiums, dayrooms, and program rooms. In addition, 4,000 state correctional officer vacancies are not expected to be filled for at least five years, exacerbating security threats related to overcrowding.²⁰ A trial court in California found that "[p]rison overcrowding in California is a crisis creating conditions of extreme peril to the safety of persons and property within the state..."²¹ In the words of U.S. District Court Judge Lawrence Karlton, "people are dying" because of the state of California prisons.²²

Owing to this severe overcrowding, Governor Arnold Schwarzenegger declared an emergency in twenty-nine California prisons on October 4, 2006. As a temporary solution to alleviate the housing problems, Governor Schwarzenegger chose to transfer inmates to out-of-state prison facilities. Two contracts with out-of-state, private prison facilities, one with The Geo Group, Inc. ("GEO") and the other with the Corrections Corporation of America (CCA), were entered into on October 19, 2006. In response, on October 30, 2006, the prisons guard union (California Correctional Peace Officers' Association) filed a lawsuit to prevent the inmate transfer. On April 2, 2007, the trial court ruled that the Governor exceeded his authority in ordering the transfer of inmates, and so mandated he revoke his order, and excluded any contracts to transfer inmates to out-of-state prisons. In part, the court ruled that the contracts violated the California Constitution, which prohibits the hiring of non-civil servants for such positions.²³ While exceptions to this constitutional provision have been made for the sake of emergency situations, the same trial court that declared the overcrowding to be a "crisis" did not find that the current case qualified under the requirements. However, upon appeal to the California Court of Appeals, the trial court's order was stayed, allowing for the transfer of inmates out-of-state pending a decision on the appeal.²⁴ As of July, the state has begun to transfer inmates to out-of-state private prison facilities.²⁵

The future of Governor Schwarzenegger's decision to outsource prison services to out-of-state private facilities is uncertain, but the case raises questions surrounding each legal question. While California prohibits the use of private prisons except for emergencies, the need for private prison facilities to alleviate an obvious emergency in the state is indicative of a wider problem with prohibition of private prison services. Without outsourcing to these prisons, California would have no way of achieving basic constitutional standards for inmates. As well, California has made a specific distinction between public employees and employees of private facilities performing government services. Most importantly, the humanitarian threats to inmates living in California correctional facilities has prompted the need to look to private facilities as alternative remedies that provide better quality-of-life.

CONCLUSION

Significant evidence demonstrates that private prisons do save money. It is remarkable that such a wide variety of approaches spanning over a decade and half of research conducted in states across the nation repeatedly demonstrate time and again that privatization does not reduce quality.

One might argue that, at the end of the day, citizens do not care who is providing a service as long as it is being provided effectively. Taxpayers ultimately care about results and performance; it matters not whether a private or public employee does the work. In order to generate genuine discussions about improving performance in state and local correctional systems, policymakers need to get away from ideology and partisanship. Policy debates need to focus on results, performance, and achieving the best outcome with the limited resources available. Failing programs, whether public or private, should be halted in favor of better-performing programs. The debate should

move away from public versus private and toward performing versus non-performing.

Neither a fully public nor a fully private corrections system is necessarily ideal. But, by introducing competition and focusing on outcomes and results, governments can provide the greatest incentives to innovate, and provide the high-quality services citizens expect for their tax dollars. Regardless of whether public agencies or private companies ultimately win the contract, the threat of losing "business" to competitors ensures that operators do their best to meet or exceed predetermined benchmarks.

Competition between public agencies and private companies provides greater accountability and incentives to achieve than the status quo bureaucratic approach. In the event of a contract, agencies may enhance these incentives for maximum effect by including provisions for performance bonuses and penalties, and even cancellation (for failure to achieve) for every institution, regardless of whether it is publicly or privately run. Competition, in conjunction with performance-based budgeting, is the best means of ensuring that correctional managers will continue to seek improved prison performance, reduced recidivism rates, and the best uses for taxpayer dollars.

Ultimately, focusing on performance and goals enables elected officials, the public, and government officials to know that they are receiving the maximum value for the funds appropriated to corrections. Governments will be forced to become more efficient, and taxpayers will benefit from fewer repeat offenders, reduced crime, and reduced criminal justice system costs.

Endnotes

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- 3 See generally *id.*
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17 534 U.S. 61, 66 (2001) (holding that companies operating private correctional facilities, like agencies operating analogous public facilities, are not subject to civil rights suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).

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