The privatization of prisons and the issue of security: is the private sector up to the task?

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Introduction

In considering the issue of security and the privatization of prisons, I would like to discuss the topic in light of the experience of the United States. I do so not solely as a matter of my own nationality, but because the issue involves two significant considerations that are unique to the U.S. The first is the fact that the United States has the highest rates of incarceration in the world and the second is that the U.S. is generally viewed, and views itself, as the world's foremost advocate for free enterprise and private initiative. The topic that I shall address today, that of prison security in the context of the privatized prison, lies at the intersection of these two considerations.

In developing this topic, I shall (1) provide a brief history of prison privatization in the United States, (2) outline the elements that have gone into the privatization decision in modern America and, (3) discuss how the issue of security has been addressed and with what success, in private correctional facilities.

Preliminary

Before embarking on the topic at hand, I would like to define "privatization" for our purposes. As I shall be using the term, privatization in the prison context refers to the transfer from public to private hands of the management and operation of correctional services. As part of this process, the responsibility for staffing, maintaining and operating prison facilities thus shifts from the state to the private sector.

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Nonetheless, it is important to emphasize that "[t]he function of incarcerating people, whether done publicly or privately, is the exclusive prerogative of the state"[1]. Although, as we shall see, there is a history of private involvement in the correctional process in the United States, the punishment of wrongdoers "is a truly unique function and has traditionally and exclusively been reserved to the state"[2]. In whatever form private contractors may be used to provide correctional services, the "governmental nature of the function" remains[3].

Thus, "[i]f a state government must satisfy certain constitutional obligations when carrying out its functions, it cannot avoid those obligations and deprive individuals of their constitutionally protected rights by delegating governmental functions to the private sector. [citation omitted] The delegation of the function must carry with it a delegation of constitutional responsibilities"[4].

In any event, the use of the private sector to discharge a public responsibility raises numerous issues, especially with respect to prison security, as we shall see.

Historical overview

As I have used the term, the privatization of penal facilities is a 20th century phenomenon. The process of transferring state functions to the private sector presumes that those functions were being exercised by the state in the first place.

Nonetheless, there is a long tradition in the United States of private involvement in the correctional process dating back to the colonial period. In the case of *Richardson v. McKnight*, a significant case concerning prison privatization that I shall discuss shortly, the U.S. Supreme Court confirmed that in the American experience, "correctional functions have never been exclusively public"[5].

This fact is, in large part, attributable to America's origins as a frontier society and an outpost of a large colonial power. In 1597, the English parliament enacted a law calling for what it called the "punishment of Rogues, Vagabonds and Sturdy Beggars"[6]. One aspect of the law was the banishment

1 *Giron v. Corrections Corporation of America*, 14 F. Supp. 2d 1245, 1249 (D.N.M. 1998).
2 *Ibid*.
3 *Ibid*.
4 *Id*. at 1250.
5 521 U.S. 399, 405 (1997).
6 For a history of banishment in 17th century England, see *Stogner v. California*, 539 U.S. 607, 641-647 (2003) (Kennedy, J., dissenting). See also: Lupe S. Salinas, Deportations, Re-

from the kingdom of certain offenders. This provision established the framework for the deportation of prisoners to the American colonies and, later, to Australia as well as other colonial possessions.

The transportation of prisoners to distant places was placed in the hands of private entrepreneurs who conveyed their human cargo to America in exchange for the right to sell them as indentured servants. As indentured servants, prisoners were bound to work for the master who had purchased their services, often for as long as seven years. At the end of that period, the prisoner was able to re-enter society as a free person. The use of prisoners in this way not only provided a source of manpower for the development of the colonies, but also it permitted Britain to relieve itself of otherwise burdensome offenders at relatively low cost[7].

Many years passed before penal sanctions in America involved the use of brick-and-mortar prisons as facilities exclusively dedicated to the incarceration of criminal offenders. Until then, the correctional regime was a mix of various sanctions that generally did not require confinement. Punishment was often accomplished by means that involved public shaming rather than isolation from the public. Thus, mutilation, branding, ear-cropping, flogging at the pillory and restraint in public stocks served were frequently used sanctions[8]. Moreover, the number of offenses calling for the death penalty was enormous, even by contemporary American standards, and practically every felony was treated as an offense warranting execution in the case of a second conviction[9].

The use of prisons to confine offenders evolved in large part as an alternative to the sanguinary options that I have mentioned. The development of a more benign form of punishment was promoted especially by the Quakers, for whom the restraint of criminals in workhouses was a humanitarian alternative to the brutal forms of punishment that were then prevalent. In the view of William Penn, a leading figure in the Quaker community of Pennsylvania, "all prisons shall be workhouses for felons, vagrants and loose and idle persons"[10].

American society thus began to move in the direction of confinement as its preferred method for dealing with criminal offenders and, starting in the

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movals and the 1995 Immigration Acts: A Modern Look at the Ex Post Facto Clause (2004), at http://law.bepress.com/expresso/eps/256.

7 James Austin & Garry Coventry, Bureau of Justice Assistance, Emerging Issues on Privatized Prisons 9 (2001).

8 O.F. Lewis, The Development of American Prisons and Prison Customs 1776-1845 9 (Prison Association of New York, 1922).

9 *Id*. at 13.

10 *Id*. at 12.

18th century, local jails were often operated by private individuals[11]. Similarly, "private contractors were heavily involved in prison management during the 19th century" as well[12]. Thus, although the head jailer was designated by public authorities, he operated as a private contractor engaged in a profit-making enterprise. To the extent that jails functioned on the model of a workhouse, those who ran such facilities profited by selling the handiwork and labour of the inmates they oversaw[13].

Eventually, "some States (…) leased their entire prison systems to private individuals or companies which frequently took complete control over prison management, including labour and discipline"[14]. By 1885, 13 states had contracts with private companies to lease out prison labour[15]. Some of these contracts allowed private businesses to supply raw materials to be processed in prison workshops and later sold by the companies for profit. Other prisoners were leased out to work in various industries outside the prison walls, including mines, railroads, farms and other private endeavours. In many southern states, this system of leasing inmates provided a source of cheap labour that could be directed back to plantations following the abolition of slavery[16].

However, the expectation that the leasing of inmates would pay the cost of their incarceration and generate profit was never quite fulfilled. Moreover, organized labour, manufacturers, and farmers considered convict labour a form of unfair competition and strongly opposed its use. Their efforts, coupled with the poor conditions often found in many prison labour camps, fuelled intense public opposition to the leasing out of convict labour.

Under public pressure, State legislatures began investigating alleged incidents of mismanagement and cruelty within private facilities. These investigations eventually brought about extensive changes to the convict leasing system[17]. In 1905, President Theodore Roosevelt signed an executive order prohibiting the use of convict labour on federal projects. Later, in 1929, Congress passed a legislation allowing individual states to ban importation of goods produced by inmates from other states. During the Great Depression,

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11 See *Richardson v. McKnight*, 521 U.S. at 405, citing: G. Bowman, S. Hakim and P. Seldenstat, Privatizing the United States Justice System 271, n.1 (1992).

12 *Ibid*., citing: D. Shichor, Punishment for Profit 33, 36 (1995).

13 Austin, *supra* note 7.

14 521 U.S. at 405 (citations omitted).

15 Austin, *supra* note 7 at 10.

16 Matthew Zito, International Foundation for Protection Officers, Prison Privatization: Past and Present 2 (2003) at http://www.ifpo.org/articlebank/prison_privatization.htm.

17 *Id.* at 11.

Congress and state legislatures passed other laws that further minimized the use of inmate labour in private enterprise.

The trend that thus developed was to reduce private sector involvement in the management of prisons and prisoners and to increase the role of government with respect to correctional matters. Eventually "governments nearly everywhere had assumed responsibility for imprisonment and most other criminal justice functions"[18]. Significantly, the convict lease system was virtually abandoned. It is only during the last twenty years that American society has seen a new move toward the privatization of correctional facilities and functions.

The current experience with privatization

During the early 1980's a number of factors came together that supported the increased use of private companies to provide correctional services. Perhaps the primary consideration was the record number of defendants being sentenced to prison, in large part driven by stiffer sentencing practices, including mandatory minimum sentences associated by many with the so-called "War on Drugs". Thus, the number of state and Federal prison inmates more than doubled from just over 300,000 in 1980 to well over 700,000 by 1990[19]. The figures continued to rise in the following decade to the point that the number of persons incarcerated awaiting trial or following conviction exceeded 2,000,000 by 2002[20]. Put another way, in 2002 (the last year for which official figures are currently available), the U.S. rate of incarceration surpassed that of every other country on earth, achieving a rate of 702 inmates per 100,000 population, a record high[21].

Overcrowding and violence in many prisons reached such proportions that in 1982 a Federal District court found Tennessee's entire prison system in violation of the constitutional prohibition against cruel and unusual pun-

18 Douglas McDonald, et al., Private Prisons in the United States: An Assessment of Current Practice 4 (Abt Associates Inc., Cambridge, Massachusetts, 1998) (the "Abt report"). The Abt report was prepared under agreement with the National Institute of Corrections to comply with the Congressional mandate contained in the National Capital Revitalization and Self-Government Improvement Act of 1997, requiring the Attorney General to "conduct a study of correctional privatization". *Id*. at i.

19 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prisoners in 1994, Table 1 (1995).

20 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prisoners in 2004, Table 1 (2005).

21 Marc Mauer, Comparative International Rates of Incarceration: An Examination of Causes and Trends, (Presented to the U.S. Commission on Civil Rights by The Sentencing Project, 2003).

ishment[22]. By 1986, 38 states were operating at or above rated prison capacity, some by more than 50 percent[23]. Soon, all these states were under court order to remedy overcrowding and other constitutional violations.

Other demands were imposed by the increased use of intermediate sanctions such as probation, halfway houses and rehabilitation programs for defendants not requiring incarceration. These alternatives, which focus on methods such as education and job training as well as drug and alcohol counselling, required specialized and often costly services that state authorities were not in a position to provide directly[24]. Moreover, the period saw a growth in the demand for juvenile facilities, which already had a long history of private involvement[25].

The emerging correctional crisis thus required prompt action that would likely cost a substantial amount. In the circumstances at the time, there was little political or public appetite to spend more money on prisoners after society had just spent large sums to ensure their conviction. Add to this a variety of economic problems already confronting both the states and the Federal government and the groundwork was laid for finding another way to get the job done[26].

In response to the various pressures already mentioned, state and federal governments began entering into contracts with private companies to manage and operate prison facilities housing convicted inmates[27]. Additionally, they turned to the private imprisonment industry to provide secure confinement of defendants awaiting trial, persons subject to deportation, and juve-

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22 *Grubbs v. Bradley*, 552 F.Supp. 1052 (M.D. Tenn. 1982).

23 Kim Richard Nossal and Phillip J. Wood, "The Raggedness of Prison Privatization: Australia, Britain, Canada, New Zealand and the United States Compared", 3 (Paper before the Prisons 2004 conference on Prisons and Penal Policy: International Perspectives, June 23-25, 2004).

24 There was already a tradition of private entities supplying such services to inmates inside of state prisons. "In the adult correctional system, private firms had long been contracting with federal and state governments to provide a variety of specific services to correctional facilities [that] did not seem to pose fundamental questions about the state's authority to incarcerate prisoners". Abt report, *supra* note 18 at 5.

25 "Private, mostly not-for-profit charities and organizations had played a long a distinguished role in operating facilities for juvenile offenders". *Ibid*.

26 See generally: Nossal, *supra* note 23.

27 Approximately 80% of all privately held prisoners are serving state or Federal sentences. The balance consists of jail inmates supplied by local authorities. Considering that there are more than 3000 local governments in the U.S. whose practices with respect to privatization would need to be surveyed, "most of the studies comparing cost and performance of privately and publicly operated facilities examine state prisons or their private equivalents, rather than local jails and privately operated detention facilities". Abt report, *supra* note 18 at iii.

nile offenders[28]. Faced with difficult economic conditions, the governments of some states agreed to contract out correctional services as a financially plausible way to respond to overcrowding.

In 1984, a private company named Corrections Corporation of America (CCA) won its first contract to run an immigrant detention center in Houston, Texas[29]. The following year it proposed taking over the entire Tennessee prison system by means of a 99-year lease[30]. Although the proposal was rejected, "the offer ignited widespread press attention and public debate"[31]. Thereafter, and in rapid succession, CCA and similar companies entered into contracts with local, state and Federal authorities to operate secure facilities to house prisoners and others requiring detention[32].

Over the next few years, the private corrections industry enjoyed rapid growth. The total capacity of private secure adult facilities climbed from a small number initially, to over 70,000 by the end of 1999, of which over 67,000 were filled by state prisoners and the rest by federal inmates[33]. By 2004, approximately 6% of all state and federal prisoners were housed in private facilities, although in several states, the number was over 20%[34]. The large majority of privately operated prisons are now located in the West and in the South, with Texas and California being the two states with the greatest number of such facilities[35].

Bumps in the road

Despite the continuing growth trend of the private corrections industry, starting in 1995 a string of bad publicity generated by several highly publicized cases tarnished the public image of private prisons and raised serious concerns about the status of security in such facilities.

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28 There was already a tradition of private involvement in the housing of juvenile offenders, while the U.S. Immigration and Naturalization Service (INS) first contracted with private companies in 1979 to house illegal immigrants pending hearings or deportation. *Id*. at 5.

29 Abt report, *supra* note 18, at 5.

30 *Id*. at 4.

31 *Ibid*.

32 *Id*. at 6.

33 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prisoners in 1999 7 (2000).

34 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prisoners in 2004 6 (2005). As of December 31, 1997, Oklahoma housed 23% of its inmates in private facilities, followed by the District of Columbia (22%), Colorado (21%), Tennessee (20%), Louisiana (19%) and Mississippi (16%). Abt, *supra* note 18, at 12.

35 Abt report, *supra* note 18, at 19-20. As of 1997, Texas had 23 such facilities and California had 11.

In June of 1995, an inmate uprising shook an immigration detention center operated by Esmor Correctional Services in Elizabeth, NJ. Most of the guards, who were "unarmed and under-trained"[36], fled once the disturbance began, and police using riot gear had to regain control of the facility. Prior to the uprising, the detention center had been the subject concerning poor treatment of detainees and substandard living conditions[37]. During its investigation following the riot, the INS found that poorly trained guards had routinely abused those being held, while supervisors did little to monitor the situation[38]. After the incident, the INS withdrew from its contract with Esmor, but did not take over operation of the detention center. Instead, it turned to another private company and the Elizabeth facility is now run by CCA. And the original operator? Esmor changed its name to Correctional Services Corporation and remains a significant player in the private corrections industry[39].

In the following year, two convicted sex offenders escaped from a prison run by CCA near Houston, Texas. After they were apprehended, Texas state officials realized that they had no authority to prosecute the convicts for the escape: at that time, there was no law in Texas, or any other state for that matter, making it a criminal offense to escape from a private correctional facility[40]. In other words, the law had not kept up with the rapid changes taking place in prison systems around the country. States that make extensive use of private correctional alternatives have since made appropriate statutory changes to criminalize such escapes.

In 1998, another inmate uprising resulted in a series of fatal stabbings and a six-person escape from a private prison in Youngstown, Ohio. The facility had been built by CCA to house convicted felons from District of Columbia[41]. Eventually, the company paid $ 1.6 million to settle a class action lawsuit

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36 Philip Mattera, et al., Jail Breaks: Economic Development Subsidies Given to Private Prisons 5 n.14 (Good Jobs First: A Project of the Institute on Taxation and Economic Policy ed.) (2001), citing: "Tinderbox Explodes in Elizabeth; Immigrants Riot; Detention Center Now Uninhabitable", The Record (Bergen County, NJ), June 19, 1995, at A1.

37 *Ibid*.

38 *Id*. At 5 n.15, citing: Ashley Dunn, "U.S. Inquiry Finds Detention Center was Poorly Run", New York Times, July 22, 1995, at 1.

39 Mattera, *supra* note 37, at 5.

40 *Ibid*.

41 It is not uncommon for correctional authorities using private prisons to send their inmates to facilities in other states. The practice has proven to be problematic as each inmate must be treated in accordance with the laws of his state of conviction, leading to the disparate handling of prisoners living in close proximity. Similarly, relocation out of state not only makes reintegration back into society difficult, but it potentially cuts the prisoner off from his family and friends, creating a source of discontent within the institution.

brought by prisoners at the facility who claimed that they were abused, denied medical care, and not properly segregated from more dangerous convicts[42].

In June of 2000, North Carolina terminated its two prison management contracts with CCA and prohibited importation of out-of-state prisoners. In August of the same year, Utah abandoned plans for its first fully privatized prison, and officials in Georgia informed CCA that the state would not need a new fifteen-hundred-bed facility the company was building in Stewart County. In 2001, two prisons in Arkansas, operated by the Wackenhut company, returned to public sector management. Later that same year, voters in Alaska rejected a plan to build the first private prison in the state[43].

Although increasingly grim, the outlook for private corrections companies had not become hopeless. Escalating levels of incarceration continued to place significant burdens on the capacity of state and Federal authorities to meet the demand for prison space. Similarly, the Federal government continued to require secure housing for the increasing numbers of persons subject to deportation or similar sanctions[44].

The basis for privatization

According to the most recent survey, the primary reason that state and Federal authorities turn to private prison contractors is the need to quickly reduce overcrowding in the public prison system[45]. Two priorities are generally cited in support of private sector involvement in this process: first, privatized operations are seen as more efficient than their public counterparts and, second, they are viewed as a more cost-effective means of fulfilling the state's correctional obligations. Let us now turn to those two considerations.

The issue of efficiency

Privatized services are often considered to be less costly than their public counterparts. Nonetheless, in the field of corrections, the issue of efficiency is more often cited than the consideration of cost as the basis for turning to the

42 Matera, *supra* note 37, at 6.

43 *Ibid*.

44 *Id*. at 7.

45 Abt report, *supra* note 18, at 15-16. "If the principal objective of contracting out the management and operations of prisons is, as surveyed correctional administrators most often reported, to expand capacity in order to alleviate overcrowding, the privatization no doubt achieves that purpose". *Id*. at 47.

private sector[46]. Freed from the bureaucratic constraints that often hamper public endeavours, privatized prison facilities are frequently seen as being able to provide additional prison space more quickly than state authorities are capable of doing[47]. A large scale capital project, such as the building of a prison, is a demanding task for the public sector to perform. It is understandable how the opportunity to be free of that obligation could serve as a considerable temptation to policymakers.

Another reason frequently given for the use of private contractors that is closely allied to that of efficiency is operational flexibility. Private contractors are not subject to many of the limitations restricting government agencies that operate public prison facilities. Thus, "[p]rivate managers can hire and fire without the constraints of civil services and restrictions on creating budget lines for new employees; labour can be disciplined and reassigned with far greater ease in the private sector, especially if the labour is not unionized"[48]. The perception is that by contracting out prison services to private companies, public policymakers can realize the benefits of such potentially controversial practices without being held directly responsible for them.

The issue of cost

Although efficiency and flexibility are prominent considerations for public officials when contemplating the privatization of prison services, the issue of cost is not far behind. A survey of state and Federal correctional administrators disclosed the following objectives for using private correctional firms: Speed of acquiring additional beds – 75%; Gaining operational flexibility – 61%; Operational cost savings – 57%; and Construction cost savings – 57%. Of interest is the fact that only 43% of the respondents cited improving the caliber of services as an objective of privatization[49].

Although there is a popular perception that privatizing government services will save money in the long run, whether or not that is true with respect to prison services is less clear. Although some studies suggest "qualified support" for the view that "meaningful costs savings can be achieve by contracting out" prison services[50], the data does not yet support a "general pattern"

46 *Id*. At 15-16.

47 *Ibid*.

48 *Id*. at 9.

49 *Id*. at 16, Table 2.3.

50 Charles W. Thomas, "Comparing the Cost and Performance of Public and Private Prisons in Arizona", (Unpublished report to the Arizona Department of Corrections, August 21, 1997, at 50-51).

of such cost benefits[51]. Nonetheless, the issue of cost is of significant importance to the issue of security in privatized prisons, especially if private companies seek to lower their expenses by reducing the quality of services they provide.

The issue of security

Before I address the issue of security, I would like to define the parameters of that term. I intend to address two aspects of security: first, the physical security of private prisons as a means for containing inmates apart from society, and, second, operational security within the prison to ensure the safety needs of both inmates and guards. The broader issue of whether released inmates are a greater or lesser threat to public safety following incarceration in a private rather than a public prison is beyond the scope of this paper.

In considering the issue of security, I also exclude from consideration those facilities and programs that are based in the community and that serve as an alternative to incarceration. Thus, convicted defendants who are placed in privately run halfway houses or juvenile offenders assigned to facilities under contract with the state are not part of the discussion that follows. This is not to say that the issue of security has no relevance to such placements. Nonetheless, prison facilities holding more serious criminal offenders present significantly greater security concerns and it is there that I shall focus my remarks.

At the outset it is worth noting the classification of inmates confined in private prisons. The most recent study indicates that only 4% of prisoners held in privately operated facilities are classified as maximum security, while 20% of prisoners in public prisons are in that category. On the other hand, medium security offenders account for 50% of the inmates in private facilities but only 39% of those in state prisons. Similarly, 45% of privately held prisoners are considered minimum security while 33% of the inmates confined in government-run prisons are so classified[52]. These statistics suggest that prisoners committed to private prisons tend to be less severe offenders than those in state or federal prisons.

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51 "Our conclusion regarding costs and savings is that the few existing studies and other available data do not provide strong evidence of any general pattern. (…) Drawing conclusions about the inherent superiority of one or the other mode of provision, based on a few studies, is premature". Abt report, *supra* at note 18, at v.

52 *Id*. at 26, Table 2.10.

Having considered the classification of the private prison population in the United States, it is also appropriate to survey the kinds of physical security provided in private prison facilities that are currently in operation. This is important because there must be a correct "fit" between the inmate being incarcerated and the prison in which he is being held.

Correctional facilities vary depending on their level of physical security. "Minimum security institutions often lack secure perimeters. Medium security prisons have secure perimeters – often two fences with a bank of razor wire between them or, in older facilities, high concrete walls ringed with razor wire and fences. Maximum security prisons typically have secure perimeters and guard towers, in which armed officers are posted. There are many variations in these general configurations, and classification of the physical security also depends on the architecture of the housing units and the procedures that are followed inside the prison"[53].

In the main, private prison facilities appear to provide a level of physical security commensurate with the classification of the prisoners they are holding. As already noted, 50% of all prisoners held in private prisons are classified as being medium security risks. The proportion of medium security private prisons is 67%, more than adequate to absorb the largest class of prisoners they are designed to serve[54].

Nonetheless, the available statistical information contains some disturbing elements. It is worthy of concern that 45% of all privately held prisoners are classified as minimum security, yet only 30% of privately operated prisons are rated as being minimum security facilities[55]. This means that a significant number of prisoners classified as minimum security are being housed in medium level facilities. Needless to say, this presents a significant security concern, as it means that inmates who present a minimal security risk are being mixed together with more serious offenders.

Just as troubling, although involving fewer inmates, the number of high security prisoners exceeds the number of high security beds available in private facilities. Although, as we have seen, 4% of all privately held inmates are classified as high security, there is only one private maximum security prison in the United States. Moreover, it is equipped to house 295 inmates, which amounts to only one-half of all high security prisoners incarcerated in private prisons[56]. This strongly suggests that there are maximum security

53 *Id*. at 24-25.

54 *Id*. at 25, Table 2.9.

55 *Ibid*.

56 *Id*. at 25.

inmates in the private prison system who are housed at a lower level of security than is appropriate.

Classification of inmates and prison security

This is probably an appropriate place to discuss briefly the issue of classification of inmates destined for private prisons. If a high security prisoner is classified as only a medium security risk and is placed within that population, the prospect for disruption and violence is enhanced. Similarly, the housing of offenders presenting a minimal risk with those who present much greater security concerns also presents a serious problem. These are very real concerns when considering the placement of prisoners in private facilities.

The majority of states directly perform the initial classification of inmates and decide the appropriate facility for incarceration[57]. This accomplishes two things. First, it avoids any possibility of self-interest on the part of a private provider that might be tempted to classify an inmate according to the beds it has to fill. Second, it recognizes that an inmate's initial classification can significantly affect the manner in which he will serve his sentence, essentially amounting to an allocation of punishment best left exclusively with the state[58]. Unfortunately, a protocol that involves the state in the initial classification decision does not necessarily address the issue of subsequent reclassification based on the inmate's conduct during his incarceration.

The violence at the CCA facility in Youngstown, Ohio was in part attributed to problems with classification. The company's contract with Washington, D.C. Department of Corrections provided for housing of medium and medium-high security inmates at Youngstown. CCA was allowed under the agreement to reject prisoners who had been improperly classified or, alternatively, to revisit their classification and assign them to a proper category.

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57 Scott D. Camp & Gerald G. Gaes, Federal Bureau of Prisons, Private Prisons in the United States, 1999: An assessment of Growth, Performance, Custody Standards, and Training Requirements 90 (March, 2000).

58 Richard Harding, Private Prisons, 28 Crime & Just. 265, 274 (2001). The distribution of decision-making between state authorities and the operators of private prisons must also be considered with respect to disciplinary sanctions. Although the administration of a private facility does not require direct state involvement, the state has exclusive authority to allocate punishment. It remains an open issue whether sanctions for prisoner misconduct such as solitary confinement, revocation of credit for good behaviour and restrictions on privileges are merely administrative matters or constitute the kind of punishment that is reserved to the state. The British practice of assigning a state adjudication officer to be responsible for disciplinary rulings in private facilities has been adopted in Florida, but in few other states.

As it turned out, Washington authorities sent a number of their most dangerous maximum security prisoners to Youngstown, and CCA accepted them, even though the facility was not rated for such serious offenders. Instead, company officials re-classified the maximum security inmates to medium security, and housed together with those properly classified as medium security inmates. This decision produced numerous conflicts within the prison population and a number of violent incidents occurred, resulting in both injuries and deaths among inmates[59].

CCA also failed to segregate inmates who testified against each other at their trials and those affiliated with different gangs. Housing together these very dangerous individuals – who also had feelings of extreme animosity toward each other – was cited as a major contributing factor in the Youngstown investigation report[60]. The same failure to separate antagonistic groups of inmates has provoked violence in other private prisons as well[61].

Operational security in private prisons

The operational security of any prison depends on the maintenance of order within the facility. The degree of order is in large part a reflection of a myriad of factors involving both inmates and those who guard them. Foremost among these, as we have already seen, is the proper classification of inmates, which is critical to internal prison security.

But there are a number of additional factors that come into play on this issue. For a prison to ensure operational security, it must deal with inmates firmly, but fairly. In the words of one expert in the field, it must "keep prisoners in, keep them safe, keep them in line, keep them healthy, and keep them busy – and to do it with fairness, without undue suffering, and as efficiently as possible"[62].

In trying to assess the performance of private prisons in this regard, we are hampered by the relative lack of research on this issue and the fact that few government agencies have rigorously evaluated the performance of their private contractors. "Even though there exist over a hundred privately oper-

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59 Office of the Corrections Trustee, "Independent Review of the Management and Operations of the Northeast Ohio Correctional Center in Youngstown, Ohio, Owned and Operated by the Corrections Corporation of America", at 57 – 77 (1998) (the "Youngstown report").

60 *Ibid*.

61 See, e.g. Lou Fecteau, "Audit: Hobbs Prison Deficient, Albuquerque Journal", June 16, 1999.

62 Abt report, *supra* note 18, at 52, citing: Charles Logan, "Criminal Justice Performance Measures for Prison", in John J. DiIulio, et al., Performance Measures for the Criminal Justice System, (Washington, DC: Bureau of Justice Statistics, 1993), at 19-59.

ated secure confinement facilities, there have been very few systematic attempts to compare their performance to that of public facilities"[63]. As a result, we must be satisfied to determine what lessons can be drawn from the available anecdotal information.

Cost-cutting and the impact on staffing

How well a prison performs is largely a function of funding: how much money is available to apply to the task at hand. Although both private and public prisons operate on a budget, private facilities are enterprises intended to make a profit. In those circumstances where the private sector can accomplish greater efficiencies than its public counterpart, some savings may be realized. But where additional services must be performed that cannot be offset by such savings, private facilities must be prepared to reduce their level of profit in order to accomplish what needs to be done. Critics of privatization suggest that when confronted by such a choice, private operators are much more likely to cut costs by reducing services than they are to accept a reduction in profits. The tension between profitability and performance can thus have a significant impact on a private prison's level of operational security.

The urge to save on labour costs has driven many private prison companies to hire fewer staff and to pay them less than what their public sector counterparts receive. In 2000, an average entry-level salary in the private sector was more than 30% lower than that paid to public employees performing the same functions[64]. Low pay, in turn, results in a high turnover rate – 52% in private prisons versus 16% in public facilities. Such a high rate of attrition results in staff who are generally less experienced and less well trained than public corrections officers, thereby undermining their ability to handle security issues effectively and efficiently.

In July, 2004, nineteen inmates were injured in a five-hour riot at Crowley County Correctional Facility, located in Colorado and managed by CCA. A Colorado Department of Corrections investigation revealed that the prison staff was inexperienced, under-trained, and spread too thin to control the inmates within the institution. On the night of the riot, fewer than 35 corrections officers were on duty to oversee more than 1,100 prisoners[65]. Lack of training and experience on the part of both supervisory and line staff were

63 Abt report, *supra* note 18, at 54.

64 Camille Camp and George Camp, The Corrections Yearbook 2000, (Criminal Justice Institute, Inc., 2001).

65 "Prisons for Profit: Inside the Big Business of CCA", the Honolulu Advertiser, Oct. 3, 2005.

found to be major contributing factors to the occurrence of the Youngstown prison riot as well[66].

Cost-cutting and the impact on prison programs

Privatization advocates argue that savings realized from the efficiencies in the private sector can be used to provide more and better quality education, job training, rehabilitation, and other services for inmates. However, statistics indicate that, in fact, private facilities offer significantly fewer such programs than do public penal institutions. This is an important consideration because prison security is enhanced when the humanizing effect of such programs are widely distributed.

The numbers tell the tale: Although 91% of all public prisons in the U.S. reported having some type of vocational training program in 2000, only 73% of all private prisons offered the same. Similarly, over 90% of state and Federal prisons provided education programs, while 80% of private facilities did so during the same period. Another difference exists in the number of psychological and psychiatric counselling programs offered. Of those facilities providing counselling, 100% of Federal facilities offered both types yet only 46% of private prisons did the same. The situation is only slightly better in regards to HIV/AIDS counselling: 90% of Federal prisons provide such counselling in comparison to only 55% of private facilities[67].

An investigation of the Youngstown facility revealed that inmates often spent 23 hours a day confined to their cells and there were no educational or vocational programs available to them. Investigators identified extensive inmate idleness as one of the major contributing factors to the violence at that institution[68].

In New Mexico, two prisons operated by the Wackenhut Corrections Corporation repeatedly erupted in violent disturbances. Wackenhut opened the Lea County Correctional Facility at Hobbs in May of 1998, but before the end of the summer, widespread violence had already broken out at the institution[69]. By the end of the first year of operations, the number of inmate deaths in violent incidents had reached five, including the death of one guard[70]. This produced an institutional murder rate described by one corrections expert as

66 Youngstown report, *supra* note 60, at 81.

67 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of State and Federal Correctional Facilities 2000 10, 11 (rev. Oct. 15, 2003).

68 Youngstown report, *supra* note 60, at 81.

69 Judith Greene, Prison Privatization: Recent Developments in the United States 2 (2000) (presented at ICOPA, May 12, 2000).

70 *Ibid*.

"off the charts"[71]. In December, a prisoner Jose Montoya was stabbed to death in the prison barbershop. The following month, Robert Ortega died from knife wounds in his cell – the twelfth stabbing of a prisoner since the opening of the facility.

Soon after, in April of 1999, hundreds of prisoners at Hobbs rioted, and it took more than 100 law enforcement officers from around the state to lock down the prison. Thirteen guards and one prisoner received injuries in this incident[72]. A state audit of the Hobbs prison revealed the reasons for the disturbance – insufficient number of work and educational programs provided by Wackenhut, among other violations. Work assignments were for the most part "on paper only". Correctional officers neither classified prisoners in a timely manner, nor scheduled them for parole hearings as required by state standards[73].

Some final words on privatization and security

As previously noted, the tension between profitability and performance can have a significant impact on a private prison's level of operational security. To the extent that private facilities must be held to the same standard as their public counterparts, the balance must always be struck in favour of proper, professional performance even at the expense of profits. One could reasonably argue that the short-term benefit realized from excessive cost-cutting amounts to a false economy that ignores the long-term economic return of an adequately resourced prison. In the long run, money is saved when internal security is preserved and disruption is avoided, and an institution that can maintain such a profile is more likely to be looked upon favourably by state policymakers.

Accountability of private actors performing public functions

As noted at the beginning of this paper, the incarceration and punishment of prisoners is a uniquely public function. Indeed, the power to confine other members of society is "the most palpable form of state police power"[74]. Before closing, it is worth considering the degree to which private actors who perform correctional functions are held accountable for their actions when they violate the rights of the prisoners that are placed in their charge. This

71 Greene, *supra* at n. 1.

72 *Id*. at 3.

73 Lou Fecteau, *supra* note 62.

74 *Richardson v. McKnight*, 521 U.S. at 414, (Scalia, J., dissenting).

bears on the issue of security because ensuring the accountability of prison staff constitutes a major step toward reducing tensions within a facility.

In the US Supreme Court case of *Richardson v. McKnight*, *supra*, the Court considered the application of federal law (42 U.S.C. § 1983)[75] to the situation of an inmate who brought legal action against two guards in a prison operated by a private, for-profit corporation. In *Richardson*, the inmate claimed that he suffered serious injury requiring hospitalization from the restraints placed on him by the guards. The guards, in turn, asserted that they were entitled to the same qualified immunity from liability that would be available to guards in public prisons[76].

On a vote of five to four, the Supreme Court disagreed with the position taken by the private prison guards, and held that they were not entitled to such immunity, "unlike those who work directly for the government"[77]. The Court ruled that there was no tradition of immunity for privately employed prison guards, nor did the Court discern a sufficient reason to change the practice. The majority stated that while a policy of immunity for state prison guards protected the public from "unwarranted timidity" on the part of public officials, such a concern is less likely to be present among prison guards working for a private company[78].

The Court concluded that "competitive market pressures" would have the same effect on the performance of private prison staff as would immunity in that both would encourage prison officials to exercise their authority vigorously but fairly[79]. The majority reasoned that if the guards in a private facility are too aggressive, resulting in lawsuits or other legal action against them, costs will go up for the company running the institution. On the other hand, if private guards are too timid, then the for-profit company employing them will run the risk of replacement by others prepared to do a more effec-

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75 "In order to state a [tort] claim under section 1983, a claimant must show (1) deprivation of a right secured by the federal constitution or federal laws; and (2) that the deprivation was caused by a person acting under state law". *Giron v. Corrections Corporation of America*, 14 F. Supp. 2d at 1247.

76 The purpose of immunity for government officials is to permit the government to perform its functions without its agents fearing that they will be subject to legal action. To that end, federal law provides government officials with immunity from suit for their official actions, unless their "act[s] [are]so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing". *Lassiter v. Alabama A & M University Board of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994).

77 521 U.S. at 413.

78 *Id*. at 408.

79 *Id*. at 409.

tive job[80]. Without citing any empirical data, they concluded that the conduct of guards in private facilities would take into account the market impact of bad behaviour on their part.

In a stern dissent, Justice Scalia, writing for the minority, asserted that whether a party receives immunity should be based on the function he performs and not on his status. Thus, where guards in private prisons perform a function on behalf of the state, they should be in the same position as their public counterparts[81]. He went on to describe the majority's reliance on market pressures as "fanciful", pointing out that there is no open market "where public officials are the only purchaser and other people's money the medium of payment"[82]. In sum, he concluded, the decision as to what company to use and how much money to spend, "is a government decision and not a market choice"[83].

Although the Court was closely divided, as in all such cases, the decision of the majority remains the law of the land. Those who function within the private prison system are bound by the same legal and constitutional restrictions as their public counterparts. Unless Congress decides to expressly provide otherwise by statute, they do not have the benefit of the same qualified immunity available to state actors. Until then, they are essentially held to a higher standard.

Conclusion

The modern American experience with the privatization of correctional services has, at best, been mixed. On the one hand, private involvement has allowed states to create desperately needed prison beds quickly and, sometimes, at a lower cost. On the other hand, it is always a concern that the pressure to make a profit will lead to cost-cutting measures that could compromise prison security, if not public safety.

Nonetheless, it is my view that, at least in the United States, private correctional services are here to stay. The confluence of the two factors that I mentioned at the outset, America's high rate of incarceration and its confidence in the private sector, will continue to drive this issue for the foreseeable future.

Let me close with this example: Just last week, the governor of California proposed moving forty percent of his state's female inmates into neighbourhood correctional centers in order to relieve the state's severely overcrowded

80 *Ibid*.
81 *Id*. at 416-417.
82 *Id*. at 419.
83 *Ibid*.

prison system. The plan would apply to approximately 4500 non-violent female offenders and would involve education and job training as well as drug and alcohol counselling. Moreover, the plan would permit inmates to have their minor children live with them at the facility. What is significant for our purposes is that the contemplated facilities would be run by private companies under contract with the state[84].

Such a proposal, involving almost half of the female inmates in California, will require the creation of community-based correctional programs throughout the state in relatively short order. This is exactly the type of initiative that advocates of privatization assert can best be accomplished by the private, rather than the public, sector. Considering that California has the second highest number of private correctional facilities in the US, after Texas[85], it is not surprising that the governor's proposal calls for the project to be accomplished by contracting out its execution to private correction companies.

Only time will tell whether the private sector will be up to the task.

84 "Plan Puts Female Inmates in Centers by Their Families", Los Angeles Times, February 11, 2006, at http://www.latimes.com/news/local/la-me-women11feb11,0,2982614,print.Story.

85 Abt report, *supra* note 18, at 20.