



Abt Associates Inc.

Private Prisons in the United States

An Assessment of Current Practice

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Contents

Foreword	i
Summary	iii
Does Contracting for Prison Operations Save Money?	iv
Do Privately Operated Facilities Provide Better Services?	v
Legal Issues Relevant to Contracting for Imprisonment	vi
Implications for Federal Prisons	vii
1. Introduction	1
The Structure of This Report	2
2. An Overview of the Private Imprisonment Industry, Past and Present	4
A Short History of Correctional Privatization	4
Why the Private Prisons Industry Emerged	7
State and Federal Experience with Private Prisons	10
Contracting for Secure Confinement	14
Reasons for Contracting or Not Contracting	15
Characteristics of Privately Operated Prisons	17
Industry Concentration	19
Where Private Prisons are Located	19
Facility Ownership	20
Facility Size	22
The Functions of Private Prisons	23
The Private Sector’s Experience with Medium and High-Security Prisoners	24
Comparing Security Classifications in Louisiana and the Bureau of Prisons	27
Inmate Programming	29
Expected Demand for Prison Space and Plans for Contracting with Privately Operated Facilities	29
3. Does Contracting for Prison Operations Save Money?	33
Privately and Publicly Operated Facilities May Not Be Sufficiently Comparable	34
Inconsistent Accounting Procedures	35
Different Treatment of Capital Spending	35
Dispersed Costs	36
Assigning Overhead Costs	37
Studies Comparing Privately and Publicly Operated Correctional Facilities	37
State Prisons in Tennessee	38
Adult Prisons in Louisiana	40
Adult Prisons in Florida	41
Adult Prisons in Texas	43
Arizona’s Prison for Men and Women	45
Summary	46

4.	How Well Do Privately Operated Prisons Perform?	47
	What Does “Performance” Mean With Respect to Prisons, Public or Private?	47
	What States Ask Contractors to Do	49
	Monitoring Contractors’ Compliance	50
	Monitoring Performance as Outcomes	51
	How Well Do Privately Operated Facilities Perform Relative to Government Operated Ones?	53
	Systematic Research to Evaluate Performance of Privately Operated Prisons	54
	Summary	56
5.	Legal Issues Relevant to Private Prisons	57
	The Legality of Delegating Correctional Services	57
	Liability for Private Prison Conditions	59
	Employment and Labor Relations Issues	61
	Inmate Labor Questions	62
	Other Important Legal Issues	62
	Access to Private Prison Records	63
	Private Contractor Access to Criminal History Records	63
	Bankruptcy	64
	Use of Force	65
	Environmental Law Concerns	66
	Regulating Interjurisdictional Private Prison Contracting	66
	Legal Dimensions of Contracting	67
	Appendix 1: Comparing Public and Private Prison Costs, by Julianne Nelson, Ph.D.	1
	1 Preliminary Findings and a Basis for Comparison	2
	2 The Tennessee Experience: The 1995 Report of the Fiscal Review Committee (supplemented with data from the Washington State Legislative Budget Committee)	5
	Operating Cost Estimates	5
	Per Diem Estimates Reconciled	6
	Spending Patterns Compared	7
	3 The Louisiana Experience: Archambeault and Deis (1996)	8
	Consistency and Accuracy	9
	Appropriateness	9
	Intertemporal Comparisons	10
	Interpreting Regression Results	12
	The Net Effect	13
	4 The Florida Experience: (i) The Florida Department of Corrections ; (ii) The Florida Correctional Privatization Commission; and (iii) The Florida Office of Program, Policy Analysis and Government Accountability	13
	5 Experience with Privatization Elsewhere	15
	The Texas Case	16
	The U. K. Experience	16
	6 Recommendations for Further Study	16

**Appendix 2: The Performance of Privately Operated Prisons: A Review of Research,
by Gerald G. Gaes, Ph.D., Scott D. Camp, Ph.D., and William G. Saylor 1**

Massachusetts and Kentucky 3

California Evaluation 6

Tennessee Evaluation 7

Washington State Review 10

 Review of Quality 10

 Qualitative Observations of Operations in Louisiana and Tennessee 11

Arizona Evaluation 12

Louisiana Evaluation 17

New Mexico Evaluation 23

 The Probable Bias in Institution Performance Indicators Based on Staff Perceptions 24

 Interpreting Institution Performance Indicators 25

 Putting the Public-Private Comparison in Perspective 27

 Other Methodological Problems 28

Florida Evaluation 28

Summary of Existing Studies 31

Outline of How the Taft Evaluation Meets the Criteria of a Sound Evaluation 33

Concluding Remarks 35

Appendix 3: Legal Issues Relevant to Private Prisons, by Malcolm Russell-Einhorn, J.D.

1. Introduction 1

2. The Legality of Delegating Correctional Services to Private Contractors Generally 3

3. Liability for Private Prison Conditions 13

4. Employment and Labor Relations Issues 27

5. Inmate Labor Questions 34

6. Other Important Legal Issues 37

7. Regulating Interjurisdictional Private Prison Contracting 47

8. Legal Dimensions of Contracting 55

**Appendix 4: State and Federal Prisoners in Government and
Privately Operated Facilities, December 31, 1997 1**

Foreword

In the National Capital Revitalization and Self-Government Improvement Act of 1997 (Pub. L. No.105-33 § 11201(c)(3)(A)), Congress mandated that the Attorney General "conduct a study of correctional privatization, including a review of relevant research and related legal issues, and comparative analysis of the cost effectiveness and feasibility of private sector and Federal, State, and local governmental operation of prisons and corrections programs at all security levels...." In response to this, the National Institute of Corrections issued a cooperative agreement (#98K38GIG5) to Abt Associates Inc. to conduct the study.

We are grateful to Kathleen Hawk Sawyer, Director of the Federal Bureau of Prisons, who facilitated our work by asking state correctional directors to take the time to respond to our survey. We are also grateful for the support of the National Institute of Corrections, and especially to Larry Solomon, Deputy Director, who facilitated the cooperative agreement, and to Brenda Maynor, the project monitor for the Institute.

This project relied heavily upon many officials who responded to our survey requesting information about contracting practices. These include the directors of correctional systems in 48 states, in Puerto Rico, the District of Columbia, and the Virgin Islands; the administrators in these agencies who manage 91 different contracts; and the monitors of these contracts. All devoted a substantial amount of time to providing us much detailed information about these contracts, their procurement and monitoring practices, their past experience with privatization, and their future plans. We were also assisted by a number of people who responded to early drafts of the questionnaire, including staff from the Bureau of Prisons; Dale Parent and Brad Snyder, colleagues at Abt Associates; and James Austin and Darlene Grant, of the National Council on Crime and Delinquency.

The National Council on Crime and Delinquency provided us information from a survey its staff conducted of privately operated facilities; we thank James Austin, Darlene Grant, and Owen Tulloch for their assistance. Preliminary data were also obtained from the 1995 census of state and federal correctional facilities, conducted by the Bureau of Justice Statistics (BJS) and the Bureau of Census. Allen Beck at BJS facilitated this, as did the Inter-University Consortium for Political and Social Research.

Tom Rolfs, retired Director, Division of Institutions in the State of Washington's Department of Corrections, devoted a substantial amount of time interviewing by telephone a number of persons in several states who responded to our survey. We are grateful to both Mr. Rolfs and to those he interviewed, as our understanding of contracting at state government levels was enlarged by them. A number of private correctional firms also responded to inquiries from us and provided us a substantial amount of information about their operations.

Malcolm Russell-Einhorn's review of the legal issues associated with privatization benefitted from the help and guidance of several individuals. These included Richard Crane, formerly Chief Legal Counsel for the Louisiana Department of Corrections and later Vice President and General Counsel for the Corrections Corporation of America. Mr. Crane provided his reactions and suggestions at several stages in the work, including reviewing drafts of this document (included here in appendix 3).

Others who provided valuable assistance included William Collins, editor of the *Correctional Law Reporter*, Harold Sklar of the Federal Bureau of Investigation's Criminal Justice Information Division, and Michael McManus of the Texas Department of Criminal Justice. Mr. Russell-Einhorn is especially grateful to four law student interns who helped with the legal research: Valerie Simons and Charles Everage of Georgetown University Law Center, Russell Drazin of George Washington Law School, and Steve Mercer of Washington College of Law, American University.

Four others made an especially valuable contribution to this study. Julianne Nelson, Ph.D., of NW Partners, undertook an assessment of the best and most recent cost analyses of private and public correctional facilities. Her report, included here as appendix 1, was supported by a separate cooperative agreement from the National Institute of Corrections. We have relied heavily upon her work in chapter 3. A similar review of studies comparing the performance of private and public facilities was undertaken in connection with this report by Gerald Gaes, Ph.D., Scott Camp, Ph.D. and William Saylor, all of the Federal Bureau of Prisons' Office of Research and Evaluation. This review, included here as appendix 2, provides such a detailed assessment of the most significant studies in the field that we have not attempted to do more than summarize their findings in the main body of this report.

Special thanks are owed to the staff at Abt Associates, who have worked extremely hard on this project. This includes, most significantly, Joan Gilbert and Ruthel Watson, as well as Susan Anderson, and Patricia Harmon. Carl Patten's reading of several sections was also valuable.

Douglas C. McDonald, Ph.D.

Summary

This report examines the current state of practice, law, and research with respect to privately operated prisons in the United States, at all levels of security. The body of current law relevant to privately operated prisons is reviewed, including federal and state statutes, regulations, and case law. Current knowledge regarding the cost and cost-effectiveness of privately operated prisons is assessed by means of reviews and evaluations of existing research on cost and quality of performance.

The report's focus is limited principally to contracting by state and federal governments for the private management and operation of facilities that are analogous to secure state or federal prisons. Although the private imprisonment industry also provides secure detention for defendants awaiting trial, for illegal immigrants, for prisoners transitioning back into their community, and for juveniles, such facilities are not examined here. Contracting for these latter facilities was excluded from this study for several reasons. First, state and federal correctional agencies are responsible for sending most of the prisoners held in privately operated facilities—about 80 percent of all privately held prisoners at year-end 1997. Second, 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. To survey more than 3,000 local governments to identify their practices of contracting for privately operated detention would have required more time and resources than were available for this study.

By 1997, the numbers of adults in privately operated secure facilities of all sorts—prisons, jails, and illegal immigrant detention centers—reached about 64,000, which constituted less than three percent of the entire United States population of confined adults. The number of facilities had grown to approximately 140, and the industry's revenues probably approached \$1 billion.

Information about the subset of the industry that encompasses state and federal contracting for secure imprisonment was obtained from a variety of sources, including a survey of contracting practices conducted by Abt Associates Inc. of prison administrators in all state and federal governments, in the District of Columbia, Puerto Rico, and the Virgin Islands. All but two jurisdictions provided information. This survey determined that 28 of these jurisdictions had 91 active contracts at year-end 1997 with 84 different privately operated facilities. These facilities reportedly held 37,651 prisoners at that time. The surveyed jurisdictions also reported having an additional 14,719 prisoners in still other privately operated facilities. Many of these prisoners had been transferred to another jurisdiction under the authority of an intergovernmental agreement, and the receiving government had placed them in a privately operated facility with which it had a contract. Others were held in non-secure facilities with which the governments contracted.

Ten correctional agencies were responsible for placing the vast majority of prisoners in privately operated facilities. These were, in descending order, the Federal Bureau of Prisons, the States of Texas, Florida, Oklahoma, Louisiana, Tennessee, California, Mississippi, and Colorado, and the District of Columbia. The most commonly reported reason for contracting with private management was not to reduce costs but to alleviate overcrowding in the public system and to acquire needed beds quickly. It is not surprising, therefore, that most (sixty percent) of the privately operated facilities are privately owned. In most places, contracting for imprisonment services was not taken at the initiative

of the correctional agency, but was instead mandated by either the legislature or the chief executive of the jurisdiction, typically the governor.

Does Contracting for Prison Operations Save Money?

Even though the quest for financial savings was not given by prison administrators as their primary reason for contracting, it is no doubt a common hope among policymakers that governments will save money by doing so. Some proponents argue that evidence exists of substantial savings as a result of privatization. Indeed, one asserts that a typical American jurisdiction can obtain economies in the range of 10 to 20 percent. Our analysis of the existing data does not support such an optimistic view.

Comparing public and private prisons' costs is complicated for a variety of reasons. Comparable public facilities may not exist in the same jurisdiction. Private facilities may differ substantially from other government facilities in their functions (e.g., the private facility in Arizona houses men and women, or some in Texas that are used for drug abuse treatment services or for pre-release populations placed in halfway houses by other jurisdictions). Or they may differ in their age, design, or the security needs of inmates housed, all of which affect the cost of staffing them. Cost comparisons are also difficult because public and private accounting systems were designed for different purposes; that is, public systems were not designed principally for cost accounting. Spending to support imprisonment is often borne and reported by agencies other than the correctional department, and computation of these costs is often difficult for lack of data. The annual costs of "using up" the physical assets are not counted in the public sector, as capital expenditures are generally valued only in the year that they are made, rather than being spread across the life of the assets. Nor is the cost to the taxpayer of contracting readily apparent from tallies of payments to contractors. Governments incur expenses for contract procurement, administration, and monitoring; for medical costs above amounts capped by contracts; and for sentence computation, transportation, and other activities performed by governments. Cost comparisons often fail to account for such expenditures.

Of the approximately 140 secure confinement facilities currently in existence, or the 84 that held active contracts with state or federal agencies at the end of 1997, only a handful have been studied to learn if contracting is less costly to the taxpayer. Fewer still have employed reasonably strong research designs and reported the data in sufficient detail to permit an assessment of the validity of the findings. The results are mixed and subject to different interpretations.

Some studies report finding that contracting saved the taxpayers money; others report small differences, if any. Some of these apparent differences may not reflect actual savings but may instead be accounting artifacts, especially those associated with lower estimated costs of government overhead activities. That is, signing lower overhead costs to privately operated facilities may not result in actual savings because these costs are quite fixed. Savings will accrue to taxpayers only if (a) overhead activities are cut back as a result of contracting (an unlikely event where only a few facilities are contracted in a larger public system), or (b) if planned increases in overhead costs are averted as a result of contracting. It is unclear in the studies reviewed if purported savings associated with reduced use of government overhead functions actually resulted in less spending.

Other apparent sources of savings in some states reflect lower spending for prisoner health care and, perhaps, in other aspects of facility operations, including lower salaries for line staff in some jurisdictions. In some states, payments to contractors may be offset somewhat by accounting deductions or adjustments for contractors' tax payments to governments.

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. Some states may be willing to pay high prices for private imprisonment if they need the beds to solve short-term deficiencies. In other states, expenditures for contracting may indeed be lower than for direct public provision. However, the bottom line with respect to costs and savings is difficult to discern given the data and the assumptions made by the analysts. Drawing conclusions about the inherent superiority of one or the other mode of provision, based on a few studies, is premature.

Do Privately Operated Facilities Provide Better Services?

Interest in better imprisonment services was infrequently given as a reason for contracting, but the issue of whether governments or private firms seek lower costs by sacrificing service quality is a major concern, especially in an environment where public safety and staff and inmate lives are at risk, and where lawsuits are common. Unfortunately, assessing the quality of imprisonment services is controversial, in part because the various objectives government and the larger society establish for prisons do not always suggest unambiguous measures. At a minimum, we expect prisons to meet the standards established by the courts.

Most contracts require that privately operated facilities conform to the law, rules, and regulations that prevail in the public correctional agency of that jurisdiction. Performance objectives are thereby framed in procedural terms, rather than outcomes to be achieved by means of imprisonment. Contract monitoring is highly variable from one jurisdiction to another, with about half of the contracts involving daily on-site monitoring by government officials.

Few studies have been conducted to compare the relative performance of privately and publicly operated prisons. Most are affected by a variety of methodological problems that severely limit the conclusions that one can draw from them. These include insufficiently comparable public facilities and insufficient attention to the possibility that observed differences resulted from dissimilar populations of prisoners or dissimilar facility designs. Given these shortcomings and the paucity of systematic comparisons, one cannot conclude whether the performance of privately managed prisons is different from or similar to that of publicly operated ones.

With respect to public safety and inmate programming, the available data do not support definite conclusions. Programs for inmates are especially important in prisons because they prepare offenders to become reintegrated into society upon their release. Well designed and implemented programs increase the likelihood that prisoners will become law-abiding citizens. The available surveys of either privately or publicly operated facilities do not provide the information needed to compare the quality of such programs or the extent of prisoners' engagement with them.

Legal Issues Relevant to Contracting for Imprisonment

Whereas the legality of governments delegating correctional authority to private firms was much debated in the 1980s, it now appears that objections to prison privatization on constitutional delegation grounds have little force. Unless a government has absolutely no persuasive statutory authority for entering into private prison contracts, courts will be reluctant to invalidate contacts on delegation grounds. Only delegated rulemaking and adjudication functions that directly purport to exercise a government power are deemed to require special constitutional due process safeguards and to be subject to heightened judicial scrutiny. No clear case law has been developed to define with precision how general due process standards will be applied to private prisons. These issues have been handled in some states through legislation, and through contracts in others.

With respect to liability, private prisons are generally treated as "state actors" for purposes of civil rights suits, so that all relevant constitutional requirements apply with equal force to private as well as public facilities. Private prison employees do not have the advantage of "qualified immunity" shields, nor are they protected by other governmental immunities that limit monetary damages available to inmates suing over prison conditions. Governments cannot shield themselves entirely from liability by means of contracting, but they can lessen their exposure by doing so. In the vast majority of suits brought by prisoners, alleging individual rather than systemic group harms, governments will generally not be deemed to have knowledge of the specific acts and injuries, and will not be held responsible. Public correctional authority's litigation costs can be kept as low as possible by requiring that a private contractor indemnify them and have relevant public entities named as an insured on the contractor's comprehensive general liability insurance policy.

While the right to strike exists in privately operated prisons, the risk of such disruptions can be minimized by private firms seeking to have employees agree, individually or collectively, to no-strike pledges. Moreover, contractors can also insist on notification requirements that allow them to make arrangements for assumption of certain essential responsibilities in the event of a labor action.

The possibility of bankruptcy has excited much concern regarding private imprisonment, but this has not yet been a problem in the industry. The few exceptions involved some small firms that speculated by building facilities in the absence of contracts with an agency. Public correctional agencies should nonetheless seek to protect themselves against the untoward consequences of bankruptcy by means of proper monitoring and careful contracting.

Regarding the use of force, including deadly force: the major legal issue is whether the use of force is properly mandated by the relevant laws of the jurisdiction. Without proper enabling legislation or contractual provisions authorizing the use of force by designated private prison officials, it is possible that such persons and their firms could face civil and criminal liability.

Sending prisoners from one jurisdiction to privately operated prisons in another poses some special legal questions. Several jurisdictions rely not on contracts but instead on intermediary governments to place prisoners in private facilities. Several jurisdictions also lease bed space directly from private contractors in foreign jurisdictions, sometimes in prisons that are built and operated on a speculative basis. These interjurisdictional arrangements have raised questions about the sufficiency of legal authority and regulation. For example, receiving facilities may lack legal authority to allow them to

respond to a variety of critical situations, including escapes and other prison emergencies. Legislation may be needed to govern these practices.

The success or failure of a private prison arrangement may depend upon the skill with which contracts are designed and negotiated. Public authorities must give close attention to the purposes served by contracting and the degree of specificity that they seek to build into the agreement.

Implications for Federal Prisons

Bureau of Prisons officials assert that the private sector's experience in operating higher security prisons or managing inmate populations with higher security needs is too limited to warrant the privatization of such facilities in the federal system. (Correctional authorities distinguish between the physical security of prisons and the security needs of inmates.) To be sure, maximum security facilities and prisoners remain almost entirely in the government-operated sector: only four percent (1,661) of prisoners in privately operated facilities were classified as maximum security, whereas 20 percent (or 200,000) of all prisoners in government facilities were so classified.

The private sector's experience with what the Federal Bureau of Prisons terms medium security prisoners is more ambiguous, however. Surveyed correctional agencies reported that half of their prisoners housed in private facilities under contract at year-end 1997 were classified as medium security. But procedures for classifying prisoners according to their security needs vary from one jurisdiction to the next. It is not clear that a prisoner classified as medium security in one will be classified the same in all others. For example, a comparison of prisoners classified by Louisiana and the Federal Bureau of Prisons suggests that the private sector's experience in at least this one state may not be comparable to the federal government's practices at the medium security level.

Eighty percent of all prisoners in two privately operated facilities and in a third government operated facility in Louisiana were classified by the state as being medium security; the remaining prisoners were split evenly between maximum and minimum security. A random sample of prisoners from these three facilities was picked and they were classified according to federal procedures, which uses a four- rather than a three-tiered classification system: high, medium, low, and minimum security. Approximately 33 percent of these prisoners would have been classified as medium-security in federal prisons; 29 percent and 28 percent would have been classified as "low" and "minimum" security, respectively. The proportion of high security prisoners was the same as classified by Louisiana (10 percent). This distribution of prisoners so classified is not characteristic of medium-security prisons in the federal prison system. Rather, it is closer to that found in low-security prisons. Lacking similar data from other states, it is not possible to determine how the security needs of inmates housed in other privately operated facilities correspond to those prisoners held in federal facilities.

1. Introduction

This report examines the current state of practice, law, and research with respect to privately operated prisons in the United States, at all levels of security. The body of current law relevant to privately operated prisons is reviewed, including federal and state statutes, regulations, and case law. Current knowledge regarding the cost and cost-effectiveness of privately operated prisons is assessed by means of reviews and evaluations of existing research on cost or performance.

The focus of this report is limited principally to contracting by state and federal correctional agencies for the private management and operation of facilities that are analogous to *secure* state or federal prisons. Although several private firms operate correctional or pretrial detention facilities under contracts with local governments that are functionally equivalent to local jails, this report does not attempt to identify or study them. Nor does it attempt to study the practice of contracting for detention centers designed to hold illegal immigrants pending deportation, for juvenile detention or correctional facilities, or for privately operated non-secure institutions, such as halfway houses or work-release facilities, in the adult or juvenile system. Reference is made to such facilities in the historical overview of privatization in chapter two, but no sustained attention is given to them elsewhere. Also beyond the study's purview are contracts for services narrower than management and operation of the entire facility, such as contracts for health care or food services.

Several sources of information were relied upon for this report.

Survey of state and federal correctional agencies. To obtain the information needed to describe the breadth and variety of current practice, a mailed survey was conducted by Abt Associates, Inc., in February—March, 1998, of all correctional agencies in state governments, the federal government (the Bureau of Prisons), the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. The questionnaire sought information about a wide range of issues. The response rate was high: all questionnaires were returned with the exception of those from two states. The findings of this survey are reported below.

Survey of private facility operators. A complementary survey was conducted by the National Council on Crime and Delinquency (NCCD) during early 1998. This survey was sent by mail to the firms that manage privately operated facilities in the United States; information was returned for approximately half of those facilities in existence at the time of the survey. NCCD provided Abt Associates with the applicable findings of the survey for this report.

Surveys by other private and federal agencies. Information about privately operated facilities was also obtained from the Center for Studies in Criminology and Law at the University of Florida. Professor Charles Thomas and his associates in Florida publish an annual census of private prisons and jails in the United States and abroad.¹

1 The most recent is Charles Thomas, Diane Bollinger, and John Badalamenti, *Private Adult Correctional Facilities Census, Tenth Edition* (Gainesville, FL: Center for Studies in Criminology and Law, University of Florida, 1997). Preliminary results from the 1998 survey (which provides data for 1997) were obtained from the center's website (<http://web.crim.ufl.edu/pcp>).

Research studies. During the past decade, a number of analysts have studied certain privately operated facilities, comparing their cost and/or performance to certain publicly operated ones. These studies, and their findings, are reviewed and assessed.

Review of contracts, requests for proposals, and other documents. In addition to information from the surveys, documents pertaining to specific contracting arrangements in a selected number of governments were examined. These include, variously, the requests for proposals that specify the scope and nature of the privatization project, the resulting contracts, formal requirements for monitoring contractors' performance, audit and monitoring reports, and the like.

Interviews. A variety of interviews were conducted with officials in state governments to clarify information reported to Abt Associates in the mail survey described above.

Review of relevant law. The body of law relevant to private prisons was reviewed, including federal and state statutes and regulations, as well as case law. In addition, a wide range of pertinent legal articles was consulted.

The Structure of This Report

A brief overview of the private corrections industry in the United States is provided in chapter two. This includes: a short history of the industry's development and the reasons for it; the industry's growth; the prevalence of privately operated facilities, their size, types of prisoners held, scope of services provided, and various other characteristics; and a discussion of the prospects for future growth in the industry.

It also examines the various arrangements by which private correctional services are obtained by governments. This includes, among other arrangements: contracting with private firms to design, build, and operate privately owned facilities; contracting with private firms to manage and operate government-owned facilities; "renting" beds in privately operated and/or owned facilities on a per diem or similar basis; and using intergovernmental agency agreements to transfer prisoners to other jurisdictions, wherein they are then placed in private facilities. Chapter two also discusses the legal authorization for these various relationships, some common differences in contractual structures, payment provisions, and monitoring activities, and other topics.

State correctional administrators sometimes chose not to report non-contractual arrangements for housing prisoners in private facilities, because they were not the contracting party. (Such situations occur when a state sends prisoners to another government correctional agency, using the vehicle of the intergovernmental agency agreement, and the receiving state then places the prisoners in a contracted facility.) Although the survey attempted to identify such arrangements, we did not generally obtain much information about them.² The surveyed agencies did provide us with the numbers of prisoners held in privately operated facilities under such agreements, however.

² Correctional agencies were not reluctant to provide these data. Rather, the Abt Associates survey failed to request specific information about them, as our questionnaire asked about contractual relationships.

Consequently, the analysis that follows is generally limited to facilities that operated under contract with state or federal governments.

What is known about the costs and savings associated with privately operated prisons is examined in chapter three. A number of studies are reviewed and their findings discussed. The data in a selected number of studies are reanalyzed for the purpose of clarifying the differences in expenditures for privately and publicly operated correctional facilities.

How the performance of privately operated facilities is measured and assessed by contracting agencies is examined in chapter four. Contracts vary in the extent to which they require performance achievement. The Abt Associates survey collected information about whether and how contracts attempt to bolster performance. Few contracts have been evaluated for cost and/or performance achievement. However, there is some research literature regarding measured performance of private and public prisons. The methods and findings of eight such studies are discussed.

The principal legal issues associated with privatization are reviewed in chapter five. It addresses both the legality of delegating the incarceration management function to private entities and the impact that this delegation has on the liability exposure of both private prison contractors and public correctional authorities.

2. An Overview of the Private Imprisonment Industry, Past and Present

This chapter offers a thumbnail portrait of correctional privatization. Its focus is generally on the practice of contracting with state and federal correctional agencies to hold prisoners, mostly convicted, who would otherwise be in government operated prisons. It begins with a brief history of the industry since the mid-1960s and a discussion of why private prisons emerged. It then describes several different constellations of public/private involvement in owning and operating prisons, state-to-state variation in experience with privately operated prisons, reasons why some state or federal agencies have chosen to contract or not to contract, where privately operated facilities are located, their size, their experience with housing higher-security prisoners and with operating programs for prisoners. Finally, correctional agencies' plans regarding growth and future privatization are discussed.

A Short History of Correctional Privatization

The phenomenon of private prisons and jails came into the public eye in the mid-1980s, when the fledgling Corrections Corporation of America (CCA) offered to take over the entire State of Tennessee's troubled prison system, with a 99-year lease from the state, for which it would pay \$250 million dollars. CCA would, in return, house the state's convicted prisoners for a negotiated per diem payment. Moreover, it would guarantee that the prisons would meet the standards set by a federal judge, who had earlier found the state's correctional system to be in violation of the U.S. Constitution because of the conditions of confinement in its prisons. The state refused, but the offer ignited widespread press attention and public debate.

Despite the apparent novelty of the idea, privately operated correctional facilities were not new in this country.³ Private imprisonment had been common in earlier centuries in both England and the United States. By the beginning of this century, however, governments nearly everywhere had assumed responsibility for imprisonment and most other criminal justice functions.⁴ By mid-century, the notion that governments were responsible for the administration of justice, and especially imprisonment, had become so well entrenched that many argued that imprisonment is an "intrinsic" or "core" function of government.⁵ But even though state responsibility for imprisonment was well

3 A longer discussion of this history can be found in Douglas McDonald, "Private Penal Institutions," in Michael Tonry (ed.), *Crime and Justice: A Review of Research* (Chicago, IL: University of Chicago Press, 1992); "Introduction," in Douglas McDonald (ed.), *Private Prisons and the Public Interest* (New Brunswick, NJ: Rutgers University Press, 1990); and Aric Press, "The Good, the Bad, and the Ugly: Private Prisons in the 1980s," in McDonald (ed.), *Private Prisons*, pp.19-41.

4 W.S Holdsworth, *A History of English Law*, Vol. 4, 3rd ed., (London: Cambridge University Press, 1922-24), p. 397; A. Crew, *London Prisons of Today and Yesterday* (London: I. Nicholson & Watson, 1933), p. 50; Blake McKelvey, *American Prisons: A History of Good Intentions* (Montclair, NJ: Patterson Smith, 1977), p. 197-216.

5 American Bar Association, *Report to the House of Delegates* (Chicago, IL: American Bar Association, February 13, 1989), p. 3; John J. DiIulio, Jr., "The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails," in McDonald (ed.), *Private Prisons*, p. 172-177; Ira P. Robbins, *The Legal Dimensions of Private Incarceration* (Washington, DC: American Bar Association, 1988), p. 44.

established, contracting continued for a variety of services associated with imprisonment, including facility management and operation, albeit confined to various niches of the juvenile and adult correctional systems. Private, mostly not-for-profit charities and organizations had played a long and distinguished role in operating facilities for juvenile offenders. Indeed, the private Society for the Reformation of Juvenile Delinquents established the first house of refuge in New York City in 1825. By the mid-nineteenth century, private cottages had been established in several states.⁶ During the 1960s, the number of privately operated juvenile facilities began to grow rapidly. By the time a national census of juvenile correctional facilities in the United States was conducted in 1989, the number of privately operated facilities had grown to 2,167, compared to 1,100 public ones.⁷ The private facilities were very different from the public ones, however. Most were small community-based group homes or halfway houses, whereas most of the government facilities were training schools and detention centers.

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, such as food services, maintenance, education, vocational training, health care, prison industries programs, and counseling.⁸ Such contracting received little attention because it did not seem to pose fundamental questions about the state's authority to incarcerate prisoners. Nor were questions raised when the Bureau of Prisons began in the late 1960s to contract with private firms to operate community treatment centers, halfway houses to which federal prisoners were transferred prior to being released or paroled.⁹ These were outside the mainstream of secure prisons.

The private sector began to approach that mainstream in 1979 when the U.S. Immigration and Naturalization Service (INS) began contracting with private firms to detain illegal immigrants pending hearings or deportation, some of whom had finished terms in state or federal prisons, in secure confinement facilities. These contracts provided the seedbed for the contemporary private imprisonment industry in the United States, as several of the now-significant players in the industry started with them. This includes the Corrections Corporation of America (CCA), a Tennessee-based firm that incorporated in 1983 and opened its first detention center in Houston, Texas, the following year. Wackenhut, Inc., a long-established private security firm, entered the private imprisonment business when it won a contract to build a detention facility outside Denver, Colorado, for the INS. Similarly, the Correctional Services Corporation (formerly ESMOR) won a contract in 1989 to operate an immigrant detention facility in Seattle, Washington.

6 Philip B. Taft, Jr., "The Fiscal Crisis in Private Corrections," (Part I), *Corrections Magazine* VIII, no. 6 (December 1982):27-32.

7 *Biannual Census of Public and Private Juvenile Detention, Correctional, and Shelter Facilities* (Washington, DC: U.S. Bureau of the Census, 1989 census).

8 Camille G. Camp and George M. Camp, *Private Sector Involvement in Prison Services and Operations* (South Salem, NY: Criminal Justice Institute, 1984).

9 Matthew J. Bronick, *The Federal Bureau of Prisons' Experience with Privatization* (Washington, DC: Federal Bureau of Prisons, March 1989).

These developments drew little attention, but this changed in 1985 and 1986 when governments began to contract with private firms to operate secure facilities that functioned as county jails and state prisons. In 1985, CCA contracted with Bay County, Florida, to operate its jail and with Santa Fe County, New Mexico in 1986, to operate its jail. In January 1986, U.S. Corrections Corporation opened a 350-bed prison in St. Mary's, Kentucky to hold sentenced prisoners for the state. At approximately the same time, a small privately operated facility was opened in rural Cowansville, Pennsylvania, and the District of Columbia government arranged to transfer 55 inmates from the District's overcrowded jails to it. Their arrival created an uproar. Local residents came together and patrolled the streets with shotguns, fearing escapes. A prison reform group in Philadelphia learned of this and successfully petitioned the state legislature to declare a moratorium on privately operated prisons in that state.¹⁰

These events set off a nationwide debate about the legality, propriety, and desirability of private imprisonment. Congress held hearings in 1986; the National Institute of Justice convened a conference; and many criminal justice professional associations took a stand. The latter included the American Federation of State, County, and Municipal Workers (opposed), the National Sheriff's Association (opposed), the American Correctional Association (cautious support), and the American Bar Association (which asked for a moratorium pending further study).¹¹ The American Bar Association (ABA) study concluded that delegating operating authority to private entities posed "grave constitutional and policy problems."¹² This debate did not stop correctional privatization in its infancy, however. By the end of 1989, there were 44 secure private facilities in this country, housing about 15,000 prisoners.¹³ By the close of 1997, the total number of privately operated secure facilities for adult prisoners in the United States had grown to 142, and the number of prisoners held in them to 64,086, according to the most recent estimates developed by Charles Thomas and his associates.¹⁴

Comparisons between conditions prevailing in 1986 and 1996 give some measure of the rapid growth experienced in this industry. (1996 is the most recent year for which a consistent data series is available, developed by Professor Charles Thomas).¹⁵ The number of beds in privately operated facilities in operation or under construction in the U.S. increased at an average annual rate of 45

10 Joint State Government Commission, *Report of the Private Prison Task Force* (Harrisburg, PA: General Assembly of the Commonwealth of Pennsylvania, March 1982).

11 U.S. House of Representatives, *Privatization of Corrections: Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee of the Judiciary, House of Representatives, Ninety-ninth Congress, First and Second Sessions on Privatization of corrections, November 13, 1985, and March 18, 1986.* (Washington, DC: U.S. Government Printing Office, 1986).; John Peterson, *Corrections and the Private Sector: A National Forum* (Washington, DC: U.S. Department of Justice, National Institute of Justice, 1988), Conference Proceedings.

12 American Bar Association, *Report to the House of Delegates* (Chicago, IL: American Bar Association, February 13, 1989).

13 Douglas McDonald, "Private Penal Institutions," in Michael Tonry (ed.), *Crime and Justice: A Review of Research* (Chicago, IL: University of Chicago Press, 1992).

14 Charles Thomas, Private Corrections Project (Gainesville, FL: Center for Studies in Criminology and Law, University of Florida, June 29, 1998) <http://web.crim.ufl.edu/pcp/>.

15 Thomas, Bolinger, and Badalamenti, *Private Adult Correctional Facility Census*, Tenth Edition (Gainesville, FL: Center for Studies in Criminology and Law, University of Florida, 1997). These annual census of privately operated facilities use similar rules for including facilities in each. Generally, they include only "secure" facilities.

percent. Few of these beds were empty: the occupancy rate of all private adult facilities averaged 96 percent during 1996. In 1987, there were about 3,000 prisoners in such facilities. By 1996, the number had soared to more than 85,000. During 1996 alone, the number of prisoners increased 30 percent.¹⁶

As a result of these trends, growth in the private correctional industry's revenues has been explosive: from about \$650 million in 1996 to about \$1 billion in 1997.¹⁷ Wall Street and individual investors have been impressed with these growth statistics and with the apparently bright prospects for future growth (private facilities have less than 3 percent of the "market share" of prisoners held in state and federal prisons and in local jails in the United States).¹⁸ Stock prices of the four publicly traded firms consequently have been bid up very high, providing these companies with substantial amounts of cash to finance further expansion.

Why the Private Prisons Industry Emerged

The contemporary private imprisonment industry owes its emergence to several dynamics, other than the obvious fact that entrepreneurs saw business opportunities and seized them. One was the desire of many government correctional agencies to expand their capacity quickly. For example, the INS, faced with the need for more beds to house illegal aliens, turned to private firms to design, build, and operate detention facilities. This could be done quickly, using funds budgeted for detention operations, rather than waiting months or years for a capital appropriation to be requested and approved.

For cities and counties, contracting for private imprisonment resolved certain problems peculiar to local governments. In Bay County, Florida, for example, the county commissioners were displeased with the pace at which the independently elected sheriff was making improvements to the local jail, which had been found by the state to be in violation of established standards. The commissioners turned to the Corrections Corporation of America, which promised to make the necessary improvements quickly and to get the state off the county's back within a matter of months. In Santa Fe, New Mexico, the county had built a larger jail than it needed, resulting in a higher per prisoner expenditure than anticipated. County officials decided that it would be more economically advantageous to contract with a private firm to operate the facility and to pay only for the space used, leaving the rest of the facility to be used for housing prisoners in other "markets": for example, prisoners from other counties that lacked sufficient bed space or federal prisoners being transported by the U.S. Marshals Service.

16 C.W. Thomas, *Private Adult Correctional Facility Census* (1997).

17 1996 data from Nzung Xiong, "Private Prisons: A Question of Savings," *The New York Times*, July 13, 1997; 1997 data from Alex M. Singal and Raymond F. Reed, *An Overview of the Private Corrections Industry: Industry Analysis*, (Baltimore, Md: Legg Mason Wood Walker, Inc., July 16, 1997), p. 12. Singal and Reed estimate the "revenue power" of the industry to have been about \$1 billion in mid-1997; we have not attempted to determine the actual revenues received by year-end.

18 On June 30, 1997, a total of 1.2 million persons were held in state and federal correctional facilities, and 570,000 in local jails. As discussed below, the private industry's share of the state and federal market is slightly larger, about 4.2 percent.

Different dynamics created business opportunities for the private sector in state governments. Beginning in 1973, the nation's state and federal prison population began growing rapidly, and by 1986, it had almost tripled, growing more than fifteen times faster than the general population. To accommodate the increase from 1985 to 1986 alone—about 43,000 additional prisoners—seven new medium-sized (500-bed) prisons were needed each month.¹⁹ Governments did not build facilities quickly enough to handle this flood of prisoners, and severe overcrowding became the norm. By 1986, all but seven states were operating their prisons in excess of 95 percent capacity; 38 were either full or above capacity; and seven states exceeded capacity by more than 50 percent. The federal prison system was also operating at somewhere between 27 and 59 percent above capacity. Throughout the nation, prisoners were sleeping in hallways, day rooms, gymnasiums, sometimes even in bathrooms, or were doubled up in small cells.

Overcrowding exacerbated another serious problem: a large proportion of the nation's penal facilities were outmoded and even obsolete by contemporary standards. A government survey conducted in 1983 found that half of all state and federal prisons in operation at the time were more than 35 years old and a substantial number more than a hundred.²⁰ Only about one-fifth of all state and federal prisons had been accredited by the Commission on Accreditation for Corrections. The confluence of these dynamics resulted in a spate of lawsuits challenging the constitutionality of the conditions under which prisoners were being confined. By mid-1988, 39 states, the District of Columbia, Puerto Rico, and the Virgin Islands were operating prisons and jails under court orders to remedy unconstitutional conditions. Several states were even forced to release prisoners ahead of time to bring occupancy levels down to mandated levels.

Correctional administrators found themselves in a difficult position, unable to stanch the flow of prisoners and constrained in the ability to build more prisons quickly. Following the passing of Proposition 13 in California in 1978, expenditure controls or revenue restrictions were placed on many state and local governments. Federal aid to state and local governments had also been shrinking since 1980. By 1986, the general revenue sharing program was dead, leaving many local governments without any federal assistance. Many state governments were reaching their debt ceilings and were unable to issue more bonds to finance prison construction. Even though voters were supporting legislation to send more criminal offenders to prison and for longer times, they often voted down prison construction debt proposals.

Turning to the private sector to provide new prison beds was an attractive solution to many governments facing debt restrictions. If a private firm financed, constructed, and operated a new prison, payments to the firm by governments for housing the state's prisoners could be charged against operations budgets, rather than capital budgets, thereby avoiding any need for increasing debt. Some jurisdictions relied on a variant of this arrangement: private corporations were brought into being, operating on behalf of a government, which would issue bonds to finance the construction of a new prison that would then be leased to the state. Lease payments could be paid using government

19 McDonald (ed.), *Private Prisons*, p. 4.

20 Bureau of Justice Statistics, *Prisoners in State and Federal Institutions on December 31, 1983* (Washington, DC: Department of Justice, 1986), Table 16.

operating funds, and the state's corrections department could operate the facility as if the state owned it outright.²¹

To this day, the market for private imprisonment is largely confined to the provision of *new* beds in state and federal prisons, rather than takeovers of existing government operated facilities. Although privatization came onto the public stage with the Corrections Corporation of America's bid to take over Tennessee's prisons in 1985, such a transfer of assets has occurred only once. Effective January 30, 1997, CCA acquired a twenty-year lease on the District of Columbia's Correctional Treatment Facility for which it pays \$233,000 a month. CCA also has a twenty-year contract to operate the facility.

The growth and development of the private imprisonment industry received important support from broader political and ideological developments in the mid-1980s. On both sides of the Atlantic, in the United States and in Great Britain, conservative governments held sway and launched concerted attacks on the institutional structures and ideology of the welfare state. "Privatization" initiatives gained influential proponents, although the opportunities in this country were fewer, largely because governments here hold fewer assets that can be privatized and because a wide variety of services funded by governments had long been delivered by private contractors. Despite this, the public landscape in the United States was combed in search of targets for privatization or contracting, and prisons were identified by some as promising opportunities for expanding private sector involvement.²²

For a variety of reasons, the belief emerged that contracting for services, including correctional services, was superior to direct government provision.²³ Private firms were said to be more efficient as they are not mired in the "red tape" that encumbers public agencies, especially in procurement and labor relations. Private managers can hire and fire without the constraints of civil services and restrictions on creating budget lines for new employees; labor can be disciplined and reassigned with far greater ease in the private sector, especially if labor is not unionized.

Another purported advantage of the private sector was its greater efficiency in the face of competition. According to this line of argument, public agencies have monopolies on services, and few incentives exist to discover and implement ways of improving efficiency. Shielded from the demands of the marketplace, public managers may not strive for greater productivity but for maintaining their positions by avoiding risks. Government positions and agency budgets, once established, are difficult

21 Jan Chaiken and Stephen Mennemeyer, *Lease-Purchase Financing of Prison and Jail Construction* (Washington, DC: U.S. Department of Justice, National Institute of Justice, 1987).

22 President's Commission on Privatization, *Privatization: Toward More Effective Government*, (Washington, DC: President's Commission on Privatization, 1988).

23 The arguments in support of this belief are offered in, for example: E.S. Savas, *Privatizing the Public Sector: How to Shrink Government* (Chatham, NJ: Chatham House Publishers, 1982); Stuart Butler, *Privatizing Federal Spending: A Strategy to Eliminate the Deficit* (New York, NY: Universe Books, 1986); James K. Stewart, "Costly Prisons: Should the Public Monopoly Be Ended?" in Patrick B. McGuigan and Jon S. Pascale (eds.) *Crime and Punishment in Modern America* (Washington, DC: The Institute for Government and Politics of the Free Congress Research and Education Foundation, 1986), pp. 365-388; President's Commission on Privatization, *Privatization: Toward More Effective Government* (Washington, DC: President's Commission on Privatization, 1988).

to reduce because constituencies are created inside and outside government that press legislatures for continued funding. In contrast, competition in the private marketplace, and the risk of losing money or going out of business, supposedly stimulates the search for increased efficiency.

Critics of privatization have challenged these beliefs, however. For example, Donahue argues that there is little room for technological innovation in prisons because of their labor intensive nature.²⁴ Others argue that the high priority given to maximizing profits creates incentives to minimize costs, which may lead to reductions in service quality.²⁵ Critics also point to examples of flagrant overcharging by contractors to state and local governments for shoddy goods and poor services.²⁶ Some opponents of privatization in corrections point to the dismal experience with the convict leasing arrangements that pervaded the South during the Civil War decades. The conditions of those privately operated facilities were generally appalling, and the death rates in them were considerably higher than in public prisons.²⁷

State and Federal Experience with Private Prisons

There were a total of 142 privately operated secure facilities at the end of 1997, according to Professor Charles Thomas' census. The focus of this report is on a subset of these: privately operated *prisons*, rather than jails or detention centers. That is, we examine the experience of privately operated secure confinement facilities that are most equivalent to secure confinement facilities in state or federal prison systems and which contract with the correctional agencies in the surveyed jurisdictions to provide prison space. In contrast with jails, prisons are designed to hold inmates for longer terms and have a variety of programs for the inmates. We exclude from our purview: all privately operated facilities that function as jails; detention centers for illegal immigrants or others; facilities operating under contract with the U.S. Marshals Service, the U.S. Immigration and Naturalization Service, or local governments; all privately operated non-secure facilities; and all juvenile facilities.

To identify the subset of privately operated facilities that most closely correspond to state or federal prisons, we mailed questionnaires to the heads of all correctional agencies in all states, the Federal Bureau of Prisons, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. (Hereafter, these governmental entities are referred to as "jurisdictions.") This questionnaire had two sections. The first inquired about the agencies' practices and plans regarding privatization. The second section was designed to obtain information about each contract, its administration, and monitoring. Of the 55 surveyed government agencies,²⁸ all but two responded to the survey.

24 John D. Donahue, *The Privatization Decision* (New York, NY: Basic Books, 1990).

25 American Bar Association, *Report to the House of Delegates*, unpublished document (Chicago: American Bar Association), p. 4.

26 American Federal, State, County, and Municipal Employees (AFSME) AFL-CIO, *Passing the Bucks: The Contracting Out of Public Services*. (American Federation of State, County and Municipal Employees, AFL-CIO, 1984).

27 George Cable, "The Convict Lease System," in *The Silent South* (Montclair, NJ: Patterson Smith, 1969).

28 Two agencies contract for private prisons in Florida: the state Department of Corrections and the Florida Privatization Commission. Both responded to the survey.

Twenty-three states reported having contracts with private firms on December 31, 1997, to house prisoners, as did the District of Columbia, the Federal Bureau of Prisons, and the Commonwealth of Puerto Rico. In addition, two other states reported placing prisoners in private facilities located in other states through an agreement between two public agencies (hereafter, an "intergovernmental agency agreement" or "IGA"). These were reported by the two respondents as equivalent to contracts, and we have included them in our analysis. (In the discussion that follows, we call all reported agreements "contracts," even if this is not technically accurate in the case of these two jurisdictions.) These 28 jurisdictions reported having a total of 91 active contracts on that date, with 84 different private facilities. (The number of contracts exceeded the number of private facilities because some facilities contracted with more than one political jurisdiction.) These 84 facilities held a total of 37,651 prisoners at year-end 1997.

In addition, surveyed agencies reported having active contracts on the same day with 529 community-based facilities, such as work-release or educational-release facilities or half-way houses. For the purposes of our survey, "community-based facilities" were defined as they are in the periodic Bureau of Justice Statistics census of state and federal prisoners. That is, a community-based facility is one in which 50 percent or more of the inmates are regularly permitted to depart unaccompanied for work or study release or for other rehabilitation programming.

In addition to the 84 privately operated secure facilities that received prisoners *under contract* directly from correctional agencies in the surveyed jurisdictions, others held these jurisdictions' prisoners via a more circuitous route. That is, some state or federal correctional agencies sent prisoners to a local government agency using an intergovernmental agency agreement. These local governments in turn contracted with private companies to house the prisoners. By requesting information about only those facilities with which correctional agencies in the surveyed jurisdictions *contracted*, private facilities receiving prisoners through the intermediary of a local government were not reported in our survey.²⁹ The numbers of *prisoners* in these facilities can be estimated from the information provided in the survey, however. All surveyed jurisdictions reported a total of 52,370 prisoners housed in privately operated facilities on December 31, 1997, 14,719 more than they accounted for in the 91 contracts they identified as being active on that date. We assume that those prisoners housed in privately operated facilities through intergovernmental agency agreements were included in this number. We cannot assume that all of these nearly 15,000 prisoners were held in secure facilities, however. Because of some ambiguity in the wording of the question posed to correctional administrators, some respondents may also have counted among these 14,719 inmates those held in non-secure community-based private facilities.

In summary, the 53 responding agencies reported that privately operated facilities held a total of 52,370 prisoners on December 31, 1997.³⁰ This included all prisoners under the correctional authority

29 The two exceptions to this were the two states that reported such IGA agreements as though they were contracts; their responses are included in this report.

30 This number differs dramatically from that reported by the Bureau of Justice Statistics in its *1995 Census of State and Federal Correctional Facilities* (Washington, DC: U.S. Government Printing Office, 1997). This census identified 29 privately operated secure confinement facilities, holding 12,534 inmates. This discrepancy does not reflect simply a two-year difference in data collection points. Rather, it is a result of different inclusion rules in the Abt Associates and the Bureau of Justice Statistics censuses. The former asked correctional officials to report on *all* facilities under contract to hold their prisoners, whereas the BJS census asked

of these surveyed jurisdictions who were held in privately operated secure facilities (whether by direct contracts or through intermediary local governments), and some in non-secure facilities. This figure represents 4.3 percent of the nation's 1.2 million prisoners held by state and federal correctional agencies.

Table 2.1 and Figure 2.1 report how each responding state's prisoners were housed—in government or privately operated facilities, in-state or out-of-state. Most of these (36,441) were held in facilities located within the political boundaries of the state. (This does not include the 9,951 federal prisoners held in private facilities.) A small number (5,978) were held in facilities located in other states. These included, most notably 1,725 prisoners from the District of Columbia held outside the district; 1,008 prisoners from Colorado held principally in Minnesota facilities; and 933 prisoners from Oklahoma held in Texas facilities. Most of these prisoners "exported" by state or federal correction agencies to other jurisdictions were being held in Texas, where private firms have established contractual relationships with local county governments.

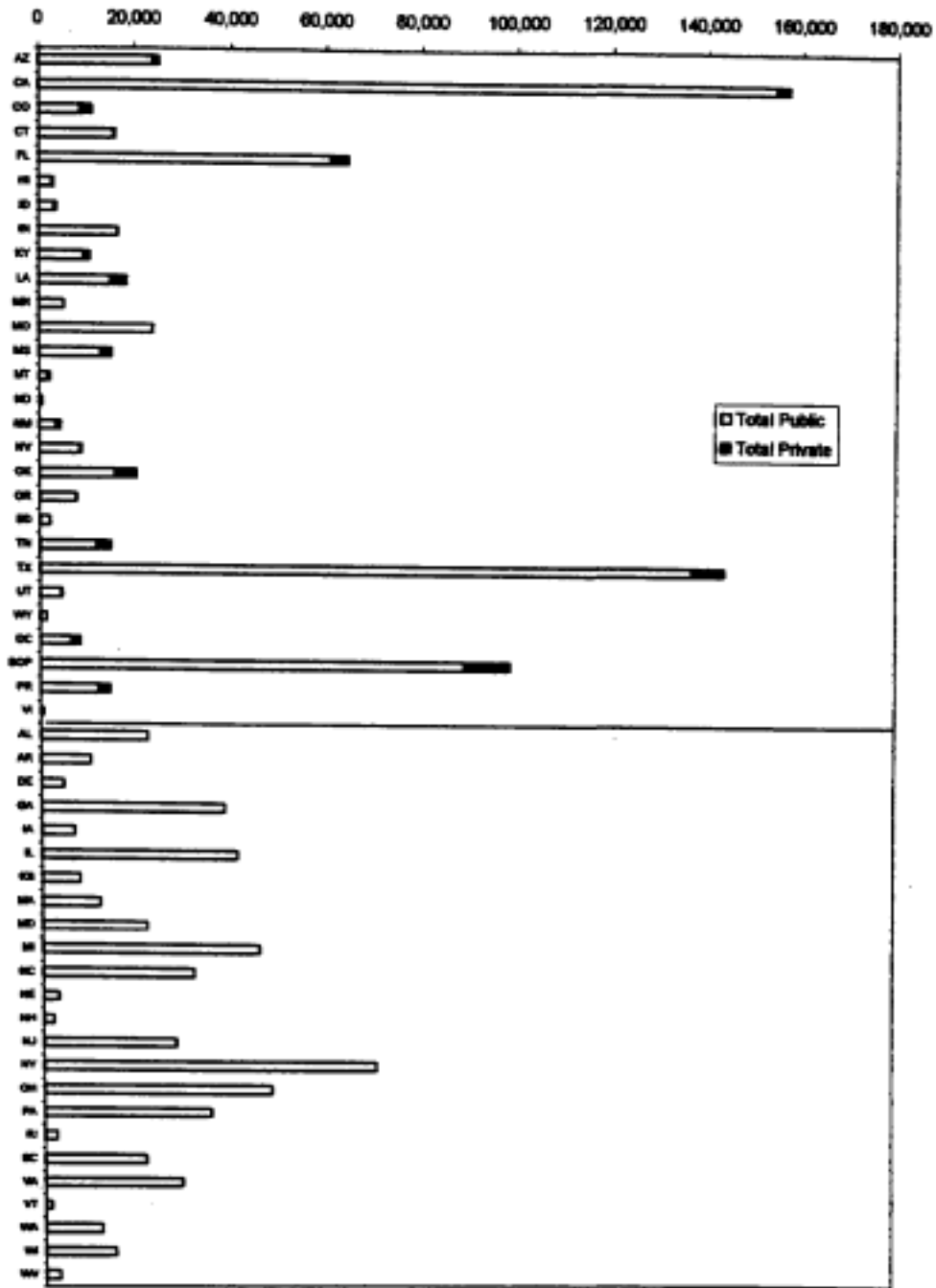
At the close of 1997, ten correctional agencies were responsible for the vast majority (41,965) of the 52,370 privately held prisoners. The Federal Bureau of Prisons reported having 9,951 prisoners, or 10 percent of its total population of 98,631 sentenced prisoners in privately operated facilities. Texas had the second largest number of prisoners in private facilities—7,223, or 5 percent of its state prisoners.³¹ Other high-use states include: Oklahoma (4,588), Florida (3,877), Louisiana (3,581), Tennessee (2,958), California (2,948), Colorado (2,390), Mississippi (2,522), and the District of Columbia (1,927).

Although the Federal Bureau of Prisons, Florida, and Texas report having jurisdiction of the most prisoners held in privately operated prisons, other states rely on private facilities to house larger proportions of their state prison populations. Oklahoma, for example, housed 23 percent of its state prisoners in such facilities on December 31, 1997, the highest percentage of any state or federal correctional agency in the nation. The District of Columbia followed, with 22 percent of its 8,590 prisoners in privately operated facilities. Other heavy users included Colorado, with 21 percent of its state prisoner population in private facilities, Tennessee (20 percent), Louisiana (19 percent), and Mississippi (16 percent).

correctional officials to exclude private facilities in which fewer than 50 percent of the prisoners were from state or federal agencies. Correctional officials may have been unable to make that determination effectively, especially because many facilities accept prisoners from a number of different federal or state agencies and no single agency may know the total state/federal share.

31 The State of Texas contracted with private firms to house other prisoners as well but in facilities that functioned as local jails.

Figure 2.1
Number of State or Federal Prisoners in Government and Privately Operated Facilities on December 31, 1997, By State



Source: Abt Associates survey of state and federal correctional administrators

- Notes:
1. Alaska and Maine are not described in the figure; no survey response was received from these jurisdictions.
 2. Jurisdictions above the line report using private facilities to house prisoners; those below the line do not.

Table 2.1**The Housing of State and Federal Prisoners, December 31, 1997**

	In-State Facilities	Out-of-State Facilities	Total
Prisoners in Government Facilities	1,162,357 (95.2%)	5,840 (.5%)	1,168,197 (95.7%)
Prisoners in Private Facilities	46,392 (3.8%)	5,978 (.5%)	52,370 (4.3%)
Total	1,208,749 (99%)	11,818 (1%)	1,220,567 (100%)

- Notes:*
1. "Private facilities" include all those privately operated, regardless of facility's ownership.
 2. "In-state" facilities are located in the geographic boundaries of the relevant governmental unit, "out-of-state" facilities are not.
 3. Excludes prisoners in privately operated facilities that function as jails in Texas, even though they are under contract with the State of Texas.
 4. Prisoners in out-of-state government facilities for the Federal Bureau of Prisons includes prisoners in a correctional facility operated by any other governmental agency at state or local levels.
 5. For this table, some responding agencies included prisoners housed in community-based facilities (such as halfway houses, home confinement, etc.) in the reported figures, especially those describing private facilities. These facilities and prisoners are not included elsewhere in this report. However, we were unable to disaggregate them from the figures reported here.

Source: Computed from data supplied to Abt Associates Inc. in its survey of state and federal correctional administrators.

Contracting for Secure Confinement

The survey indicated that certain jurisdictions have far greater experience in contracting with private firms for secure beds than others (see table 2.2). The Texas Department of Criminal Justice reported having 14 active contracts on December 31, 1997 for secure imprisonment services (excluding contracts with six privately operated jails). The State of Florida, either through the Department of Corrections or the Florida Privatization Commission, reported five active contracts on that day; Oklahoma reported seven; California reported ten.

Table 2.2**Number of Active Contracts for Secure Confinement on December 31, 1997, by Contracting Jurisdiction**

Arkansas	2	Nevada	1
Arizona	3	New Mexico	3
California	10	North Carolina	2
Colorado	5	North Dakota	1
Florida	5	Oklahoma	9
Georgia	2	Oregon	1
Hawaii	3	Tennessee	4
Idaho	3	Texas	14
Indiana	2	Utah	1
Kentucky	3	Virginia	1
Louisiana	2	Wyoming	1
Minnesota	1	Federal Bureau of Prisons	2
Mississippi	3	District of Columbia	2
Montana	2	Puerto Rico	3
Total Contracts			91

Source: Abt Associates Inc. survey of state and federal correctional administrators.

Reasons for Contracting or Not Contracting

Responding agencies that reported having contracts for secure facilities on the last day of 1997 were asked to rank their reasons for turning to private firms. The most commonly cited reason was to reduce overcrowding in their public prison system; fourteen of the 28 agency directors listed this as their state's primary objective. All but five surveyed correctional departments that were contracting with private firms were operating their prisons in excess of 100 percent of reported capacity.³² Being overcrowded was not a distinguishing characteristic of those jurisdictions that chose to contract with private firms, however. Most other states also reported operating prison systems that were filled beyond the design capacity of their prisons. The most commonly cited second reason was the need to acquire new bed space quickly—suggesting that the private sector was able to create the needed space faster than the public agency. The most commonly cited third reason was to gain "operational flexibility" (see table 2.3).

³² This was computed by comparing actual prisoner population on December 31, 1997, with the reported "design" capacity in existence on that same day.

Table 2.3**Reported Objectives, by Rank, for Contracting with Private Correctional Firms**

	Rank					Number (and Percent) of States Citing this Objective
	1st	2nd	3rd	4th	5th-8th	
Reducing overcrowding	14	2	3	3	2	24 (86%)
Speed of acquiring additional beds	2	9	4	1	4	21 (75%)
Gaining operational flexibility	1	0	8	2	5	17 (61%)
Operational cost savings	8	3	1	3	1	16 (57%)
Construction cost savings	0	6	3	4	3	16 (57%)
Improving caliber of services	1	0	0	1	9	12 (43%)
Reducing legal liability exposure	0	0	1	2	7	11 (39%)
Other	3	2	0	0	1	6 (21%)

Note: One state listed several objectives without ranking them. Its responses are counted in the column on the right summing the responses, but not in the columns indicating rank. The sum total reported here does not, therefore, always equal the total of the ranked objectives.

Source: Abt Associates survey of state and federal correctional administrators.

Among those *not* citing the need to reduce overcrowding as the principal reason for contracting, the most common reason for contracting was the desire to save money by virtue of reducing operating costs (8 of the 28 states). Two states reported that their primary objective was to acquire bed space quickly: two others sought to gain operational flexibility, and two others sought to improve the "caliber of services."

Table 2.3 also indicates the frequency with which various reasons were reported, regardless of their rank order. These responses from correctional administrators indicate that the driving force behind contracting for privately operated prisons is the desire to reduce crowding, to acquire additional beds speedily, or to gain operational flexibility. Less frequently mentioned concerns were interests in reducing the operating costs of imprisonment or saving money in construction. Reasons given least often were improving the service quality in the prisons, and reducing exposure to legal liability.

Interestingly, contracting in most of the jurisdictions surveyed did not result from the correctional agencies' initiative. Of the 28 jurisdictions that were contracting with private firms in the closing days of 1997, 11 reported that the initiatives were mandated by the legislature, five by the governor, and three resulted from a court order or consent decree. Only seven reported taking the initiative to contract for private prisons.³³

³³ This probably oversimplifies the dynamics by which privatization programs were initiated.

The Abt Associates survey asked the 25 jurisdictions that reported not having contracts with private imprisonment firms on December 31, 1997 their reasons for not doing so; seventeen provided reasons. Four reported not having contracts because their prison systems either already had sufficient space or because planned construction was expected to be sufficient to handle the demand. Three others cited legal prohibitions that prevented them from contracting; four reported that contracting was not under consideration because of concerns about labor relations or because of labor opposition; two reported that the issue of contracting was under study or that a decision was pending; two were not convinced that cost savings would result; one reported that no funding was available for such contracting; and one reported having concerns about accountability and the quality of private management.

Characteristics of Privately Operated Prisons

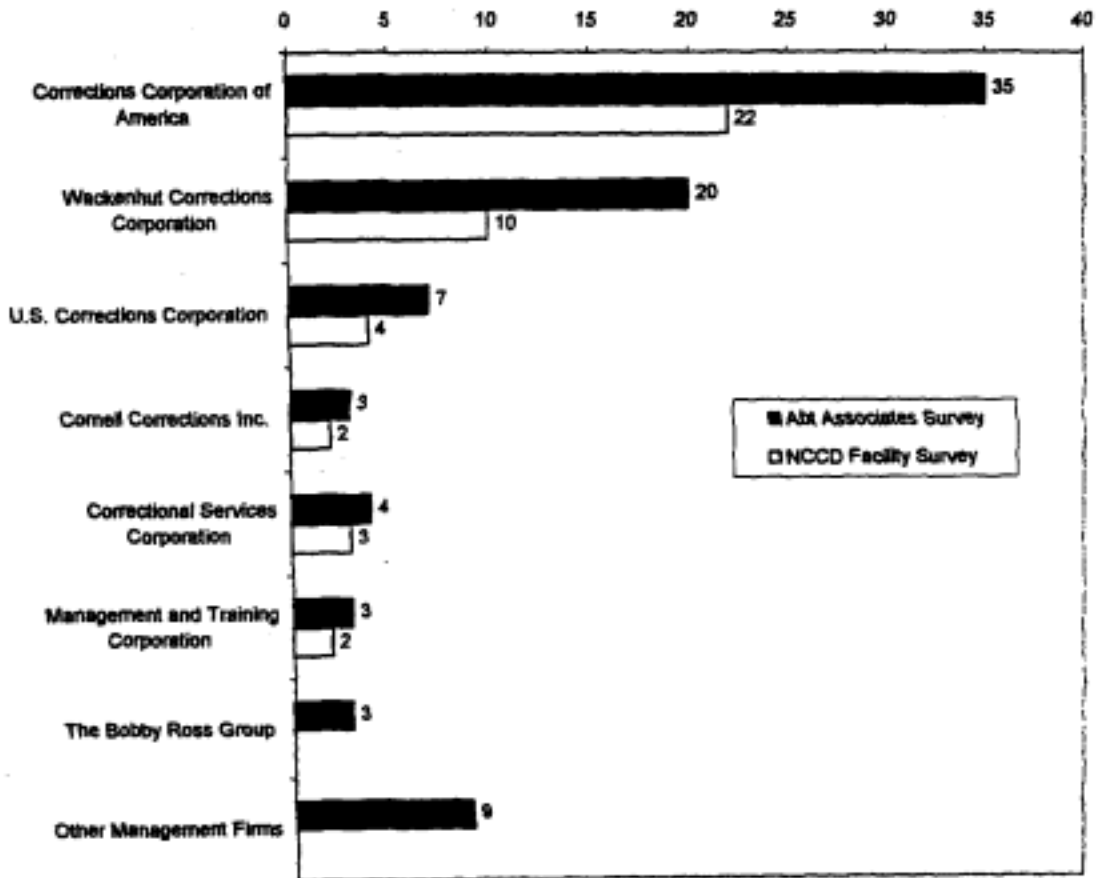
This section describes, in summary fashion, those privately operated prisons that were reported to be contracting with state and federal correctional agencies at the end of 1997. This includes information about their geographical location, ownership, size, type (e.g., general confinement, parole violator confinement), reported levels of physical security, and numbers and proportions of prisoners classified according to the risk they pose.

Unfortunately, we lack uniform information about all privately operated facilities. The Abt Associates survey of state and federal correctional agencies was designed primarily to obtain information about the *correctional agencies'* contracting practices for privately operated imprisonment. Much less information was obtained for their partners in these contractual relationships—the private firms and their facilities. For this latter information, we have obtained data from the National Council on Crime and Delinquency (NCCD), which undertook to survey private correctional firms in early 1998, and data from the Bureau of Justice Statistics' 1995 census.

Reliance on these two different sources of information about private facilities at year-end 1997 creates some difficulties because the Abt Associates and NCCD surveys obtained information for different subsets of facilities. The NCCD survey collected information from six private corrections management firms that reported information about only 43 of the facilities identified in the Abt Associates survey. Figure 2.2 compares the numbers of facilities counted in both the Abt Associates survey of government administrators and the NCCD survey of facility administrators, classified according to the management firms that operated them.

For reasons not determined, information was not obtained in the NCCD survey for 41 others that Abt Associates identified as having active contracts with state and federal agencies on the same date. Information is missing in the NCCD survey for facilities operated by some of the smaller firms, but also for several facilities operated by CCA and Wackenhut—the two industry leaders. *Because of this selective reporting and incomplete data collection, the data collected by NCCD cannot be considered representative of the entire set of privately operated facilities.* Readers must keep this limitation in mind when considering these data characterizing privately operated facilities in the following pages. These characterizations can only be considered tentative, at best.

Figure 2.2
Comparing Numbers of Privately Operated Facilities Reported in NCCD Survey and Abt Associates Survey of State and Federal Correctional Agencies, by Management Firm



Sources: Abt Associates survey of state and federal correctional administrators; NCCD survey of private facility administrators.

Table 2.4

Management Firms who Operate Facilities Reported in NCCD Survey and Abt Associates Survey

Corrections Corporation of America
Wackenhut Corrections Corporation
U.S. Corrections Corporation
Cornell Corrections Inc.
Correctional Services Corporation
Management and Training Corporation
The Bobby Ross Group
Civigenics Incorporated/Fenton Securities
Alternative Programs, Inc.
Capital Corrections Resources, Inc.
GRW Corporation
CCA Prison Realty Trust
Marantha Production Company, LLC
Louisiana Corrections Services
Turning Point of Central California

Sources: Abt Associates survey of state and federal correctional administrators; NCCD survey of private facility administrators.

Industry Concentration

Two firms—CCA and Wackenhut—dominate the market, holding 61 of all 91 reported contracts with state and federal agencies that were active on December 31, 1997. CCA had 41 active contracts with state or federal correctional agencies, Wackenhut 20. (This reflects the dominance of these two in contracting with all governments generally, not just state and federal.) The third-ranking firm, U.S. Corrections Corporation, lagged behind the two leaders with seven contracts.

Long dominated by a few big players, the industry appears to be experiencing still further consolidation, as well as some diversification. Smaller firms are being acquired by larger ones, and some are developing new capacities—such as drug treatment services—to augment their “core” capabilities. Firms that have been focusing on the adult corrections market are also moving into juvenile corrections.

Where Private Prisons are Located

Most of the privately operated prisons holding state or federal prisoners in this country are located in the West and in the South (see table 2.5). Texas is home to the most such facilities by far—23, not including six privately managed jails under contract with the state and some others not reported because state or federal government agencies relied on intergovernmental agency agreements to place prisoners in them. California is the state next most populated with such facilities, having 11 within its

boundaries. Three other states have five each (Arizona, Tennessee, and Florida). In the remaining 15 states, the District of Columbia, and in Puerto Rico, three or fewer facilities hold state or federal prisoners.

Table 2.5

Number of Private Facilities Contracted by State and Federal Correctional Agencies, by State of Location

Arkansas	2	Mississippi	3
Arizona	5	North Carolina	2
California	11	New Mexico	2
Colorado	4	Nevada	1
District of Columbia	1	Ohio	1
Florida	5	Oklahoma	3
Georgia	3	Puerto Rico	3
Indiana	1	Tennessee	5
Kentucky	3	Texas	23
Louisiana	3	Utah	1
Minnesota	1	Virginia	1
		Total Facilities	84

Source: Abt Associates survey of state and federal correctional administrators.

Facility Ownership

Of the 84 facilities that contract with state or federal correctional agencies to house their prisoners, 34 are owned by governments (see table 2.6). Fifty others are owned by the management firms that operate the facilities or by other private entities. Several of these latter facilities are only nominally private, as they have been created by governments to own the facility on behalf of the government.³⁴

³⁴ For example, the Industrial Development Authority of Brunswick County owns Lawrenceville Correctional Center on behalf of Brunswick County.

Table 2.6
Number of Privately Operated Facilities, by Ownership

Private Owners	Facilities
Corrections Corporation of America (CCA)	16
Wackenhut Corrections Corporation	5
United States Corrections Corporation	6
Cornell Corrections, Inc. (CCI)	4
Corrections Services Corporation (CSC)	3
Management and Training Corporation	2
Civigenics Incorporated/Fenton Securities	1
Marantha Production Company, LLC	1
Dove Development Corporation	1
Industrial Development Authority of Brunswick Co.	1
Delta Correctional Authority	1
Appelton Prison Corporation	1
Louisiana Corrections Facility Corporation	2
Louisiana Corrections Services	1
Mooreland Corporation	1
CCA Prison Realty Trust	1
Turning Point of Central California	1
Wilkinson County Industrial Development Authority	1
Hardeman County Correctional Facility Corporation	1
Subtotal Private Owners	50
Government Owners	
Arkansas	2
Bear County, TX	1
Crystal City, TX	1
Brown field, TX	1
Mansfield, TX	1
Odessa, OK	1
Davidson County, TN	1
Florida	4
Frio County, TX	1
Hamilton County, TX	1
Karnes County, TX	1
Limestone County, TX	1
Mississippi	1
Marion County, IN	1
Newton County, TX	1
Puerto Rico	3
Teller County, CO	1
Tennessee	1
Texas Department of Criminal Justice	8
Utah	1
Federal Bureau of Prisons	1
Subtotal Government Owners	34

Table 2.6
Number of Privately Operated Facilities, by Ownership

Total	84
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Note: Includes only facilities holding prisoners under contracts with state or federal correctional agencies on December 31, 1997; excludes privately operated state jails contracting with State of Texas.

Source: Abt Associates Inc. survey of state correctional administrators

Facility Size

Privately operated facilities that held state or federal prisoners under contract at the end of 1997 were approximately the same size, on average, as all government operated prisons in this country. Table 2.7 shows the average “rated capacity” for facilities that had active contracts with state or federal governments on this date, as reported both by the facility administrators in the NCCD survey and by correctional agencies administrators in the Abt Associates survey, and as well as the average for all government operated prisons in the nation on June 30, 1995.³⁵ (The rated capacity of a correctional facility is assigned by a rating official and is meant to reflect the available space to house prisoners and the ability to staff and operate the facility.)

Table 2.7
Comparing Capacities of Privately Operated and Government Operated Prisons in the United States

	<u>Privately Operated</u>		Government Operated
	NCCD Survey	Abt Associates	
Rated capacity			
Average	834	716	797
Range	224 – 2,192	45 – 2,048	20 – 6,381
Average daily population	643	NA	811

Sources: NCCD survey of private facility administrators, Abt Associates survey of state and federal correctional administrators, 1995, Bureau of Justice Statistics census of state and federal correctional facilities.

Although the average capacity of the privately operated facilities was similar to those in the public sector, the average daily populations differed from that reported by all government operated confinement facilities on June 30, 1995. This suggests that privately operated facilities were less crowded than government operated ones, but this is largely an artifact of the way questions were asked in the survey. Respondents were asked for facility capacity at year-end, but average daily

³⁵ 1995 capacity figures computed from data provided by the Bureau of Justice Statistics, *1995 Census of State and Federal Correctional Facilities* (1997).

population throughout the year. Facilities that expanded their capacity late in the year only appear to be underutilized, whereas they actually used their available capacity heavily. Most facilities operated at high occupancy rates throughout the year.

In most cases (60 percent of all contracts reported in the Abt Associates survey), contractors are allowed to determine whether single- or multiple-bed housing arrangements are used. Among the 36 contracts that specified occupancy arrangements, most allowed double bunking and dormitory housing. Only three required single cells; two others did specify single cells for particular offenders. One state specified (in 6 of its contracts) that its inmates may not be housed with another state's inmates nor with any federal prisoners unless a detailed plan for such housing is submitted and approved in advance by the contract monitor.

The Functions of Private Prisons

General adult confinement is the usual function of state and federal prisons, whether privately or publicly operated. According to the NCCD survey of privately operated facilities, 91 percent of those that responded provided general confinement services of adult prisoners (Table 2.8). Eighty-seven percent of all secure government operated facilities in operation in June 1995 were so characterized. However, it appears the range of functions served by privately operated prisons is somewhat different than that found in state and federal prisons operated by governments throughout the nation.

Somewhat larger proportions of privately operated prisons served as drug and alcohol treatment units (26 percent of the privates, compared to 16 percent of government operated prisons), and as facilities for parole violators returned to custody (16 percent compared to 7 percent).³⁶ In contrast, proportionately fewer private prisons contracting with state and federal correctional agencies provide "reception center" functions of diagnosing and classifying newly admitted prisoners, or confinement of special inmate populations (such as those needing mental health services, those sentenced to death, or geriatric patients).

Although this study did not address the question explicitly, it appears that governments may be utilizing private corrections firms to fulfill particular needs in their correctional systems. Indeed, 'gaining operational flexibility' was the most common third-ranked objective of correctional administrators choosing to contract with private correctional firms. It appears that correctional systems may be achieving this flexibility by writing contracts that specify a particular inmate profile for each facility. Thus, the type of prisoner housed in the contracted facility is restricted. Twenty-nine (29) surveyed contracts provide for the contractor's right to refuse custody of individual prisoners. When asked, contract administrators explained that the return of prisoners was usually based on a decision that the prisoner did not meet the facility's profile, either because of custody classification or medical needs.

Prisoner assignments designed to select appropriate prisoners for a facility's profile in turn affect the typical profile of the public facilities in the system. Some state administrators and public facility superintendents reported a higher concentration of badly behaved, unhealthy, or otherwise difficult

36 Facilities can serve more than a single function; the sum of facilities providing each of the discrete functions therefore exceeds the total number of private and government facilities in operation on the date of the survey or census.

prisoners housed in the public facilities. For example, few private operators are being called upon to provide facilities capable of hospital confinement. In fact, administrators for 63 contracts reported that their contracts limited the contractor’s medical liability. The limit is set either by an annual dollar amount (\$500 -\$10,000) or by specifying a length of hospital stay (48 hours - 5 days) beyond which the agency takes over both medical and security responsibilities. (Some correctional agencies reported paying for all offsite medical care.) This differentiation of privately and publicly operated facilities may make sense from an administrative point of view, but it creates an obstacle to comparing their performance.

Table 2.8
Comparing Functions Served by Privately Operated and Government Operated Facilities

	Number of Private Facilities (n=43)	Number of Public Facilities (n= 1167)
General adult population confinement	39 (91%)	1015 (87%)
Alcohol/ Drug treatment confinement	11 (26%)	186 (16%)
Primarily for persons returned to custody (e.g., parole violations)	7 (16%)	83 (7%)
Reception/ diagnosis/ classification	4 (9%)	155 (13%)
Work release/ prerelease	4 (9%)	137 (12%)
Medical treatment/ hospitalization confinement	2 (5%)	176 (15%)
Youthful offenders	2 (5%)	39 (3%)
Boot Camp	0	53 (4%)
Other	3 (7%)	246 (21%)

Figures sum to more than the total number of facilities because facilities may serve more than one function.

Source: NCCD survey of private corrections firms (1998), and Bureau of Justice Statistics, *1995 Census of State and Federal Correctional Facilities* (1997).

The Private Sector’s Experience with Medium and High-Security Prisoners

As discussed above, the private sector got its start outside of the correctional mainstream, in community-based or less secure facilities. In recent years, however, increasing numbers of facilities are designated as offering higher levels of security. This section examines the experience of the private sector in managing criminals who pose high security risks. It also explores the relevance of this experience with respect to managing federal prisoners.

Prisons differ according to their *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.

Some private facilities have the physical characteristics to meet ACA standards for medium and higher security facility ratings. Among those surveyed by NCCD in early 1998, and which were identified as contracting with state and federal correctional agencies, two-thirds (69 percent) reported their facilities as offering medium or maximum physical security (Table 2.9). The one privately operated maximum security prison (South Bay Correctional Facility in Florida, operated by Wackenhut) held 866 maximum security prisoners at year-end 1997.³⁷ It appears, then, that only one of the 295 maximum/close/high security prisons in the United States in 1995 was operated by the private sector.³⁸

Table 2.9

Physical Security of Privately Operated Confinement Facilities

	Number	Proportion
Maximum/Close/High	1	2%
Medium	29	67%
Minimum	13	30%
Total	43	100%

Source: NCCD survey of privately operated facilities.

Operating medium and high security prisons is not the same as managing medium and high security *prisoners*, however. Almost all correctional agencies classify prisoners according to the risk that they pose to staff, to other inmates and to the public. One common convention is to use a three-tiered classification: minimum-security, medium-security, and maximum-security (sometimes called ‘high-security’ or ‘close supervision’). Many jurisdictions use procedures employing objective criteria rather than subjective assessments to classify prisoners.

The Abt Associates survey of correctional agencies asked respondents to report the numbers of prisoners in each of the privately operated facilities under contract with that agency, by the prisoners’ security classifications. Fifty percent of all prisoners held in privately operated prisons under contract with these governments on December 31, 1997 were classified as medium-security; 4 percent were maximum-security, and 45 percent were minimum/low security (Table 2.10). This compares with 39

37 Charles Thomas has also reported in his annual census that this facility is the only privately operated maximum security prison, in the nation

38 The Bureau of Justice Statistics’ *1995 Census of State and Federal Correctional Facilities* reported identifying this number in existence on June 30, 1995. The number of government-operated high-security facilities has grown slightly since then.

percent medium-security prisoners housed in all state and federal prisons on June 30, 1995, 20 percent maximum-security prisoners, and 33 percent minimum security.

Table 2.10

Classification of Prisoners' Custody Levels in Confinement Facilities

	Privately-Operated (1997)	All State and Federal (1995)
Maximum/Close/High	1,661 (4%)	201,996 (20%)
Medium	18,823 (50%)	404,256 (39%)
Minimum	16,993 (45%)	337,779 (33%)
Not Classified	174 (0.4%)	39,302 (4%)
Total	37,651	992,333

Notes: The Abt Associates Inc. survey counted prisoners in custody in privately operated state and federal correctional agencies on December 31, 1997. The BJS census counted prisoners in custody on June 30, 1995 and includes unsentenced prisoners. Numbers do not sum to total shown here; data computed from that reported as shown in BJS *Census*. The BJS census includes all prisoners in custody in confinement facilities (i.e., not community-based) in state and federal correctional agencies. These include a small number of privately-managed facilities.

Sources: Abt Associates Inc. survey of state and federal correctional administrators; and Bureau of Justice Statistics, *1995 Census of State and Federal Correctional Facilities* (1997), Table 13.

To further characterize private facilities' experience with more dangerous prisoners, surveyed correctional administrators were also asked if they send violent offenders to the privately operated facilities with which they contract. Administrators replied that this was done in 63 of the 91 total contracts that were active on December 31, 1997. They did not report the number or security classification of the violent offenders actually placed in private facilities.

The private sector's experience with higher risk prisoners is not fully described in Table 2.10, however, for several reasons. First, classification procedures vary from one jurisdiction to another, and a prisoner classified as 'medium security' in one may be classified as minimum in another. (Indeed, some respondents to the Abt Associates survey had difficulty conforming to our requested categories of minimum, medium, and high security.) Second, prisoner classifications are not static. Rather, each prisoner's security rating may change throughout his institutional career, depending upon his behavior, among other things. That is, prisoners may be classified as medium security, for example, but may be housed in lower security facilities by virtue of their sustained good behavior. Indeed, it is not uncommon for maximum security prisoners to be placed in lower security institutions and then subsequently be reclassified to medium security (or they may simply keep their initial designation). Prisoners classified as medium-security, therefore, may include persons who pose substantial risk as well as those seen as posing relatively little risk. Some respondents reported that the private facilities were used to house "better" inmates, although others reported that the most troublesome prisoners were transferred to private facilities. It is difficult to know, therefore, whether the medium-security prisoners held in private facilities were equivalent, as a whole, to the populations of medium-security prisoners in the same jurisdiction's government facilities.

Comparing Security Classifications in Louisiana and the Bureau of Prisons

The congruence between different jurisdictions' classification procedures was explored in a comparison of the Federal Bureau of Prison's procedures with those used in Louisiana. State correctional administrators reported, in the Abt Associates survey, that 80 percent of all prisoners in three medium security facilities in Louisiana (the privately operated Allen and Winn Correctional Centers and the government-operated facility, Avoyelles Correctional Center) were classified as medium security. Ten percent were maximum-security prisoners, and another ten percent were classified as minimum-security. (These were the prisoners' current classifications, reflecting their institutional behavior, rather than their classifications at time of entry to the prisons system.)

To determine how these prisoners would be classified in the Federal Bureau of Prisons, BOP staff classified, using the bureau's procedures, a random sample of prisoners from these institutions. Unlike the State of Louisiana, the bureau's classification procedures produce a four-tiered rating: high, medium, low, and minimum-security. Bureau staff determined that 10 percent of the Louisiana prisoners would be classified in the federal system as high security, 33 percent as medium security, 29 percent as low security, and 28 percent as minimum security. Table 2.11 compares the numbers of prisoners in each security level, as classified by the State of Louisiana and the facilities, and the estimated proportions of prisoners at each level according to the Bureau of Prisons' standards. (These latter estimates are shown in ranges, because bureau staff estimated the classification of all prisoners by means of a small random sample. This small sample indicates a projected proportion for the entire population within a specified range of error.³⁹) Although both the facility and the State of Louisiana's correctional department had classified the majority of these prisoners as medium-security, it appears that about half of the Louisiana prisoners would not be considered medium security in a bureau facility. Rather, they would be classified as minimum or low security.⁴⁰

39 Ranges were defined as being within a 95 percent confidence level.

40 These comparisons may be distorted somewhat by the fact that the distribution of security levels reported by Louisiana referred to prisoners' current classification, whereas the bureau staff computed a classification that would have been made at the time of the prisoners' admission to the prisons. Bureau staff did not classify prisoners' institutional behavior.

Table 2.11**Classification of Prisoners' Security Levels in Two Privately Operated Facilities and One State Prison, According to Louisiana Standards and to Federal Bureau of Prisons Standards**

Prisoner Classification	Louisiana	Bureau of Prisons
Maximum/Close/High	10%	10% ± 4.9
Medium	80%	33% ± 7.7
Low	---	29% ± 7.4
Minimum	10%	28% ± 7.3

Notes: Louisiana reported the *current classification* of all prisoners. The Bureau of Prisons used *initial classification* sources to classify a sample (n=153) of prisoners from the same facilities. The range reported for the Bureau's classification categories reflects a 95% confidence interval.

Sources: Louisiana Department of Public Safety and Corrections; and Bureau of Prisons classification team.

This distribution of prisoners is not characteristic of medium-security prisons in the Federal Bureau of Prisons. In all medium-security federal prisons, 63 percent of the prisoners are classified at admission as medium custody (Table 2.12). These facilities hold very few minimum and low security prisoners (18 percent). The security classification profile in the Louisiana prisons more closely resembles the profile of BOP inmates in low physical security institutions (with 21 percent medium-security inmates, 41 percent low-security, and 36 percent minimum-security). Thus, from the Bureau of Prisons perspective, private sector experience, in Louisiana, at least, has been closer to what the Bureau calls low security facilities than medium or high security ones. How Louisiana's experience corresponds with others states' experience with 'medium' security prisoners was not determined.

Table 2.12**Distribution of Prisoners, by Their Security Classifications, in Federal Bureau of Prisons Facilities**

Prisoner Classification	Physical Security Level			
	minimum	low	medium	high
Maximum/Close/High	.3%	2%	19%	66%
Medium	8%	21%	63%	27%
Low	22%	41%	13%	4%
Minimum	70%	36%	5%	3%

Source: Bureau of Prisons KI/SSS data for initial classification of prisoners in all BOP prisons of each type.

Table 2.13**Comparison of Louisiana Medium Security Profile to Bureau of Prisons Profiles**

Prisoner Classification	Louisiana Facilities	Bureau of Prisons Facilities	
		low	medium
Maximum/Close/High	10.2% ± 4.9	2%	19%
Medium	33.1% ± 7.7	21%	63%
Low	28.7% ± 7.4	41%	13%
Minimum	28.0% ± 7.3	36%	5%

Notes: Louisiana reported the *current classification* of all prisoners in 3 medium security facilities (2 private, 1 public).
The Bureau of Prisons used *initial classification* sources to classify a sample (153) of prisoners from the same facilities. The range reported for the Bureau's classification categories reflects a 95% confidence interval.

Sources: Bureau of Prisons classification team and Bureau's KI/SSS data.

In summary: the private sector has very limited experience in managing high security prisoners. Only one maximum-security facility was being operated by a private company. Some other facilities, even though classified as medium-security, held a number of high risk offenders. For example, one medium-security prison—the Prairie Correctional Facility, operated by CCA, held 586 maximum security prisoners. Twelve other privately operated medium-security facilities were reported holding an average of 47 maximum security inmates. The private sector's experience with managing medium-security prisoners is much more substantial. Given the variability from state to state in classification procedures, however, it is difficult to determine how many of these prisoners so classified in one state would be similarly classified in another.

Inmate Programming

An important aspect of prison management is the extent and quality of programs designed to prepare inmates for their release and their lawful reintegration into society. Unfortunately, the national surveys of programming in prisons, whether public or private, do not reveal much. Both the NCCD survey of private facilities, and the Bureau of Justice Statistics census which was used as a model, simply ask whether programs were available and the proportions of prisoners enrolled. No measure is used to assess quality, or even intensity of program involvement. Moreover, the NCCD survey was returned by only half of the private facilities in existence at the end of 1997. The representativeness of the survey's findings is therefore unknown and we do not report them here.

Expected Demand for Prison Space and Plans for Contracting with Privately Operated Facilities

Many jurisdictions project substantial increases in the demand for prisons beds. Several states plan to rely upon privately operated prisons to meet at least some of this demand. If these private prison beds are indeed contracted at the scale currently planned, it will result in significant growth for the private prison industry.

The Abt Associates survey asked each correctional agency administrator to report the increase in numbers of prisoners expected by the end of five years (i.e., by December 31, 2002), or by the end of their forecasting horizon, whichever is sooner. Most (83 percent) reported projects for this five-year period. Others reported projected increases within shorter planning horizons. For all responding agencies, the total projected increase during this five-year period was expected to be 356,771, or 29 percent more prisoners than were in custody on December 31, 1997. Adjusting for the different planning periods reported by agencies, this amounts to an increase of nearly 71,000 prisoners each year.⁴¹

Anticipating these increases in demands, the responding agencies reported having definite plans to expand the overall capacity of their systems by 240,967 beds (Table 2.14). Most of this planned increase (85 percent of all beds) will be made in government operated facilities; agencies plan to contract for the remaining 15 percent, or 36,752 beds.⁴²

Correctional agencies differ widely in their plans regarding private prison beds. Twenty-six reported planning not to procure beds in privately operated prisons (Table 2.14). Twenty-one others did have definite plans to do so. California's Department of Corrections plans the largest procurement of beds in privately operated facilities: 15,000 by the year 2000. This represents 45 percent of all additional beds to be acquired or built by the department during this period. Five other states plan to rely heavily upon the private sector to meet the expected demand for prison beds. Four plan to rely entirely, or nearly so, on private facilities for additional beds: New Mexico (1,800 new beds), Mississippi (500), Connecticut (500), Idaho (96 percent of planned expansion, or 1,250), and Oklahoma (87 percent of planned expansion, or 4,000 beds). Like California, Utah and Wisconsin plan to rely on the private sector for about 40-45 percent of their capacity expansion needs.

Interestingly, those agencies that are currently contracting for the largest numbers of beds reportedly plan little further utilization of privately operated prisons. Texas plans to rely entirely upon expanded or new government operated facilities; Arizona has plans to contract for 1,000 more beds (which represents only 18 percent of its planned expansion); Florida's Department of Corrections reports no plans for such contracting, and the Florida Privatization Commission reports not having any definite plans regarding further privatization.

It is difficult to estimate how many state and federal prisoners will be held in privately operated facilities at the end of this five-year period. However, if one assumes that the state and federal agencies that now rely upon private facilities to house approximately 55,500 prisoners continue to do so at this level, and that the planned expansion of nearly 37,000 beds does not replace the existing stock of privately held prisoners, the total number of private beds for state and federal prisoners would be nearly 93,000 by the end of 2002, or 40 percent more than were held at year-end 1997. This may be an overestimate. The responding correctional administrators may have counted these recompletions or re-procurements of existing contracts in their answers to the Abt Associates survey.

41 This number may be an overestimate, as the two Florida agencies may have reported each other's plans.

42 It is possible that agencies' plans for relying upon privately operated facilities are even more ambitious. The survey asked about *definite* plans for *contracting* with the private sector. Agencies that plan to rely upon intergovernmental agency agreements to transfer prisoners ultimately to privately operated prisons may not have included these prisoners in their counts.

Table 2.14 (continued)

Table 2.14

Planned Increases in Capacities of Government and Privately Operated Facilities (as of December 31, 1997), by State

	Total Number of Planned Beds	By Year	Government Facilities		Private Facilities	
			Additional Beds	Percent of New Beds	Additional Beds	Percent of New Beds
Alaska	--	--	--	--	--	--
Alabama	1,300	1999	1,300	100	0	0
Arkansas	683	2001	683	100	0	0
Arizona	5,610	2002	4,610	82	1,000	18
California	33,593	2000	18,593	55	15,000	45
Colorado	4,078	1999	2,478	61	1,600	39
Connecticut	500	n/a	0	0	500	100
Delaware	1,800	2000	1,500	83	300	17
Florida DOC	22,078	2002	22,078	100	0	0
Florida CPC*	27,025	2002	27,025	100	don't know	0
Georgia	4,764	2000	3,264	69	1,500	31
Hawaii	2,980	--	2,980	100	0	0
Iowa	1,550	2002	1,550	100	0	0
Idaho	1,302	2005	52	4	1,250	96
Illinois	8,170	2001	8,170	100	0	0
Indiana	4,548	2002	4,448	98	100	2
Kansas	309	1999	309	100	0	0
Kentucky	2,409	2002	2,409	100	0	0
Louisiana	3,742	2002	3,026	81	716	19
Maine	--	--	--	--	--	--
Massachusetts	1,024	1998	1,024	100	0	0
Maryland	896	2003	896	100	0	0
Michigan	7,052	2000	6,572	93	480	7
Minnesota	742	2002	692	93	50	7
Missouri	9,111	2002	9,111	100	0	0
Mississippi	500	2002	0	0	500	100
Montana	1,418	2002	918	65	500	35
North Carolina	4,104	2003	3,048	74	1,056	26
North Dakota	380	2001	380	100	0	0
Nebraska	1,336	2001	1,336	100	0	0
New Hampshire	700	2001	700	100	0	0
New Jersey	1,625	1999	1,625	100	0	0
New Mexico	1,800	--	0	0	1,800	100

	Total Number of Planned Beds	By Year	Government Facilities		Private Facilities	
			Additional Beds	Percent of New Beds	Additional Beds	Percent of New Beds
Nevada	3,350	2002	3,350	100	don't know	0
New York	3,300	1999	3,300	100	0	0
Ohio	6,837	2002	4,837	71	2,000	29
Oklahoma	4,600	1998	600	13	4,000	87
Oregon	1,739	1999	1,739	100	0	0
Pennsylvania	4,321	2002	4,321	100	0	0
Rhode Island	--	--	--	--	0	--
South Carolina	3,804	2002	3,804	100	0	0
South Dakota	624	2002	624	100	0	0
Tennessee	1,922	2001	1,922	100	N/A	0
Texas	4,200	1999	4,200	100	--	0
Utah	1,856	2003	1,056	57	800	43
Virginia	6,504	2002	6,504	100	0	0
Vermont	466	2004	466	100	0	0
Washington	5,460	2006	5,460	100	0	0
Wisconsin	3,600	2003	2,100	58	1,500	42
West Virginia	5,140	2005	5,140	100	0	0
Wyoming	500	2000	400	80	100	20
Federal BOP*	23,553	2003	21,553	92	2,000	8
District of Columbia	0	N/A	0	--	--	--
Puerto Rico	2,000	2002	2,000	100	0	0
Virgin Islands	62	1998	62	100	--	0
Totals	240,967		204,215	84.7%	36,752	15.3%

Note: Projected Federal BOP number does not include provision of section 11201(c)(1)(B) of the National Capital Revitalization and Self-Government Improvement Act of 1997. Florida's Correctional Privatization commission may be double-counting beds to be added by the Department of Corrections.

Source: Abt Associates survey of state and federal correctional administrators

3. Does Contracting for Prison Operations Save Money?

Even though cost containment is not the most frequently reported reason for contracting with private firms to operate prisons (as discussed in chapter 2), it is no doubt a common hope among policymakers that governments will indeed save money by doing so. Whether contracting for prison operations actually saves the taxpayers' money remains an open question, however. Professor Charles Thomas of the University of Florida, commenting on the last decade's experience with privatization, states that a:

reasonable assessment of the available cost analyses lends at least qualified support to the claims of privatization proponents that meaningful costs savings can be achieved by contracting out. To be sure, there is little one can find in this body of evidence that would support an expectation of massive cost savings. All other things being equal, for example, a typical American jurisdiction could anticipate economies in the rough range of 10 to 20 percent would be realized by privatization—perhaps at the low end of the range for initiatives focusing on the privatization of existing facilities and at the high end of the range for new design-finance-construct-manage projects. It would be quite misleading to describe cost savings of this magnitude as trivial.⁴³

This is consistent with one assessment of the United Kingdom's experience. Studies by Coopers & Lybrand and Her Majesty's Prison Service found that the operating costs of four privately operated prisons in the U.K. were between 9 and 30 percent lower than comparable publicly managed prisons.⁴⁴ Others draw more cautious conclusions from the research literature. The U.S. General Accounting Office, reviewing the five studies deemed to have the strongest designs and methods among those published between 1991 and mid-1996, concluded that "because the studies reported little cost difference and/or mixed results in comparing private and public facilities, we could not conclude whether privatization saved money."⁴⁵ Julianne Nelson's assessment of several recent studies, in appendix 1, generally concurs with the GAO's.

At first glance, this controversy may seem surprising. It is reasonable to expect that one could easily answer the question by comparing expenditures for imprisoning offenders in a public correctional agency to the payments to private firms. Unfortunately, such comparisons are usually not so straightforward and, indeed, are often misleading for three principal reasons. First, the facilities may differ in ways that confound comparison of costs. Second, differences between public and private sector accounting procedures make the very identification of comparable costs difficult. Although

43 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), pp. 50-51.

44 Jo Woodbridge, *Review of Comparative Costs and Performance of Privately and Publicly Operated Prisons*, Prison Service Research Report No. 3 (UK: HM Prison Service, Home Office, Offenders and Corrections Unit, Research and Statistics Directorate, December 1997).

45 U.S. General Accounting Office, *Private and Public Prisons—Studies Comparing Operational Costs and/or Quality of Service*, (Washington, DC: Report to the Subcommittee on Crime, Committee on the Judiciary, House of Representatives, August 1996), p. 7.

several studies comparing public and private correctional costs have sought to overcome these and other difficulties, not all have succeeded fully. Analysis of the studies' methods and assumptions, and reanalysis of their findings, suggests in some instances that the purported cost advantages, if any, of privately operated facilities may be less dramatic than reported.

Privately and Publicly Operated Facilities May Not Be Sufficiently Comparable

Determining whether and how privatization saves the government money is difficult in many jurisdictions because no publicly managed prisons exist that are similar enough to warrant direct comparison with the private facilities. In New Mexico, for example, the one women's prison in the state's correctional department is operated by a contractor. Finding a comparable publicly operated facility in the state is impossible, as women's prisons are operated quite differently than facilities for men and generally cost more. In Arizona, the one facility for men and women is contractor-operated, and no comparable prison exists in the Department of Corrections. Similar problems of comparability exist for other privately managed facilities that have specialized missions, such as substance abuse treatment programming or return-to-custody facilities for parole violators.

Nor is comparability assured if one compares non-specialized facilities having a common security classification—two medium-security prisons for men, for example. The cost of imprisonment generally varies according to the *mix* of different types of prisoners held by the facility. In general, health care costs vary according to prisoners' ages, and staffing costs vary according to the security levels of the inmates. Medium-security prisons generally house a mix of differently classified inmates, including some maximum-security ones and some classified as minimum-security, as discussed in chapter 2. Publicly managed prisons may differ from privately managed ones in the distribution of older and younger, healthy and unhealthy prisoners, as well as in the distribution of high, medium, and low-risk prisoners.

The cost of prisons is also a function of their size, as larger facilities benefit from economies of scale up to a certain point.⁴⁶ How full—or overcrowded—they are also affects their cost. Other things being equal, more heavily utilized prisons, and even more overcrowded ones, are less costly on a per-prisoner basis because staffing levels in prisons are relatively fixed. Privately operated prisons are probably less likely to be overcrowded than public ones, and thus, finding similarly utilized public prisons in the same jurisdiction may be difficult.⁴⁷

Another source of non-comparability stems from facility design. When states turn to private firms for facility construction and operations contracts, these firms have the opportunity to build the most labor-efficient buildings possible. Comparing the cost of operating these facilities to older and less

46 In their 1984 study, Schmidt and Witte analyzed facilities in the Federal Bureau of Prisons and concluded the "prisons are cheapest to run when they are quite large but not behemoth." Peter Schmidt and Ann D. Witte, *An Economic Analysis of Crime and Justice* (Orlando, FL: Academic Press, Inc., 1984), p. 355.

47 At a minimum, one would have to adjust cost estimates to account for such differences if utilization levels were dissimilar.

efficiently designed public prisons may lead to misleading conclusions about the reasons for an apparent cost advantage attributed to privatization.

Finally, public and privately operated prisons may differ in the levels and quality of services provided. In general, one would expect costs to be higher for more extensive and higher-quality programs and services. The most telling comparison, therefore, would be between the cost of delivering an equivalent service of equivalent quality by both a public and a privately managed facility. Measuring the quality of imprisonment services is not a straightforward task, as chapter four discusses.

Inconsistent Accounting Procedures

The accounting procedures followed by public and private organizations differ, which makes comparison of costs incurred by the two types of organizations difficult. Accounting methods developed for private firms are designed to value all inputs used for producing goods and services; a large proportion of costs incurred are thereby captured. In contrast, public accounting systems were designed not to identify costs but to control the allocation of appropriated public funds through agencies and to detect misuse of taxpayers' money.⁴⁸ Three characteristics of public accounting procedures make cost identification especially difficult in government: the deficient treatment of capital expenses, the focus on the agency rather than the service delivered, and methods for allocating overhead costs.

Different Treatment of Capital Spending

Private firms have adopted accounting conventions to spread expenditures for capital assets (e.g., buildings, land, equipment) throughout the period of the assets' useful life, so that the year-to-year cost of a service includes some portion of the physical assets that are "consumed" in the production of that service. Public accounting systems make no such attempt. In the public sector, capital expenses are counted only in the year that they are made. Because no attempt is made to spread these costs across subsequent years, it is impossible to determine how much it actually costs to deliver a service without conducting an inventory and appraisal of existing capital assets. The commonly cited costs of imprisonment by public agencies are, therefore, often lower than they would be if physical assets were capitalized. In years where large capital construction projects are undertaken, however, the operating costs will be *overestimated* as a result of "expensing" these costs fully in that same year rather than spreading them across the useful life of the asset.

Among those facilities identified by the Abt Associates survey of correctional administrators as being under contract with state or federal correctional agencies on December 31, 1997, 59 percent were owned by the contracting firms. Because the fees charged by these firms for their services are generally designed to recover capital investments in these facilities, the appropriate comparison is the cost of ongoing operations in a similar public institution plus some annualized portion of the capital investments by governments in this institution. Because the latter costs are, for all practical purposes, uncounted, comparing the relative cost of private owner-operated facilities to public facilities is subject to considerable uncertainty.

48 Herman B. Leonard, *Checks Unbalanced: The Quiet Side of Public Spending* (New York, NY: Basic Books, 1986); Douglas C. McDonald, *The Cost of Corrections: In Search of the Bottom Line* (Washington, DC: National Institute of Corrections, 1989).

Dispersed Costs

The practice of assuming that the cost of public imprisonment is equivalent to the correction department's expenditures often obscures the true cost to government for another reason as well. In many jurisdictions, several costs of operating prisons and jails are borne not by the correctional agency but by a number of different agencies or different government accounts. For example:

- employee benefits may be paid out of separate overhead government accounts rather than the correctional department's account;
- some medical care of inmates may be charged to the government's health care agencies or may be subsidized variously by state hospitals, mental health departments, and the like;
- utilities may be charged to the department of public works;
- legal work in support of prisons may be borne by the attorney general or equivalent;
- the true cost of insurance may be overlooked, as governments generally self-insure by paying for unpredictable costs when they are incurred, rather than spreading these costs over all years;
- the true cost of supplies and equipment may be understated if they are purchased and stored by a separate agency (such as the federal General Services Administration); and
- payments for contracted services (such as food or health care) may be made by central or regional offices rather than by the facilities.

To identify all such dispersed costs of correctional operations, special studies are needed, rather than simple reliance on measures of costs based on the correctional agency's budget or reported expenditures. Overlooking expenditures by other agencies or accounts may undercount actual costs by as much as 30-40 percent. One study of New York State's prisons estimated that only 77 percent of the direct cost of imprisonment in the state's prisons were covered by the department's budget. The remainder was paid by general government accounts or by other agencies.⁴⁹

A parallel problem exists with respect to identifying all costs to government for contracting. Private firms may not always bear all the costs of imprisonment, even when they own the buildings and all the assets. Some services might be performed by the public correctional agency, and the cost of those services should be counted along with the contractors' costs. For example, surveyed government officials who were charged with managing contracts with privately operated facilities reported that the following types of activities were sometimes necessary to support private facilities but were paid by government:

- contract monitoring and oversight;
- inspection and licensing;
- personnel training;

49 Douglas C. McDonald, *The Price of Punishment: Public Spending for Corrections in New York*. (Boulder, CO: Westview Press, 1980), p. 16.

- medical and/or dental care (contracts often limit the contractor’s liability for such care, placing the risk for high-cost and catastrophic care on the government);
- inmate transportation;
- inmate case management;
- background checks for visitors and volunteers;
- reviews for pardon and/or parole boards;
- correctional industries programming;
- disciplinary and grievance appeals processes;
- accounting and banking of inmate funds;
- payment of inmate wages; and
- response teams for emergencies.

As with public correctional departments, agreements with private facilities must be scrutinized to determine if these or similar costs are paid not by the facility itself but by the government agency with which it contracts. All such costs, or estimates thereof, need to be included as costs to government of contracting.

Assigning Overhead Costs

Some “overhead” expenditures incurred by various agencies of government in support of prisons and prison administration must be assigned to both government operated and privately operated facilities in a jurisdiction. The methods by which these costs are allocated affect the calculation of operating costs of each facility and, consequently, the estimation of difference in public and private facility costs. As Julianne Nelson writes in her paper (in appendix 1, at note 11), most analysts addressing the question of public and private imprisonment costs have estimated the costs assigned to facilities according to the *use* made of central office services by either public or private facility managers. She argues that this tends to overstate the relative cost of public facilities. This is because the cost of governmental overhead activities are quite fixed. That is, the marginal cost associated with increasing a prison system by one or two more facilities is quite small, regardless of whether the additional facilities are operated by government or a private firm. The appropriate method for allocating the cost of these fixed overhead costs is to assign identical amounts to all facilities in the jurisdiction, whether public or private. The only conditions in which privatization would lower overhead costs in government would be (a) where the expansion of overhead activities were averted by relying upon privatization or (b) where contracting for privately operated prisons resulted in cutting back government overhead operations, which is not likely to occur.

Studies Comparing Privately and Publicly Operated Correctional Facilities

A number of research studies have been reported since the early 1980s that aimed to compare the cost of privately operated facilities with publicly operated ones. Most have been focused on facilities for adult prisoners, although some have examined juvenile facilities. Only those pertaining to adult facilities are examined here. Moreover, attention is restricted to those few studies that have employed

reasonably rigorous research designs, and which report their methods and data in sufficient detail to assess the strength of their findings.⁵⁰

State Prisons in Tennessee

In 1991, the State of Tennessee contracted with the Corrections Corporation of America (CCA) to operate the South Central Correctional Center (SCCC), a 961-bed, multi-custody (minimum-to-maximum-security) facility. As required by state law, the Tennessee Fiscal Review Committee (FRC) undertook to “compare the full costs of the contractor with the state’s full costs of operating similar facilities.”⁵¹ Two publicly operated prisons were selected for comparison: Northwest Correctional Center (NWCC) and Northeast Correctional Center (NECC).

The FRC study is a model cost comparison. It allocated “line item” cost data for each prison to specific management functions (administration, security, etc.). Adjustments were made to operating costs (also reported by management function), which included netting out commissary revenues against commissary expenses, allowing for changes in food services inventories and non-comparable programs, eliminating depreciation expenses as a public facility expense (because there were corresponding sets of expenses in the private facility), and adding monitoring costs to the expenses reported for the private facility. After such adjustments, the FRC found that the daily operating cost during FY 1994, *exclusive of any costs allocated to central office*, averaged \$31.95 in the two public facilities, compared to \$33.78 in the CCA facility. By this measure, the private facility was 5.7 percent more costly than the two public facilities, on average. (Both public facilities were less costly: \$30.91 at NECC and \$33.06 at NWCC.) When adjustments were made for differences in the size of the facilities to equalize the comparison (more specifically, in the average numbers of prisoners under custody in each one), the cost difference diminished to one percent. Adding in an allocated share of the Department of Corrections’s central office costs to the three facilities changed the estimates slightly. The CCA facility was then found to be one percent *less costly*, on average, than the public facilities.

The FRC report did not directly address the question of whether or not privatization actually saves money for the taxpayers of Tennessee. This question was addressed by the Washington State Legislative Budget Committee (LBC) as it tackled its own version of the prison privatization

50 The studies not reviewed here include the following: A. Brown et al., *Private Sector Operation of Correctional Institution: A Study of the Jack and Ruth Eckert Youth Development Center, Okeechobee, Florida* (Washington, DC: National Institute of Corrections, 1985); John D. Donahue, *The Privatization Decision* (New York, NY: Basic Books, 1990), Chapter 8; Keon S. Chi, “Private Contractor Work Release Centers: The Illinois Experience,” in *Innovations* (Lexington, KY: Council of State Governments, 1982).; Joint State Government Commission, *Report of the Private Prison Task Force* (Harrisburg, PA: General Assembly of the Commonwealth of Pennsylvania, 1987).; Douglas C. McDonald, “The Costs of Public and Private Correctional Facilities,” in McDonald (ed.) *Private Prisons and the Public Interest* (New Brunswick, NJ: Rutgers University Press, 1990).; Douglas C. McDonald, “The Costs of Public and Private Correctional Facilities,” in McDonald (ed.) *Private Prisons and the Public Interest* (New Brunswick, NJ: Rutgers University Press, 1990); Charles H. Logan and Bill W. McGriff, “Comparing Costs of Public and Private Prisons: A Case Study,” *NIJ Reports* (No. 216, 1989), pp. 2-8.; and Dale K. Sechrest and David Shichor, *Final Report: Exploratory Study of California’s Community Corrections Facilities* (San Bernardino: California State University, 1994).

51 State of Tennessee Legislative Fiscal Review Committee, *Cost Comparison of Correctional Centers* (Nashville, TN, 1995), p. 1; for a detailed analysis of this study, see Julianne Nelson’s paper, in appendix 1 of this report.

question.⁵² The LBC conducted further analyses of the Tennessee data but followed a slightly different tack. Instead of analyzing the *cost incurred by CCA* of operating SCCC, the LBC started with the *revenues received by CCA* and adjusted these data for differences between public and private management responsibilities. The FRC had excluded medical expenses for CCA from its analysis because it lacked sufficient data. It was necessary to estimate these costs in order to compute CCA's operating surplus and to compare private per diem rates with those derived for the state-run facilities NWCC and NECC. The LBC concluded that the estimated total daily cost to the taxpayers of the privately operated CCA facility was \$37.65, as compared to \$40.16 at NECC and \$40.19 at NWCC.

Julianne Nelson undertook further analysis of the Tennessee data, reported in both the FRC and the LBC studies, to discern differences in how costs were allocated in the CCA facility compared to the two public facilities. (This study was commissioned by the National Institute of Corrections in conjunction with the Abt Associates study and is included in appendix 1.) She found that:

- Non-medical operating costs per inmate day were virtually identical in the public and private prisons studied.
- At the CCA facility, more was spent on administration and less on security, relative to the public facilities, including corporate overhead and monitoring by state officials.
- Contracting for SCCC may have saved money for Tennessee's taxpayers by averting expenditures for state government overhead activities. That is, the observed state-level overhead expenses were lower than what they would have been had SCCC been publicly managed.
- Labor costs were lower at the private facility: \$16.89 per prisoner/day at the CCA facility, as opposed to \$19.63 at NECC and \$20.96 at NWCC. Security staff costs were also lower: \$9.96 per prisoner/day at the CCA facility, versus \$12.57 at NECC and \$14.55 at NWCC.
- Employee benefits were also lower at the CCA facility. The average employee benefit rates were 28 and 29 percent at the two public facilities, and 22 percent at the CCA facility. Wide variation existed among CCA staff: administrative employees enjoyed a benefit rate of almost 80 percent, while others received benefits at the rate of 13-14 percent of salary.

She summarized that the pattern of expenditures indicates that “the bulk of reported cost savings at the privately managed prison studied in Tennessee can be attributed to differences in per-inmate medical expenditures and allocated state overhead costs. (Labor cost savings were offset by the increased administrative cost...)”

What remains unclear, however, is whether the apparently lower overhead costs are merely accounting artifacts rather than reductions in expenditures. It is unlikely that overhead activities were

52 Washington Legislative Budget Committee, *The Tennessee Experience: The 1995 Report of the Fiscal Review Committee* (Seattle, WA, 1996), appendix 3. In particular, LBC analysts both estimated the medical expenses incurred by CCA on behalf of prisoners at SCCC and obtained an unofficial report of these expenses directly from CCA. The LBC analysts also collected data on the fees paid by Tennessee to CCA for operating SCCC. This information was collected after the FRC report was published.

actually cut back, or that significant increases in expenditures for overhead were averted by contracting for a single facilities. The actual difference in expenditures was therefore small, if any.

Adult Prisons in Louisiana

The State of Louisiana contracted with two different private correctional firms—the Corrections Corporation of America and Wackenhut Corrections Corporation—to operate two prisons for men. The former firm contracted to operate the Winn Correctional Center, the latter the Allen Correctional Center; both opened in 1990. In 1996, William Archambeault and Donald Deis, professors at Louisiana State University, reported the findings of their study which compared the cost and performance of these two facilities with a third, the Avoyelles Correctional Center, operated by the Louisiana Department of Public Safety and Corrections.⁵³

The basic question addressed by Archambeault and Deis was how the full cost per inmate-day in a publicly managed prison (i.e., Avoyelles Correctional Center) compared with the full per diem cost of housing an inmate in either of two privately managed facilities. Their choice of comparison institutions was appropriate. All three institutions were built by the state and shared a common design. The capacities of all three were identical—1,474 beds. They are located in the same section of rural Louisiana and draw from the same general labor pool. All three house maximum, medium, and minimum security prisoners in approximately the same proportions. Moreover, the private facilities appear to be well-integrated into the ongoing operations of the state’s public correctional agency. They adopted the same rules and procedures that govern the state’s prisons, and the upper management of these two privately operated prisons participate in agency-wide management functions. A number of the potentially confounding factors are thereby held constant, permitting a comparison of institutions that vary only in their being managed and operated by either the state correctional agency or by private firms.

Archambeault and Deis compared expenditure data for all three prisons for five fiscal years, 1992 through 1996. As they were interested in assessing the total cost and savings to the taxpayers, they based their analysis upon the state’s fees paid to the management firms and sought to identify all costs incurred to support either the privately operated or the government operated facilities, including all costs incurred by other agencies or other government accounts. They also sought to estimate a variety of costs not accounted for on an annualized basis, such as self-insurance. Numerous other adjustments were made, such as for costs associated with prison industry programs and services provided by local vocational/technical schools. After such adjustments, Archambeault and Deis concluded that the taxpayers of Louisiana saved an average of 12.75 percent for both private facilities combined, throughout the five years studied, relative to what taxpayers spent for the Avoyelles facility during the same period. The average five-year savings were greater for the Allen facility operated by Wackenhut: 13.80 percent, as opposed to 11.69 percent at the CCA facility in Winnfield.

At approximately the same time as Archambeault and Deis were conducting their study, the State of Washington’s Legislative Budget Committee examined expenditure data for the same three facilities

53 William G. Archambeault and Donald R. Deis, Jr., *Cost Effectiveness Comparisons of Private Versus Public Prisons in Louisiana: A Comprehensive Analysis of Allen, Avoyelles, and Winn Correctional Centers* (Baton Rouge, LA: School of Social Work, Louisiana State University, 1996).

and drew different conclusions about the savings.⁵⁴ The LBC's report was released before Archambeault and Deis released theirs. Comparing the two reveals that they took different approaches to estimating some costs or made different assumptions. In the end, the LBC concluded that the state could expect to break even on its two contracts during FY 1996 when all facilities were operating at full capacity. Whereas the CCA facility was costing about one percent more than the state facility during that year, according to the LBC's analysts, the Wackenhut facility was saving the state an equivalent amount. (The LBC suggested that costs of the three private and public facilities had recently converged and that the private facilities had been costing the state approximately four percent less during FY 1994.)

Julianne Nelson reviewed both the Archambeault and Deis study and the LBC report and identified a number of difficulties in the former. (See appendix 1) She concluded that the savings associated with private operation in the Winn and Allen facilities are more in the range estimated by the LBC analysts. That is, during fiscal year 1996, the savings were more likely to be below 5 percent than above 12 percent. Savings to the taxpayers could be greater, she argues, if contracting out operations of facilities results in cutbacks in state-level overhead expenses.

Adult Prisons in Florida

The controversy over the appropriate measure of operating costs in Florida prisons shows how hard it is to get all sides to agree on whether or not privatization saves money. Current state law helps identify the participants in this debate. Chapter 89-526 of the Florida state statutes, enacted in 1989, first authorized the state Department of Corrections (DOC) to enter into contracts with private prison management companies. The subsequent Chapter 93-406, adopted in 1994, created the Correctional Privatization Commission (CPC), to expedite prison privatization; it is housed in the state Department of Management Services and operates independently of the Department of Corrections. Chapter 957.05 qualifies the authority of the CPC, requiring it to demonstrate—before any contract is signed—that private prison management will result in *at least* a 7 percent savings (relative to the cost of allowing the state Department of Corrections (DOC) to run the prison). Chapter 957.07 also empowers the state Auditor General to decide whether or not this condition has been satisfied before any contract with a vendor has been signed.

In the summer of 1995, two prisons opened under contract with the Correctional Privatization Commission. One, the Bay Correctional Facility, is operated by CCA; the second, the Moore Haven Correctional Facility, is operated by Wackenhut Corrections Corporation. Both are 750-bed prisons that were designed for medium-security inmates, although the department has been assigning a large percentage of minimum-security prisoners to them (about half, during FY 1997).⁵⁵

To provide for ongoing independent oversight, Florida state law requires the Office of Program Policy Analysis and Government Accountability (OPPAGA)⁵⁶ to review the performance of all management

54 State of Washington Legislative Budget Committee. *Department of Corrections Privatization Feasibility Study, Report 96-2* (Olympia, WA, 1996).

55 Florida OPPAGA, *Review of Bay Correctional Facility and Moore Haven Correctional Facility*, Report No. 97-68 (Florida OPPAGA, April 1998).

56 Although the OPPAGA is a unit of the Office of the Auditor General, it reports directly to the state legislature.

companies that operate private prison facilities in Florida (this may include both vendors under contract to the CPC and those under contract to the DOC). A separate oversight board, the Florida Corrections Commission, was established in 1994 and is “charged with reviewing the effectiveness and efficiency of [Florida’s] correctional efforts, recommending policies, and evaluating the implementation of approved policies.”⁵⁷

Not surprisingly, these different parties do not always favor the same measure of privatization benefits. In its *Annual Report* for the fiscal year 1996-97, the DOC argued that *all three* privately managed adult prison facilities were *more expensive* than similar publicly run facilities would have been.⁵⁸ Using a somewhat different approach, the OPPAGA reached a similar conclusion. Nevertheless, the OPPAGA report included responses from the Correctional Privatization Commission, the Corrections Corporation of America, and Wackenhut proposing alternative methodologies—ones that led to conclusions directly opposed to those reported by the DOC and the OPPAGA.

The Department of Corrections’ estimates are somewhat biased against the privately managed firms. The per diem rate for the men’s public prison is derived as the *average* of nine other facilities; all but one of these public facilities is substantially larger than any of the private facilities being analyzed.⁵⁹ Given the economies of scale in prison operation, this approach understates the public sector cost of running a prison comparable in size to Bay or Moore Haven.

Nevertheless, the OPPAGA reached a similar conclusion from a more appropriate starting place. It compared two private men’s facilities (Bay and Moore Haven) with a single comparably-sized public facility, the Lawtey Correctional Institution. In its analysis, the OPPAGA started with the management fee due to CCA and Wackenhut (for running Bay and Moore Haven, respectively); it then deducted monitoring costs paid by the management companies, property taxes *not* paid, and medical insurance co-payments collected from prisoners and retained by the prison operators. For the Lawtey facility, the OPPAGA used the annual cost of operations, health services, and education programs reported for this facility by the Department of Corrections in its *Annual Report*. All three cost estimates were then adjusted for differences in scale economies, the scope of management responsibilities and the quality of services provided.

The OPPAGA estimated that Moore Haven was more expensive to operate than its public sector equivalent; it also argued that the Bay facility was only 0.2 percent cheaper. Neither private facility achieved the 7 percent cost savings required by law.

57 Commissioners are appointed by the Governor and with the approval of the state Senate. The Commission’s mission statement appears on its web site, located at <http://www.dos.state.fl.us/fgils/agencies/fcc/>.

58 These estimates are reproduced and analyzed in Florida Department of Corrections, *Privatization in the Florida Department of Corrections* (1998). Available at web site (time stamped April 28) www.dc.state.fl.us/administrative/reports/privatize/index.html.

59 Apart from the one public facility with an ADP of 733, the remaining public prisons housed between 1214 and 1719 inmates on average. In contrast, the observed average daily populations for the privately operated Bay and Moore Haven facilities were 708 and 706 respectively. If these two prisons were assumed to operate at 95 percent of capacity, they would house approximately 713 inmates on average. Each of these private facilities has a contract maximum of 750 beds.

In response to this finding, CCA proposed some adjustments that substantially change the interpretation of the data: they argue that private management at Bay and Moore Haven *saved* taxpayers, respectively, 8.3 and 6.0 percent of state costs. This difference arises primarily from three simple changes: an increase in the CCA's credit for taxes paid to the state, an increase in CCA's credit for the "Inmate Welfare Trust Fund Net Revenue,"⁶⁰ and a decrease in the state's adjustment for "medical costs for higher medical grade inmates at Lawtey."⁶¹ The OPPAGA itself rejected these three CCA amendments, observing that CCA sought to claim credit for more tax revenue than was properly attributable to its Bay facility,⁶² that it retained custody over Inmate Welfare Trust Fund balances,⁶³ and that Lawtey inmates had considerably more medical needs than those at the Bay facility.

This debate is further complicated by an adjustment that the OPPAGA could have made but ultimately rejected. As in Louisiana, the state retirement system was not fully funded by past payroll deductions. To eliminate this shortfall, a surcharge of 5.78 percent was included in the the payroll costs reported for Lawtey. The OPPAGA justified counting this surcharge, stating that "it is still a cost to the taxpayers. Privates do not pay this and thus should be able to reduce costs in comparison to state by at least 5.78% of payroll."⁶⁴

This accounting decision biases the comparison against the public facilities, however. The unfunded liability was incurred in the past; the surcharge was imposed to collect the funds needed to cover that liability. To compare the *current* costs of operating public and private facilities, the surcharge should not be counted. In other words, payroll costs at the Lawtey facility should be 5.78 percent lower than what is reported by OPPAGA. Omitting this surcharge brings the cost of the public and private facilities yet closer together, although the end result does not change the basic conclusion: there is no strong evidence indicating that contracting for these facilities rather than direct government operations saved taxpayers' money in Florida.

Adult Prisons in Texas

In 1987, the Texas State Legislature enacted a law authorizing the Texas Department of Corrections to contract with private vendors and county commissioners to finance, construct, operate, maintain or manage correctional facilities. In June of that year, a request for proposals was issued offering the opportunity to operate four 500-bed prisons, to be structured as pre-release centers, with programming designed to reintegrate prisoners back into society upon their release. Such programming would

60 This trust fund is an account containing the revenue (in excess of expenses) from the prison commissary, vending concessions and inmate telephone service.

61 A fourth small adjustment by CCA remains unexplained: the "unadjusted" per diem reported by CCA for Lawtey exceeds that found in the OPPAGA report by \$.36, OPPAGA, p. 38.

62 According to the OPPAGA report (p. 59), CCA sought to claim credit for taxes paid on income from other facilities.

63 According to the OPPAGA report (p. 13), this trust account is established in the name of the private contractor operating the prison. However, current law requires the contractor to obtain the approval of the CPC commissioner before using these funds for anything other than the purchase of items for resale. In contrast, state profits from the prison commissary and inmate phone usage are used to offset prison operating costs.

64 OPPAGA, p. 36.

include educational and vocational programs as well as counseling and treatment for drug and alcohol abuse, domestic difficulties, and other problem areas. Contracts were ultimately awarded to the Corrections Corporation of America (CCA) for two facilities, and to the Wackenhut Corrections Corporation for two other 500-bed facilities.⁶⁵ The two facilities operated by CCA were located in Cleveland and at Venus, Texas. The two operated by Wackenhut were in Bridgeport, and Kyle, Texas. These facilities began receiving prisoners during the summer of 1989.

The law specified that the state could not contract with a private vendor without an assurance that services would cost at least 10% less than the state would have to spend for an equivalent facility. The task of determining if the private firms were delivering the service at least 10% below the state's cost was given to the Sunset Advisory Commission. The challenge was to find comparison institutions operated by the state. The statute specified that the commission should analyze the cost and quality of services in the private prisons as compared to the cost and quality of any similar state services. However, as the commission noted in its 1991 report, "The development of a cost estimate was complicated by the fact that the TDCJ did not, and still does not, operate a comparable facility."⁶⁶

The commission therefore requested that the Texas Department of Criminal Justice develop two cost estimates: (1) the total cost to the state of contracting for the operation of the privately operated prisons, and (2) the total cost to the state if TDCJ operated the facilities directly. The estimate of the former cost included actual contract costs plus a number of other direct and overhead costs borne by the state in support of this contract. The second estimate included all direct and indirect costs that would be associated with direct government operation of the CCA facilities and, separately, the Wackenhut facilities. The commission concluded, from a comparison of the actual costs and the estimated costs, that contracting saved the state 14-15 percent—more than the required 10 percent. However, some of the savings to the state was in the form of payments by each of the firms to local governments that approximated the taxes that the firms would have paid if the property were privately owned. Because the state owned the facilities, with the firms contracted to operate them, it makes little sense to require the firms to be liable for any such taxes. Moreover, the cost to the state of the capital asset is the same, regardless of whether the facilities are managed by the private firms or the TDCJ. Not counting these payments in lieu of taxes, private operation appears to cost the state 8.8 or 9.7 percent less than direct TDCJ operation, depending upon the facility—or slightly less than the savings required by statute. The payments in lieu of taxes appear to be simply a fee paid by the private firms to governments so that the net cost of contracting to Texas exceeds the 10 percent threshold.

An examination of the commission's report indicates that the principal sources of savings associated with contracting, apart from this payment, were lower operating costs and a lower overhead expenditure by the state. Operating costs were \$1.53 to \$1.96 lower on a daily per prisoner basis, state overhead costs were \$1.36 less for the private facilities. The precise reason for the lower operating costs cannot be identified because the report provides only aggregate-level expenditure data.

65 The RFP initially requested that contractors construct the prisons as well as operate them, but the state subsequently decided that it was less expensive for the state to construct the facilities and to own them. Consequently, the contract was written as an operations contract only.

66 The State of Texas, Sunset Advisory Commission, Recommendations to the Governor of Texas and Members of the 72nd Legislature: Final Report (March 1991).

In short: the evidence from Texas suggests that the private firms are delivering a service that would cost the government approximately 9-10 percent more if the state's corrections department operated the facilities directly. This assumes that the estimates of the department's costs of direct operation are accurate, of course. Lacking more information about how these costs were estimated, it is not possible to evaluate them.

Arizona's Prison for Men and Women

In 1993, the Arizona Department of Corrections awarded a contract to the Management and Training Corporation to design, construct, operate, and own a 450-bed minimum security state prison for men and women. This prison, the Marana Community Correctional Treatment Facility, was evaluated by Charles Thomas to assess how the facility's cost and performance compared with other comparable institutions in Arizona.⁶⁷ Unfortunately, no equivalent facility operated by the Department of Correction existed in the state. The Marana Facility is the only one in the state that houses both men and women. Other things being equal, that fact alone would affect any cost comparison significantly because women prisoners are generally more costly to house than men. Thomas acknowledged a variety of differences between the Marana facility and others. For example, many of the publicly operated prisons used for comparison housed prisoners in tents, which no doubt affected the level of per inmate expenditure in these facilities. Moreover, the Marana Facility, by design and legislative wish, provides a higher level of programming—both in the types of programs and the level of inmate involvement in them—than other Arizona facilities generally. Thomas's solution to this was to compare costs at Marana to the average costs of all 15 minimum-security prisons operated directly by the state's Department of Corrections.

During fiscal year 1996, the operating costs of the Marana Facility, including adjustments for payments by the management for *ad valorem* property taxes, were \$13,140 per prisoner per year, or \$35.90 per day. This compared to an average operating cost for the 15 state-operated minimum security prisons that year of \$15,766 per prisoner per year, or \$43.08 per day, a difference of almost 17 percent.

However, the Marana Facility was not the least expensive of the minimum security prisons operating during FY 1996. Three publicly operated facilities were less costly (before crediting the private facility for payment of property tax). Indeed, seven of the fifteen publicly operated facilities were within five percent of the cost of the Marana Facility. Even after adjusting for payment of property taxes by the management firm, Marana still remained more expensive to operate than two of the public facilities. In light of this, Thomas concluded "Given the limitations of the available data and the heterogeneity of the facilities, it would be speculative to conclude that a precise cost savings had been achieved."⁶⁸

67 C.W. Thomas, *Comparing the Cost and Performance of Public and Private Prisons in Arizona* (Gainesville, FL: Center for Studies in Criminology and Law, University of Florida, 1997).

68 C.W. Thomas, *Comparing the Cost and Performance of Public and Private Prisons in Arizona* (1997), p. 93.

Summary

Perhaps the main finding of this review is that only a very small percentage of those facilities operated by private firms have been evaluated systematically to determine how much more or less the relevant government would spend in the absence of contracting for operations. Ninety-one contracts existed on December 31, 1997 with privately operated secure confinement facilities that held prisoners on that day, and some undetermined number of facilities also held prisoners sent to them through non-contractual means (that is, via an intergovernmental agency agreement). The number of contracts that have been issued during the past decade is much higher. But only a handful have been subjected to close scrutiny with respect to their costs, relative to the cost of directly government provision. Moreover, some of these studies examined contracts that were negotiated in the early days of this industry. It is difficult to have much confidence in conclusions about the relative costs of public versus private provision when we have systematic cost comparisons of such a small and dated subset.

In Florida and Arizona no strong evidence of significant savings exists. In Louisiana, Tennessee, and Texas, the studies find that contracting did reduce costs to government. Some of the savings reportedly associated with contracting are seen to flow from lower spending by state governments for “overhead” administrative functions. These savings may only be apparent, an artifact of how government expenditures are allocated to all correctional facilities in the state. Governments will not actually realize these savings unless they actually reduce overhead spending in conjunction with contracting, rather than merely shifting the allocated share of an unchanged expenditure to the government-operated facilities.

Generally unstudied in these few evaluations is the potential for either governments or private firms to control specific types of costs, such as spending for prisoner health care. Expenditures for prisoner health care has been rising at a much faster rate than for other non-medical correctional activities, in part because prisons are subject to the same inflationary pressures experienced in the broader health care marketplace. However, prisons have generally lagged behind other sectors in developing procedures for managing these costs. Private firms that operate prisons are certain to implement “managed care” strategies to contain costs, all of which could also be adopted by public correctional agencies.⁶⁹

⁶⁹ See Douglas C. McDonald, *Managing Health Care and Costs* (Washington, DC: National Institute of Justice, 1995).

4. How Well Do Privately Operated Prisons Perform?

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, then privatization no doubt achieves that purpose. But advocates of privatization often proclaim other goals. For example, the President's Commission on Privatization, established by President Reagan, described contracting—and broader private participation in government generally—as a means not only of increasing the efficiency but also the effectiveness of public administration. Thus: “Contracting the administration of jails and prisons at the federal, state and local levels could lead to improved, more efficient operation.”⁷⁰ More recently, the National Performance Review has also supported privatization as one means of improving effectiveness as well as efficiency. Is there any evidence that contracting has, indeed, improved prison operations or, more broadly, the performance of prisons? Or, does it appear that the increased attention to cost containment has resulted in *reduced* service quality?

Some read the studies to date as providing favorable support for privatization on this question. Charles Thomas and his associates write that studies of private prison operations in Florida, Louisiana, and the United Kingdom “demonstrate that these cost savings are often matched with performance improvements (e.g., fewer disturbances, fewer escapes, increased prisoner involvement in work programs, and more programs aimed at reducing recidivism).”⁷¹ Others are more cautious. Analysts at the U.S. Government Accounting Office (GAO) reviewed what they thought were the strongest studies and concluded that they “offer little generalizable guidance for other jurisdictions about what to expect regarding comparative operational costs and quality of service if they were to move toward privatizing correctional facilities.”⁷²

This chapter discusses different approaches to defining and monitoring performance, both with respect to government services generally and to prisons specifically. The current practice of monitoring and evaluating the performance of privately operated prisons is described, reporting results of the Abt Associates survey of correctional administrators. Finally, it reviews and assesses several studies that have sought to evaluate the relative performance of privately and government operated facilities.

What Does “Performance” Mean With Respect to Prisons, Public or Private?

Much of current thinking about performance in government has been framed, at least at the federal level, by the Government Performance and Results Act of 1993 (GPRA), the Clinger-Cohen Act of

70 President's Commission on Privatization, *Privatization: Toward More Effective Government* (Washington, DC: President's Commission on Privatization, 1988), p. xviii.

71 Thomas, Bolinger, and Badalamenti, *Private Census*, 1997, p. vi.

72 General Accounting Office, *Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service* (Washington, DC: U.S. General Accounting Office, 1996), p. 3.

1996, the revised handbook to the Office of Management and Budget Circular A-76, and the Clinton Administration's major management reform initiative—the National Performance Review (NPR). All have stimulated greater attention to improving government performance. More importantly, GPRA aims to improve the operations of federal government programs by changing management emphasis from *inputs* and *processes*, to *performance* and *results*. It mandates that each federal agency develop a strategic plan describing the agency's goals, objectives, and operations. Each agency is, in turn, to derive from its strategic plan an annual performance plan for each of its program activities, defining program-level goals, operations, and performance indicators.

The Senate Report accompanying GPRA emphasizes that measures of program performance should, to the extent possible, concentrate on *outcomes*, rather than *outputs*. Outcomes refer to “the actual results, effects, or impact of a program activity compared to its intended purpose,” whereas outputs refer to actual levels of activity or effort that are realized. The report provides an example of the distinction: eligible clients completing a job training program are outputs, but an increase in their rate of long-term employment is an outcome. “While recognizing that outcome measurement is often difficult, and is infeasible for some program activities,” notes the report, “the Committee views outcome measures as the most important and desirable measures, because they gauge the ultimate success of government activities.”

But how does one gauge the success of prison operations? What are the outcomes of prisons intended to be, whether publicly or privately operated? Reaching agreement on those questions has been difficult.

Throughout the two-hundred-year history of prisons in America, penal administrators, theorists, reformers, and lawmakers generally have sought to advance different goals through imprisonment, or, at least, to give certain ones more salience than others. Establishment of the nation's first penitentiary, in Pennsylvania, was animated in great measure by a desire to civilize punishment (depriving persons of newly-valued liberty rather than more “barbaric” corporeal punishments and executions), to save souls, and to teach self-discipline. Later reformers, and then penal administrators, embraced prisoner rehabilitation, which could be accomplished more by the application of scientific principles. “Penitentiaries” became “reformatories” and later “correctional institutions.”

Conceiving of imprisonment's purpose as rehabilitation or reformation of criminal offenders suggests an obvious outcomes-based performance measure: offenders' criminality following release from prison. But recidivism rates of prisoners have been depressingly high, and advocates of imprisonment have generally turned away from justifying their existence and assessing their performance according to such measures. Many have embraced, in recent years, a more minimalist conception of the purposes of imprisonment: the containment, or “incapacitation,” of criminals. If nothing else, prisons do remove prisoners from civil society and prevent their committing crimes outside the walls.

Simple incapacitation cannot be the only purpose, however. Rather, containment must also be constitutional. Faced with claims of appalling conditions in prisons, the federal courts began in the early 1970s to intervene in prison administration. Entire state prison systems were found to be in violation of the Eighth Amendment's prohibition of “cruel and unusual punishment,” and nearly all states were forced to spend large amounts of money to institute the required improvements.

In response to the perceived absence of national standards, correctional professional associations began to promulgate such standards for prison administration. Most prominent are those established by the American Correctional Association (ACA), first in the mid 1970s. Since then, the ACA has published standards for many different types of correctional facilities, including detention centers, boot camps, juvenile facilities, and adult confinements. The ACA also established an auditing system to accredit facilities.⁷³ Other standards for health care services were established by the National Commission for Correctional Health Care. Both sets of standards primarily prescribe procedures. The great majority are written in this form: “The facility shall have written policies and procedures on” They emphasize the important benefits of procedural regularity and effective administrative control, which flow from written procedures, and the careful documentation of practices and events.

For the most part, the prevailing professional standards prescribe neither the goals that ought to be achieved nor the indicators that would let officials know if they are making progress toward those goals over time. Two facilities could conform equally to an ACA standard by having a written policy on a particular issue, yet they could have diametrically opposite practices and outcomes on that issue. For example, both could have a written policy on the use of isolation, each of which covers topics like when isolation may be used, how long inmates can be isolated, and how reviews should be conducted to extend periods of isolation. One facility, however, might use isolation rarely, if at all, while the other could use it prodigiously.

The effect of these various trends has generally been to conceive of prison performance quite narrowly as conformance to law, state rules and regulations, and professional standards.⁷⁴ That is, performance tends to be measured according to procedural compliance, or *outputs*, in the language of the above-mentioned U.S. Senate report. The dominant focus is not on *outcomes*, other than achieving compliance or accreditation—which, arguably, is not a true outcomes-oriented measure of institutional performance. However, procedural compliance is what most state correctional agencies contract with private facilities to do.

What States Ask Contractors to Do

In general, state and federal governments demand in their contracts that privately operated facilities perform like their public sector counterparts. Statements of work in the contracts generally specify that compliance will be required with the same procedural rules, regulations, and standards that are in force in the public facilities. Although the Abt Associates survey did not explicitly ask if compliance with departments of corrections’ rules and regulations was required of contractors, monitors for eleven contracts volunteered that such compliance was indeed specified as a performance objective in the contract. An examination of a selected number of contracts also found this to be true. Correctional administrators also reported that 57 of the contracts in force at the end of 1997 required that facilities achieve ACA accreditation within a specified time. In addition, administrators reported that 61 contracts explicitly required compliance with conditions established in consent decrees or other court-mandated standards.

73 ACA accreditation requires a facility to meet all mandatory standards during a three-day inspection by an ACA audit team. The facility receives a score based on the proportion of optional standards the facility meets. To maintain accreditation, the facility must pass inspection every three years.

74 There are some exceptions to this, as discussed below.

There is no doubt that inclusion of such procedural requirements in contracts is necessary. As discussed in chapter five, governments may remain liable for the performance of contractors. Compliance with national standards and laws provides governments a measure of protection against lawsuits. However, examples of contracts that go beyond these to specify other performance outcomes are rare.

Monitoring Contractors' Compliance

Governments' practices of monitoring privately operated facilities vary widely. All contracts receive some oversight from the contracting agency. This ranges from minimal attention from a centrally located contract administrator to a combination of a contract administrator and one or more on-site monitors. Of the 28 state and federal government agencies surveyed by Abt Associates that reported having active contracts with privately operated facilities on December 31, 1997, twenty reported using monitors in addition to contract administrators. Several states required a strong background and knowledge of a government agency or corrections as prerequisites for monitoring correctional contracts. Others required experience as an internal auditor or investigator. Most governments required at least some level of formal training (up to 40 hours annually) in areas such as auditing, establishing performance standards and measures, ethics, and reporting disputes and conflicts. Contract monitors surveyed by Abt Associates often reported receiving more training than was required. One reportedly received more than 120 hours of training as a contract monitor. However, only 12 states reported providing training specifically geared towards the monitoring of privately operated correctional facilities.

The amount of time and labor spent on monitoring privately operated facilities also varied widely: from full-time monitors who spend a substantial proportion of their time on-site to virtually no monitoring at all. Of the 91 contracts for which we have information, 46 (52 percent) reported having monitors on-site on a daily basis (see table 4.1). These monitors generally worked full-time on these assignments, although some had responsibilities for more than one contract. A smaller number of contracts (16) had part-time monitors, who averaged about one day a week, visiting the facilities on a monthly basis. Ten contracts had monitors who devoted about the same level of attention to the contract, but visited only quarterly.

Table 4.1**Contract Monitoring Practices, by Frequency of Visits to Facility**

	Daily Visits	Weekly Visits	Monthly Visits	Quarterly Visits	No On-site Monitoring
Number of monitors	35	3	7	6	2
Number of contracts	46	5	16	10	3
Average hours per month spent on site, per contract	145	57.6	19	6.7	0
Average hours per visit, per contract	7.25	14.4	19	20	0
Total monitoring time (% FTE), per contract	84%	43.3%	18.6%	23.1%	0%

Note: Assumes a 40 hour work week. Nine contracts are not included in this table. Monitors of these contracts reported other arrangements for site visits, including visiting on an “as needed” basis or on an annual or semi-annual basis.

Source: Abt Associates survey of state and federal correctional administrators.

Monitoring Performance as Outcomes

An alternative to conceiving of prisons’ performance as procedurally based is to frame goals as *outcomes* and to identify and measure indicators that assess the facility’s progress toward accomplishing these goals. This conforms to how many correctional administrators see their job. Even though legislators, governors, correctional theorists, and other parties may differ in how they define the mission of the prison, correctional administrators in public and private facilities generally agree with one another on both the general and specific goals of their assignment. Prisons should be operated to maximize public safety, either by keeping prisoners behind walls or maintaining strong controls over those who are released for short periods of work or education or for short furloughs and the like. Prisons should also be safe internally, for both prisoners and staff alike. Prisoners should be occupied rather than idle. Health care should be sufficient, more or less equivalent to the standards prevailing in the free community (if only because the courts have so required). Each of these objectives could be translated into specific outcomes that are amenable to measurement. Public safety could be measured by numbers of escapes, for example, or institutional safety by numbers of assaults by prisoners on other prisoners or on staff.

Professor Charles Logan attempted to formalize such an approach in his definition of what he calls a “confinement model” of corrections and associated performance indicators.⁷⁵ This model does not assume the success of prisons is determined by their effects on criminality in the larger society. Rather, goals are limited to aspects that prison officials have the ability and resources to affect. Thus, the mission of corrections is to “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.” The goals associated with this mission statement are security (“keep them in”), safety (“keep them safe”), order (“keep them in line”), care (“keep them healthy”), activity (“keep them busy”), justice (“do it fairly”), conditions (“without undue suffering”), and management (“as efficiently as possible”). These goals are then given operational objectives and detailed performance measures, some of which rely on objective data (e.g., escape rates), some on subjective data (e.g., inmates’ perception of their risk of being assaulted). Logan has used this approach, and his model, to compare the performance of a privately managed facility in New Mexico to a federal facility.⁷⁶ (See below for a discussion of these studies.)

Even though most contracts for private operations of facilities do not incorporate outcomes-oriented performance objectives in a *systematic* way, monitors do report measuring such indicators in many instances. Monitors for 71 contracts reported in the Abt Associates survey that they track variously specified incidents occurring in the privately operated facilities. Sixty-nine reported monitoring inmate misconduct, 68 monitor escapes, 73 monitor inmate programming, and 49 staff turnover. How these measures were used to assess the contractors’ performance was not reported in the surveys. It does not appear that thresholds were contractually established to define acceptable or unacceptable ranges.

Nor do most contracts tie performance on such indicators to financial rewards. One exception is the Federal Bureau of Prisons’ contract with Wackenhut for the operation of the Taft Correctional Institution in California, which contains provisions for an award-fee incentive worth up to 5 percent of paid invoices. The contract also has provisions for reducing payment for poor performance. The other exception is a contract between the District of Columbia and the Corrections Corporation of America for the operation of the Correctional Treatment Facility, which permits financial rewards for meeting targets based on performance indicators.

In summary: even though most correctional administrators could agree upon a number of outcomes that could be used to assess their success, in addition to compliance with various procedural rules and regulations and recognized standards, most contracts have not taken such an approach. Rather, good performance is seen as complying with the terms of the contract—the rules, regulations, and standards included explicitly in the statement of work or by reference.

75 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), pp. 19-59).

76 Charles H. Logan, *Well Kept: Comparing Quality of Confinement in a Public and a Private Prison* (Washington, DC: U.S. Department of Justice, National Institute of Justice, 1991).

How Well Do Privately Operated Facilities Perform Relative to Government Operated Ones?

The Abt Associates survey of state administrators asked contract monitors to assess the performance of each of the facilities that were operated under contract with their agencies. More specifically, the monitors of these contracts were asked, “In your professional opinion, does the quality of service provided in this facility fall below, equal, or exceed (a) that of the contract requirements? (b) the quality of service in other reasonably comparable facilities in your system operated directly by public correctional authorities?” Most (68 of the 80 responses) reported that the contractors’ performance met the contractual requirements; only three exceeded requirements; ten were seen as failing to meet requirements. Similarly, most (58) were assessed to be the equals in terms of performance to similar facilities operated by the government correctional agency; ten were thought to exceed the performance of these government facilities; and twelve were deemed inferior. Thus, about three-quarters of those facilities under contract with state or federal agencies in the closing days of 1997 were assessed as delivering performance equivalent to that found in comparable government operated facilities in the same jurisdictions.

Another indicator of contractor performance is whether contracts are terminated or whether contractors are found to be in violation of the terms of contract. The Abt Associates survey of state and federal correctional administrators asked for information about contract terminations and contract violations. However, these inquiries focused on contracts that were active as of December 31, 1997. Terminations occurring before this date were reported summarily, with little characterizing information. Based on the data reported in the survey, it is not possible to determine whether contracts terminated before this date were terminated as a result of contract violations. Of the sixteen terminations reported, nine agencies reported that their sole reason for terminating their contracts was reduced need for beds. In probably only five instances, terminations occurred as a result of vendor violations.

- North Carolina terminated its contract with the Limestone County Detention Center in Texas citing operational problems and a reduced need for contractor capacity.
- Oklahoma also terminated its contract with Limestone County Detention Center in Texas for use of excessive force, idleness, and lack of attention to need. Reduced need for beds also contributed to the decision to terminate this contract.
- Colorado terminated its contract with Bowie County Correctional Facility in Texas citing “conditions.”
- Utah terminated its contract with Frio County Detention Center and Crystal City Detention in Texas citing several escapes with legal inability to prosecute.⁷⁷
- Montana terminated its contract with Dickens County Correctional Facility in Texas citing unsuitability of facility for long term inmate housing.

In each of these cases, the agency and the contracting facility were located in different states. These facilities were typically engaged to house prisoners in what amounts to a temporary “bed renting” arrangement to alleviate crowding in the state’s prisons.

⁷⁷ See chapter 5 for further discussion on prosecutorial jurisdiction and statutory authorization.

Eight agencies reported issuing violations to eleven facilities. For example, the Federal Bureau of Prisons reported several escapes occurring at Eloy Detention Center, which is operated under contract. Other agencies reported four other security-related violations. Oklahoma reported violations of inmate rights which included excessive use of force, disciplinary measures, idleness, and lack of attention to need.⁷⁸ Other common violations involved case management and medical issues.

That some private facilities have been found in violation of their contracts reveals little, if anything, about their relative performance vis-a-vis their public counterparts. Sub-par performance exists in publicly operated prisons, but no equivalent mechanism exists for finding the facilities in violation of written agreements (other than court orders or consent decrees). Superintendents of public facilities do not contract with their superiors to deliver institutional performance specified in legally binding terms. Moreover, many public facilities fail to achieve American Correctional Association accreditation, and federal courts have found the performance of many public prisons deficient.

Systematic Research to Evaluate Performance of Privately Operated Prisons

Eight research studies have been conducted and reported during the past decade of privately operated secure confinement facilities in the United States. All but one were described in chapter three, as each sought to evaluate both cost and performance of private and public facilities.

Perhaps the most striking aspect of this research literature is that it is so sparse and that so few government agencies have chosen to evaluate the performance of their contractors formally. Even though there exist over a hundred privately operated secure confinement facilities, there have been very few systematic attempts to compare their performance to that of public facilities. Most government agencies have been satisfied with monitoring compliance with the terms of the contracts. An examination of the available literature indicates that only a few states have sought formal evaluations of a contractor facility's performance. In a small number of other states, researchers have received grants to conduct research and have gotten agreements from private and public facilities to be studied.

The authors of these studies measured institutional performance using a variety of different indicators. These included outcomes-oriented measures such as post-release recidivism, numbers of escapes, uses of force, disciplinary problems, and major disturbances. Some studies also measured the extent to which prisoners were engaged in productive activities, including educational programming. Some assessed compliance with standards; some conducted audits, especially of security procedures. Others surveyed staff and inmates to learn their subjective assessments of the facilities. For an assessment of these studies, see the paper by Gerald Gaes, Scott Camp, and William Saylor, in appendix 2.

Some of the researchers argued that their findings indicated superior performance in the private facility studied. Charles Thomas, for example, concluded that the performance of the privately

⁷⁸ Oklahoma was the only state to report violations which caused termination. Strict adherence to our questionnaire, as noted, would not permit such a report.

operated Marana Community Correctional Facility in Arizona was comparable and in some respect superior to the average performance of all other 15 state-operated minimum-security facilities.⁷⁹ However, as discussed in chapter three, this facility was a specialized one for which no comparable government-run facility existed. Comparing its performance to an average of all other minimum-security prisons obscures the fact that it did better than some and worse than other public facilities. The more reasonable conclusion to draw from the data is that the Marana facility appears to have delivered a level of service within the same range found in the other fifteen facilities.

In his ten-year old study of New Mexico's only facility for women, Logan reported finding superior performance under private management, compared to the direct government management of the same facility one year earlier and compared to the performance of a federal prison in West Virginia.⁸⁰ Although a large number of dimensions were measured, using both objective data and subjective assessments of staff, the small size of the sample limits the generalizability of the findings. Moreover, the claim of superiority relies mostly upon the subjective data obtained from staff surveys, which were possibly biased in favor of private management, if only because contractors were invited into New Mexico to remedy an unsatisfactory system for housing women offenders.

Only a few studies had the advantage of comparing similar public and private facilities in the same jurisdiction. The State of Tennessee compared three facilities, two publicly operated and one privately operated, and concluded that all three were operating at essentially the same level of performance.⁸¹ In Louisiana, William Archambeault and Donald Deis compared two privately operated facilities with one government facility that was similar in design and mission. Performance was measured by a number of different indicators. On some measures, the authors interpreted the data as evidence of the private facilities' superiority; on others, the reverse was thought to be the case. In general, however, they concluded that the two private facilities outperformed the public one used as a comparison. We read the study and the data differently. We see no compelling evidence of the private facilities' superiority with respect to performance.

In their review of several studies comparing public and private prisons' performance, Gaes, Camp and Saylor reach the same general conclusion that GAO reported: that all of the existing evaluations are flawed in fundamental ways, and there is little information that is widely applicable to various correctional settings (see appendix 2). Accordingly, they believe that it is not possible to make any general statements about the ability of private contractors to ensure quality correctional services in comparison to public prison management.

The authors argue that the existing evaluations fail to coherently examine factors other than management differences that might influence correctional outcomes. That is, the existing evaluations assume that any observed differences in performance of public and private prisons can be attributed to management practices, when these differences may be caused by a variety of other factors that often

79 Thomas, *Comparing Cost and Performance*, 1997.

80 Logan, *Well Kept*, 1992.

81 State of Tennessee Select Oversight Committee on Corrections, *Comparative Evaluation*, 1995, p. 68.

are not under the direct control of management. Such factors include dissimilarities in the prisoner populations and the architecture of the facilities.

Gaes, Camp and Saylor note also that none of the existing evaluations tried to determine the extent to which management practices, ideas, and personnel were shared among public and private sectors. Little research attention has been given to the impacts that contracting may have had upon the public prison systems that have relied upon contracting for private imprisonment. Moreover, few researchers have attempted to document innovations developed by private contractors to improve services and/or reduce costs.

Summary

In general, it appears that state and federal governments are getting what they ask for in privately operated prisons, with some notable exceptions. Where contractors are sought to operate facilities owned by the contracting agencies, the contract procurement and monitoring procedures appear to be designed to obtain a facility that is a close equivalent to the public facility, differing mainly in the legal status of the operator (i.e., private rather than government). Rules and regulations to be followed are consistent with, if not identical to, those promulgated in the public corrections agency. Governments monitor contractors to ensure that they comply with standards, rules and regulations, and court orders, if for no other reason than to reduce their exposure to lawsuits. Great variability exists in the time and attention government monitors spend on their tasks, with some devoting virtually no time at all and others spending all of their time at a single facility. Where monitoring is so limited, it is unlikely that contracting agencies are able to provide more than a cursory assessment of the contractor's performance.

When state governments house prisoners in out-of-state facilities, they are looking more for beds on a temporary basis than for another facility that will be integrated into the states' public correctional agency. Although these contractual relationships were not studied closely, it is likely that the threshold for acceptable performance differs from that applied to management contracts in state-owned or perhaps privately-owned, in-state facilities. How well these out-of-state facilities are integrated into the public correctional agency is an issue, and expectations may be lower. Whether or not private prisons have gone beyond contract compliance and actually perform better on other measures of outcome is not well documented.

Only a few of the more than a hundred privately operated facilities in existence have been studied, and these studies do not offer compelling evidence of superiority.

5. Legal Issues Relevant to Private Prisons

The legal issues surrounding the privatization of prisons have elicited considerable interest and concern from public correctional officials and the general public since private prisons became a reality in the mid- to late 1980s. Over the past decade, however, the thrust of this interest and concern has changed as practical experience and legal precedent have answered some questions and raised others. A host of subsidiary legal and contractual matters continue to receive attention and provoke discussion. These range from questions about the use of force by private prison guards to highly-publicized problems resulting from certain states' lack of legislation governing out-of-state prisoners in private prisons.

With these and other legal matters increasingly well illuminated, it becomes possible to discern how relatively few legal topics turn on public-private distinctions. To a considerable extent, the legal requirements applicable to public correctional agencies—most notably the constitutional standards governing incarceration—are the same for their private counterparts. Meanwhile, only a handful of the legal issues peculiar to private correctional facilities have elicited legislative treatment. For the most part, the contracting process has become the real focus of legal innovation. In the coming decade, more of the resulting contractual arrangements will be carefully scrutinized and modified by public correctional officials and the courts.

This chapter briefly focuses on the major legal issues that have emerged in prison privatization over the past decade. The broad conclusions contained herein are treated at greater length in appendix 3.

The Legality of Delegating Correctional Services

While the legality of governments delegating the incarceration function to private entities generated considerable controversy in the 1980s,⁸² it would now appear that objections to prison privatization *per se* on constitutional delegation grounds have relatively little potency. To begin with, the federal constitutional delegation doctrine, grounded in separation-of-powers principles, is rarely invoked and has little direct application to private delegations.⁸³ Unless a government has absolutely no persuasive statutory authority for entering into private prison contracts, courts will be extremely reluctant to invalidate privatization arrangements strictly on delegation grounds. More generally, privatization is usually viewed merely as a delegation of certain *administrative* functions related to incarceration. Accordingly, only delegated rulemaking and adjudication functions that directly purport to exercise a government power are deemed to require special constitutional due process safeguards and to be subject to heightened judicial scrutiny.⁸⁴

82 See, e.g., Field, Note, *Making Prisons Private: An Improper Delegation of a Government Power*, 15 Hofstra L. Rev. 649 (1987); I. Robbins, *The Legal Dimensions of Private Incarceration* 396-413 (1988).

83 The Supreme Court has not invalidated a private delegation since the New Deal-era case of *Carter v. Carter Coal*, 298 U.S. 238 (1936).

84 See generally Lawrence, *Private Exercise of Governmental Power*, 61 Ind. L.J. 647, 650-653.

These constitutional due process mandates—often subsumed under a broader “delegation” heading—appear to require that certain types of rulemaking and adjudication be kept in public correctional agency hands.⁸⁵ As a practical matter, these mandates have generally meant that private delegations are permissible where the private entity’s role is subordinated to adequate public oversight and/or approval.⁸⁶ In this context, a due process or delegation challenge might be sustained if, for example, private correctional authorities had the final say in functions like writing rules on release or making disciplinary decisions.

The courts have yet to determine whether a private contractors’ *potentially* strong interest (it need not actually be shown to exist) in maximizing their inmate populations⁸⁷ would disqualify them from making rules or decisions directly affecting inmates’ liberty interests, including rules and decisions involving sentencing, parole, release dates, furloughs, discipline, and other matters affecting “good time” credits.⁸⁸ Still, numerous states have enacted legislation directed at retaining ultimate release-related decision-making and rulemaking in the public sector.⁸⁹ Other states have sought to retain such powers by contracts. In most cases, these statutory or contractual provisions have mandated that initial decisions or recommendations, even where formulated by private contractors, must be subject to final approval or ratification by public authorities.

85 The Due Process Clause has given use to an influential line of Supreme Court cases invalidating the delegation of discretionary rulemaking or adjudication powers to financially interested—or potentially interested—parties. In the rulemaking context, *see, e.g., Eubank v. City of Richmond*, 226 U.S. 137 (1912) (striking down local ordinance authorizing majority of landowners to impose set-back requirements on neighbors); *Carter v. Carter Coal Co.*, *supra*. In the adjudication context, *see, e.g., Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) (invalidating law authorizing private parties to garnish employee wages before employees can respond to garnishment in court); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (striking down state optometry board’s adjudication of conduct by corporate salaried optometrists where board was composed of individual optometrists with financial interest in reducing corporate competition). Note that these standards are applicable to the federal and state governments alike, since the constitutional restrictions on private delegations apply to the fifty states through the Fourteenth Amendment. *See Liebman, Delegation to Private Parties in American Constitutional Law*, 50 Ind. L. J. 650, 652-54 (1975).

86 *See, e.g., Currin v. Wallace*, 306 U.S. 1, 15-16 (1939) (creation of market controls by producers judged constitutionally acceptable based on government-imposed requirement that 2/3 of producers waive antitrust restrictions); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (industry officials allowed to propose non-binding minimum prices where officials functioned “subordinately” to a public commission); *Fuentes v. Shevin*, 407 U.S. 67, 80-83 (1972) (state-sanctioned prejudgment repossession of property by private companies permissible only if property owners have opportunity to resist seizure before a judge).

87 In some cases, the nature of the contract between the responsible agency and the private provider eliminates any financial interest on the part of the provider to maximize the inmate population—for example where the contract sets a fee that is independent of the number of inmates housed.

88 The most persuasive guidance, albeit in a property rights, rather than liberty interest, context, are the so-called “Todd Standards” first articulated in the case of *Todd & Co. v. SEC*, 557 F.2d 1008 (3d Cir. 1973). Under *Todd*, three factors were presented that enabled rulemaking and adjudicatory functions by private securities associations to accord with due process. First, the private entity’s rules had to be approved by a governmental authority before becoming effective. Second, all private decisions regarding rule violations and penalties had to be subject to governmental review. Finally, all such private adjudications had to be governed by a *de novo* standard of review giving no particular deference to the earlier decision. While the third factor has not been accorded much attention, many states have interpreted the first two factors to require that rulemaking for private prisons and adjudications by private prison contractors be subject to final government review and approval. *See, e.g.*, the state statutes mentioned in fn. 7 below.

89 Taking just a few examples of the many statutory restrictions of this nature, *see, e.g.*, Va. Code Ann. § 53.1-265 (barring private contractors from developing and implementing procedures for calculating inmate release and parole eligibility dates); Ariz. Rev. Stat. Ann. § 1609.01 (prohibiting contractors from taking any disciplinary action against an inmate); Colo. Rev. Stat. Ann. § 17-1-203 (preventing private contractors from making conclusive recommendations about parole of particular inmates); Fla. Stat. Ann. § 957.06 (preventing private prison contractors from granting, denying or revoking inmates’ good-time credits).

Liability for Private Prison Conditions

Of central importance to governments contemplating correctional privatization is the question of how privatization affects liability for the conditions in private prisons. For some time, relatively extravagant claims were made by both advocates and opponents of privatization that the advent of private prisons would insulate governments from liability exposure.⁹⁰ Claims were also made that privatization would substantially shield private contractors from inmate civil rights suits alleging constitutional harms.⁹¹ The following questions hung heavily over the debate: Can prisoners' rights—including those established under the Constitution—be adequately protected in a private correctional context? Does the delegation of day-to-day responsibility for facility management to a private contractor yield lower potential liability exposure for government correctional authorities? And does correctional privatization result in a lower litigation price tag for the government?

The answer appears to be a qualified “yes” to the first and second questions and a “maybe” to the third. As to the matter of safeguarding inmate rights, it is generally accepted that private prisons will be treated as “state actors” for purposes of civil rights suits,⁹² so that all relevant constitutional requirements will apply with equal force to private as well as public correctional facilities. Moreover, private prison employees will not be covered by the “qualified immunity” that shields from liability public correctional authorities who reasonably believe that their discretionary actions are lawful.⁹³ Finally, private prisons and officials will not be protected by other governmental immunities that may otherwise limit the monetary damages available to inmates suing over prison conditions.⁹⁴

As for liability exposure, a government's exposure will generally be lower if a private contractor is running a private facility. A contractor will be the primary defendant in inmate litigation, and government authorities generally will not have direct responsibility for the actions of contractor employees. In the vast majority of inmate cases—including most prisoner civil rights litigation where individual, rather than systemic, group harms are at issue—governments will not be deemed to have specific knowledge of, and therefore bear responsibility for, the specific acts and injuries alleged.⁹⁵

90 See, e.g., Wash. Post, March 23, 1986, at F6, col. 2 (describing how some politicians believed that government could escape liability through use of private prisons); M. Walzer, "Hold the Justice," New Republic, April 1985, at 12 (privatization may result in an "escape from the enforcement of constitutional norms").

91 See, e.g., Sullivan, *Privatization of Corrections: A Threat to Prisoners' Rights*, in G. Bowman, et al., eds., *Privatizing Correctional Institutions* 139 (1994).

92 See *West v. Atkins*, 487 U.S. 42 (1988). See also, e.g., *Street v. Corrections Corp. of America*, 102 F. 2d 810, 814 (6th Cir. 1996); *Payne v. Monroe County*, 779 F. Supp. 1330, 1335 (M.D. Fla. 1991).

93 *Richardson v. McKnight*, 117 S. Ct. 2100 (1997).

94 The Eleventh Amendment and state sovereign immunity statutes may prevent inmates from suing federal or state correctional agencies and supervisory officials in their official capacities. In these cases, plaintiffs may be limited to suits for monetary damages against officials in their personal capacity.

95 Under "Section 1983" civil rights litigation—which represents the overwhelming majority of inmate claims—a firm and its supervisory employees must be shown to have been directly involved in an alleged violation, have known about the violation or its likelihood of occurring, and been "deliberately indifferent" toward the risk, or have generated or validated a policy or custom that led to the violation. See, e.g., *Street v. Corrections Corp. of America*, *supra* at 818. See also generally *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978). Since public correctional authorities will have entrusted day-to-day management of prisons to private contractors, they will be less likely to have notice or knowledge of specific harms alleged to have caused injury to individual inmates.

While reliance on a private contractor will not prevent government authorities from being named in lawsuits or being exposed to liability for widespread or obvious problems relating to facility conditions, private contracting will greatly lessen the liability of government supervisory officials for most inmate claims alleging individual harm. These claims represent the most common type of prisoner lawsuit and assume a significant proportion of a correctional agency's litigation budget.

Government litigation costs at a particular facility may or may not be lower with prison management in the hands of a private contractor. A great deal depends on the nature of the facilities involved, the profile of the inmate population, and the risk management approaches taken by particular public versus private authorities. The latter approaches can themselves vary greatly according to the overall management plan, quality of staff, and claims handling procedures employed by those administering a specific prison facility or system. While it may be contended that private authorities can exercise greater flexibility than their public sector counterparts in given situations, this assertion cannot be readily substantiated.⁹⁶ Thus, even though a prudent government correctional agency will insist as a matter of course that a contractor indemnify and hold it harmless against all acts and omissions of the contractor arising under a management contract—and even though such an agency will similarly insist that it be named as an insured on any private comprehensive general liability insurance policy covering particular prison facilities—there is no way to tell for sure whether its litigation expenditures under privatization will be lower.⁹⁷

While some degree of liability exposure will still attach to governments that have privatized certain prison facilities, such exposure can be further reduced through the sensible use of monitoring personnel. Having on-site monitoring provides a mechanism by which government supervisory officials can take remedial steps upon learning of certain problems, thereby limiting the potential for a negligence lawsuit.⁹⁸

96 Some privatization proponents have asserted that private firms may prove more responsive to inmates and the general public in remedying problems that result in prison litigation. They contend that a private contractor can more more expeditiously to correct a problem or settle a lawsuit when political pressures are absent, fewer approvals are needed, and funding is more readily accessible. Also, a private firm's concern with market reputation and profitability is alleged to create incentives for flexibility and holding costs down. There remains no solid evidence or study to support these contentions, however plausible they may be.

97 Clear answers to this question are likely to be exceedingly difficult to obtain. To begin with, public entities do not carry third party liability insurance, so direct cost comparisons are impossible. Also, public correctional authorities and contractors alike would find it very hard to isolate with any precision all of their relevant litigation costs (staffing costs, particularly in the public sector, are hard to attribute exclusively to litigation-related functions), and may be reluctant to disclose their damage awards paid out. Ascertaining what portion of the contractor's per diem is attributable to litigation defense would probably be quite speculative. Finally, it would be extremely difficult to control for potentially wide differences in prison populations, facility conditions, and the past history of litigation at one or more facilities. Still, one could surmise that public authorities have a number of factors that could aid them in keeping certain litigation defense costs relatively low. These include the judicious use of salaried government attorneys to handle virtually all prison litigation, possibly less expensive claims handling, and the lack of a profit mark-up. Private contractors, by contrast, might feature relatively more expensive claims handling and legal assistance (e.g., though contract attorneys billing at market rates), as well as that portion of their fee allocated to such work.

98 Government correctional authorities may be liable for their own negligence in oversight even though management of a correctional facility has been turned over to an independent contractor. See *Logue v. United States*, 412 U.S. 521, 532-33 (1973). A monitor can prevent such negligence from occurring. Moreover, in Section 1983 cases, a monitor can keep supervisory officials accurately informed about situations that, if left unattended to, could give rise to charges of "deliberate indifference."

Employment and Labor Relations Issues

Employment and labor relations questions pose a number of important issues to government correctional authorities as well as private contractors, including concerns about private employees' right to strike. As a preliminary matter, it is important for a government correctional agency to ensure that a private prison management company is indeed treated as an independent contractor, with its own responsibility for compliance with all legal requirements imposed on private industry, including the Fair Labor Standards Act and relevant federal and state nondiscrimination laws.⁹⁹ It is also important for government officials to ensure that they have adequate statutory authorization to privatize corrections from the standpoint of civil service laws.¹⁰⁰

Private contractors will be subject to the National Labor Relations Act (NLRA), rather than labor legislation governing public employees. At an entirely new facility, this will mean that a contractor will not be permitted to interfere with any concerted activity taken by its employees. At an existing facility, however, it is extremely unlikely that a contractor will have to bargain with an existing union or adopt an existing union contract. Under the NLRA, an incumbent public employees' union will not be able to represent prison guards in a private employment setting.¹⁰¹ Only a special guards union—such as the United Plant Guard Workers of America—can represent prison guards under the NLRA. Even in the extremely rare case where guards at a public facility are already represented by such a union, a private contractor would not be bound by the substantive provisions of the existing labor contract unless the contractor were to indicate affirmatively that it would hire most of the named correctional officers at a facility or would explicitly consent to the terms of the existing contract.

While the right to strike clearly exists at private prisons, the potential for work interruptions also exists in the public sector, i.e., work slowdowns and “blue flu” outbreaks. Still, the potential for more serious disruption of prison operations can be blunted in two important ways. First, a private contractor can seek to have employees agree, individually or collectively, to a no-strike pledge.¹⁰² Contractors can also seek notification requirements that allow contractors to make arrangements for assumption of certain correctional responsibilities in the event of a work interruption.

99 If a management company were not an independent contractor, it could be deemed a "joint employer" with the government, which would prevent the contractor from having unfettered discretion over a range of personnel issues. This might emerge most critically where a government, as joint employer, was deemed to retain civil service control over employees, thereby negating the purported benefits of personnel flexibility that are supposed to attend privatization.

100 For example, in Washington and Colorado, courts have ruled that those states' civil service laws bar privatization. *See Colo. Ass'n of Public Employees v. Dep't of Highways*, 809 P.2d 988, 995 (Colo. 1991)(*en banc*); *Wash. Fed'n of State Employees v. Spokane Community College*, 585 P. 2d 474, 476 (Wash. 1978)(*en banc*).

101 Under the NLRA, "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership. . . . employees other than guards." NLRA § 9(b)(3), 29 U.S.C. § 159(b)(3).

102 Unions often agree to the inclusion of such clauses in labor contracts in return for a management agreement to seek peaceful settlement of contract disputes through an agreed-upon grievance procedure. The U.S. Bureau of Prisons contract for its privatized Taft, California facility provides that any collective bargaining agreement entered into during the period of the contract "should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout or other interruption of normal operations." Taft Contract at 14.

Inmate Labor Questions

The Thirteenth Amendment to the U.S. Constitution excepts convicted prisoners from its bar against “involuntary servitude.”¹⁰³ Courts, accordingly, acknowledge this “convict labor exception” and uphold laws mandating prison labor while finding no prisoner right to remuneration for prison work.¹⁰⁴ Against this backdrop, there is little reason to believe that private prisons, merely based on their for-profit nature, would create a persuasive basis for a Thirteenth Amendment objection.

In fact, federal and state regulatory schemes governing prison industry labor are designed to prevent exploitative situations from developing. In the federal system, a government corporation known as Federal Prison Industries (“Unicor”) manages all prison industry labor (roughly 20% of all federal inmates) and cannot sell its products and services in regular interstate commerce. Moreover, because they do not work voluntarily, prisoners working for Unicor are not “employees” under the Fair Labor Standards Act.¹⁰⁵ In the case of state prisons, the federal government has largely preempted state legislation by generally restricting the flow of prison products and services in interstate commerce.¹⁰⁶ While the Prison Industry Enhancement (PIE) Act of 1994 does allow prison-made goods from 50 pilot industry programs in various states to be sold in interstate commerce, prisons employing inmates in these programs must pay them prevailing or minimum wages and provide them with workers’ compensation coverage.¹⁰⁷ Questions remain as to whether private prisons will be authorized to operate prison industry programs pursuant to the PIE Act.

The biggest worry about inmate labor does not relate to such prison industries, but to increasing use of inmate labor to perform ordinary prison maintenance or service work. There is understandable concern that inmate labor may increasingly be used by for-profit contractors to handle more aspects of prison operation—including tasks traditionally performed by government employees. One way to draw boundaries in such situations is to use the same inmate staffing plans for private prisons that are used in public facilities. This creates a level playing field and allows for reasonable cost comparisons. Public correctional authorities should also attempt to ensure that, wherever possible, prison labor staffing innovations are accompanied by commensurate reductions in the per diem rates charged to the government by private contractors.

Other Important Legal Issues

A number of other legal issues have important implications for correctional privatization. These include public access to private prison records; private contractor access to criminal history records;

103 Only pretrial detainees are protected from involuntary labor. *See, e.g., Channer v. Hall*, 112 F.3d 214 (5th Cir. 1997).

104 *See, e.g., Berry v. Bunnell*, 39 F.3d 1056 (9th Cir. 1994).

105 *See, e.g., Vanskike v. Peters*, 974 F. 2d 806, 810 (7th Cir. 1992), *cert. denied*, 507 U.S. 928 (1993); *Nicastro v. Reno*, 882 F. Supp. 1128 (D.D.C. 1995), *aff’d*, 84 F.3d 1446 (D.C. Cir. 1996).

106 *See* the Summers-Ashurst Act, 18 U.S.C. § 1761.

107 18 U.S.C. § 1761(c).

the impact of bankruptcy laws on possible private contractor insolvency; private contractor use of force; and environmental law responsibilities. These topics merit brief discussion in turn.

Access to Private Prison Records

The shift toward private prisons has prompted concern that the public may be cut off from access to information necessary for proper accountability. A few key principles have emerged from the federal FOIA framework; state analogues, though too numerous and various to catalogue here, are likely to follow the same pattern. First, records relating to privatized facilities that are generated by public correctional authorities will be subject to public disclosure. Second, only private contractor records obtained *and held* by public agencies will be similarly available for public review.¹⁰⁸ Even then, however, exemptions for confidential “financial or commercial information” may limit disclosure, particularly if public authorities determine that disclosure might cause substantial competitive harm to a contractor.¹⁰⁹ Such is often the case with private prison proposals in competitive bidding processes. While the systematic collection of private contractor documents by public authorities might ensure adequate public access, other, less burdensome solutions include contractual requirements that simply require contractor compliance with FOIA.¹¹⁰

Private Contractor Access to Criminal History Records

To perform its prison management duties properly, private correctional contractors need access to criminal history records for two purposes: (1) to classify inmates properly and take other steps for the proper safety and care of prisoners; and (2) to screen potential private correctional employees. Of necessity, both of these needs affect the privacy rights and expectations of inmates and private citizens seeking employment in the field of law enforcement and corrections. As it turns out, there exist two related, but distinct, legal regimes at the federal level that safeguard these privacy rights and that would be accessible to private contractors.

The federal mechanisms established to permit transfer of selected federal criminal history records information (CHRI) to private firms represent a compromise between full disclosure and redacted or edited data which could hamper contractors’ ability to perform their contractual obligations.¹¹¹ For prisoner data, private contractors may rely on the Federal Bureau of Investigation’s National Crime Information Center (NCIC), which is able to link local, state, and federal criminal justice agencies for the purpose of exchanging CHRI. Public correctional authorities must first obtain such information

108 See *Dep’t of Justice v. Tax Analysts*, 429 U.S. 136 (1989).

109 See, e.g., *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 878 (D.C. Cir. 1992)(*en banc*), cert. denied, 507 U.S. 984 (1993).

110 In the future, another solution might be special legislation that mandates such a result for all privatized facilities. See N. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. Mich. J. L. Reform 249, 301 (1995).

111 At the state level, the policies are governed by state law, which reflects varied approaches too numerous to summarize within the scope of this report. Most of the mechanisms at the state level parallel and intersect with those employed by federal authorities.

and then summarize or characterize it for use by private firms.¹¹² Access thus far has not appeared to be a problem.

A separate federal regulatory regime, which embraces employment screening, governs the use of CHRI for purposes unrelated to the “administration of criminal justice.” CHRI can only be used for screening and licensing purposes pursuant to state and local statutes or regulations that are certified by the FBI’s Criminal Justice Information Division, Access Integrity Unit, and that are administered by designated state and local agencies. Here too, contractor access has not appeared to pose a problem. It is worth noting, however, that the Federal Bureau of Prisons has decided to conduct criminal background and records checks itself in the case of the Taft facility. This would obviously maintain consistent screening procedures.

Bankruptcy

Few topics surrounding privatization seem to generate as much concern as bankruptcy, yet generally speaking, such concern seems exaggerated. Bankruptcies involving private prisons have been virtually nonexistent over the decade-and-a-half of privatization and have been confined to those firms concentrating on the building of private prisons on a speculative basis. More important, public correctional authorities should be able to protect themselves against the untoward consequences of a potential contractor bankruptcy through proper monitoring and contracting.

A properly monitored contract should provide public authorities with some warning that financial problems exist. Annual financial investigations provide a baseline, while interim signals, such as complaints by certain vendors about missed payments, provide additional guidance that may militate in favor of prompt contract termination and the selection of another contractor (or resumption of public control). Public correctional agencies can also protect themselves by insisting in the contract that a contractor purchase business interruption insurance that names the relevant public agency as an insured.

Careful contracting and the competitive nature of the private prison industry are the best safeguards against serious problems developing from a bankruptcy. A general “termination for convenience” clause with a ninety-day phase-out or transition period can keep the public authorities outside the bankruptcy process (removing a facility from the bankruptcy process’ automatic stay and control by a bankruptcy trustee)¹¹³ and permit the public authority time to resume management of a facility or find another private operator. Moreover, a 90-day transition period also provides a government facing an impending private contractor bankruptcy with a significant financial resource with which to engineer a successful transition and cover most expected or unexpected damages. Due to the lag time in contractor invoicing—usually 30 days, followed by another 30 to 60 days for payments to be due—public authorities can withhold payment and use these sums for purposes of covering current operations and securing a new contractor.

112 See generally 20 C.F.R. §§ 20.21(b)(3), (c)(3).

113 The pre-petition termination of the contract can be ensured by a contractual requirement that notice of a filing of bankruptcy be given to the contractor several days or weeks in advance. See Ruben, *Legislative and Judicial Confusion Concerning Executory Contracts in Bankruptcy*, 89 Dickinson L. Rev. 1029, 1058-59 (1995).

Use of Force

Legal questions about the use of force often revolve around subtle matters of proper statutory authorization. The major issue for private prisons is whether the use of force generally, or specific variants thereof, including the use of deadly force, is properly mandated by the relevant law of the jurisdiction. Without proper enabling legislation or contractual provisions authorizing the use of force by designated private prison officials, it is possible that such personnel and the private firm could face criminal and civil liability.

The applicable legal standards for the use of force vary tremendously from place to place. Some laws may adequately treat the use of force generally, but insufficiently address the use of deadly force in a variety of situations. Other states, for example, recognize a common law right of any citizen to use deadly force in certain circumstances, including the apprehension of one previously arrested for a felony.¹¹⁴ For states that have adopted the Model Penal Code, which permits correctional officers to use deadly force under certain conditions, private correctional firms may be so authorized if their employees are brought statutorily within the definition of “correctional officers.”¹¹⁵ A still different approach is taken by some states like Louisiana, which, in its correctional privatization statute, specifically authorizes private firms to use force and further prescribes standards and procedures for licensing private correctional employees to use weapons.¹¹⁶

Even if a contractual solution is adopted on a case-by-case basis—delegating certain use of force and weapons use powers to private correctional management firms—care must be taken to explore all of the nuances involved in various scenarios, including escapes and actions taken outside of a correctional facility. American Correctional Association (ACA) standards address many dimensions of the use of force in generic ways,¹¹⁷ but specific policies and procedures are necessary to comply with state statutes and case law that have evolved under the Eighth Amendment. So-called rent-a-cop statutes delegating certain use of force powers to private security companies may not be sufficient to cover many of the circumstances encountered by private contractor guards. Also, correctional officials must be sensitive to interjurisdictional issues about the use of force, particularly in the case of escapes where use of certain types of force may not be authorized beyond a facility’s perimeter. All of this requires government correctional officials and their legal staffs to think through very carefully all of the possible scenarios requiring different kinds of force and to ensure that there is proper authorization for their use.

114 This is ostensibly the case, for example, in Michigan. *See, e.g., People v. Whitty*, 96 Mich. App. 403, 292 N.W. 2d 214 (1980).

115 *See* Model Penal Code §§ 3.04-3.07, *cited in* Wooley, *Prisons for Profit: Policy Considerations for Government Officials*, 90 Dickinson L. Rev. 307, 323 (1985).

116 *See* La. Rev. Stat. Ann. § 39:1800.4(D)(5), (6). Note, for example, that the State of Ohio similarly requires a private correctional officer working at a correctional facility housing out-of-state prisoners in Ohio to carry and use firearms only if the officer is certified as having satisfactorily completed an approved training program designed to qualify persons for positions as special policemen, security guards or persons otherwise privately employed in a police capacity. Ohio Rev. Code § 9.07(E).

117 *See, e.g.,* ACA Standard 2-4206, for example, which simply requires a written policy and procedures to restrict the use of force as a last resort in cases of justifiable self-defense, protection of others, protection of property, and prevention of escapes. Elaboration is left to prison officials.

Environmental Law Concerns

Environmental concerns unique to a privatized correctional facility are few. The only major questions concern responsibility for environmental impact statement (EIS) preparation in the case of new prison construction and proper allocation of the risk of hazardous waste cleanup liability.

The former issue will usually be the responsibility of the public correctional agency. Although a project proponent could be public or private, the government agency most involved with the project is the party responsible for the preparation of an EIS.¹¹⁸ The latter issue revolves around the way in which public correctional agencies and private contractors choose to allocate their risk through carefully drawn indemnification agreements. Due to the transfer of land and property rights that may occur between governments and private contractors in a particular construction, sale, or lease arrangement, hazardous waste liability presents real concerns. Experience has shown that contracting parties need to articulate indemnification arrangements expressly to minimize the risk of non-indemnification.¹¹⁹

Regulating Interjurisdictional Private Prison Contracting

Prison privatization, as commonly conceived, involves a government correctional agency contracting out correctional management work to a private contractor that operates within the agency's political jurisdiction and is subject to statutes and regulations promulgated by that jurisdiction. Correctional privatization can, however, involve other arrangements between public and private correctional entities that span multiple jurisdictions. These arrangements can encompass the transfer of prisoners to private contractors in distant localities and the interplay of several jurisdictions' laws that affect such a transfer. Two basic patterns characterize this phenomenon of interjurisdictional contracting. The first involves indirect arrangements where public correctional authorities send inmates to another jurisdiction via an intergovernmental agreement or contract, and the receiving jurisdiction in turn subcontracts to a private contractor to run the facility where the inmates are housed. The second arrangement involves the leasing of bed space directly from a private contractor in a foreign jurisdiction. Many of these prisons are built and operated on a speculative basis.

Both of these interjurisdictional arrangements have generated considerable controversy and legal problems. Correctional specialists have criticized the fact that the receiving facility may not have the legal authorities to allow it to cope with a variety of critical situations, including inmate escapes and

118 See *Seattle Audobon Society v. Lyons*, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994) ("Agencies may not delegate the responsibility of preparing an EIS to private parties...."). This is the standard enunciated with respect to the federal National Environmental Policy Act (NEPA). State environmental protection acts (SEPA) may have different requirements. See, e.g., G. McGregor, *Environmental Law and Enforcement* 10 (1994). Moreover, some SEPA require different EIS preparations depending on whether a project is deemed public or private in nature. See, e.g., Wash. Rev. Code § 43.21C.030. In most cases, however, a private prison should be deemed a public project based on its governmental function. Cf. *Weyerhaeuser v. Pierce County*, 873 P.2d 498, 504-07 (1994) (*en banc*) (holding that a private contractor's construction and operation of a landfill is a public project because the handling and disposal of waste is a governmental function).

119 See Hill, *Contractual Indemnification for Environmental Liabilities*, 21 Colo. Law. 943, 944 (1992).

prison emergencies. The law in most cases has lagged behind these correctional realities.¹²⁰ A good example is the case of two Oregon prisoners who escaped a few years ago from a private prison in Texas and yet were unable to be charged with a crime, since Texas law at the time did not recognize escape from a private prison as a felony.¹²¹ More recently, a lack of legal oversight mechanisms was highlighted in the case of the privately-operated Northeast Ohio Correctional Center (NOCC) in Youngstown, Ohio, which accepted out-of-state prisoners from the District of Columbia. The NOCC experienced two fatal prison stabbings within a year of its opening, allegedly due in part to the acceptance of out-of-jurisdiction inmates without an adequate classification system and without standards requiring sufficient criminal history information about the prisoners.¹²²

In response, many states have recently crafted detailed legislative solutions. Two notable examples are Ohio (in direct response to the NOCC difficulties) and Texas.¹²³ These new statutes attempt to give state correctional agencies greater authority to prescribe minimal operating standards for such facilities and to eliminate gaps and inconsistencies that have emerged in the legal treatment of private facilities housing in-state versus out-of-state inmates. They address in particular the need for private prisons with out-of-state inmates to be inspected by state authorities, maintain proper staffing, coordinate closely with local law enforcement officials, reimburse them for the costs associated with prison escapes and disturbances, and reject foreign prisoners if necessary for a variety of reasons, including patterns of institutional violence in their correctional record. More such legislation can be expected in coming years.

Legal Dimensions of Contracting

Today, the success or failure of a private prison arrangement may critically depend on the skill with which contracts are negotiated. Public authorities must give close attention to the purposes served by contracting and the degree of specificity which they seek to build into the agreement. In the absence of an adequate statutory or regulatory framework, a contract may have to import from the outside and treat in detail a number of issues that would otherwise govern various aspects of prison operation. Correctional authorities should also be sensitive to the need to create, wherever possible, a level playing field between public and private prisons to promote fairness, increase competition, and allow for meaningful cost comparisons.¹²⁴ Requests for Proposals (RFPs) can be structured in such a way as to elicit many kinds of contractor information and plans which public officials can scrutinize and evaluate in putting together a tight and effective contract.

120 See Associated Press, *Private Prisons Shackle Texas with Confusion: State Laws Haven't Caught Up with New Phenomenon*, Chicago Tribune, Nov. 7, 1996 at 34.

121 See *Prison Brake: Texas Needs More Scrutiny of Private Prisons*, Houston Chronicle, Sept. 3, 1996 at 18A.

122 See Washington Post, February 23, 1998 at B1.

123 Ohio House Bill 293, effective March 17, 1998; Texas Senate Bill 367, May 7, 1997.

124 A good example of this is ensuring that private contractors do not make money from things like inmate phone service, commissary sales, and the like. Income from these, if it exists, should be reflected in lower per diem rates or should be paid into the general fund.

Contracts themselves can ensure better performance and cost effectiveness through well-drafted provisions, the inclusion of objective standards, relatively short contract periods (e.g., 3-4 years) and renewal opportunities, and broad termination clauses and penalty provisions. Contracts can even specify cost savings requirements, which can be phrased in terms of a provider delivering correctional services at significantly less cost or with significantly better services at the same or less cost than that which public correctional authorities would need to pay if they did the job themselves.¹²⁵ Drafters must be careful, however, not to inadvertently bestow third-party contract beneficiary rights on inmates or the public.¹²⁶

Public correctional authorities should also be wary of excessive use of alternative dispute resolution provisions in a contract—particularly those relating to arbitration—to handle disputes with contractors. Although arbitration is appropriate for handling issues surrounding payment and possibly certain issues regarding the satisfaction of certain technical standards (including certain American Correctional Association standards), its use in other contexts can deprive public officials of the effective contractual and legal tools they need to ensure prompt contractor compliance. In cases where mandatory ACA standards are at issue, or where resort to injunctive relief may be necessary (which covers a good deal of contractual content), maintaining a public agency’s flexibility to seek immediate recourse in the courts is essential.

125 The State of Tennessee actually mandates by law that private prison management contracts be at least 5% less expensive than the likely full cost of the state providing correctional services itself. *See* Tenn. Code Ann. § 41-24-1-4(c)(1)(E).

126 Prisoners do not automatically possess such rights. A contract must intend to grant them legally enforceable rights to sue under the contract, which can occur through conscious adoption of contractual language or through a court reading such an intent into a contract and its surrounding circumstances. There is some precedent for courts reading an implicit intent to bestow third-party beneficiary status on prison inmates, so drafters must explicitly disavow such an intent if they do not wish to create such rights in prisoners. *See, e.g., Owens v. Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979) (court finds intent to bestow third-party beneficiary status on federal inmate housed in county jail based on U.S. Bureau of Prisons statutory policy to safeguard federal prisoners while in the care of county governments).

Appendix 1

Comparing Public and Private Prison Costs

by

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How much money do taxpayers save when a prison is privatized? What are the sources of these savings? These questions have received increasing attention from elected officials, civil servants, academics and policy analysts as more and more prisons are transferred to private management. Today, roughly 5 percent of adult jail and prison inmates in the United States are housed in privately-run facilities.¹ This proportion is likely to increase as states come to rely more heavily on private companies to supervise expanding prison populations. For example, the Governor of Tennessee announced his support early in 1998 for proposed legislation that would “privatize the management of up to 70 percent of the state’s prison system.”² Some analysts predict that the private sector’s share of the prison “market” will more than double in the next five years.³

This privatization movement has stirred considerable controversy, on both philosophical and financial grounds.⁴ Among those invoking financial data, supporters of prison privatization cite potential cost savings as high as 50 percent; others claim that the evidence to date in support of these claims is ambiguous at best.⁵ The strength of these claims ultimately depends on the extent to which they can be replicated in carefully-designed studies that compare cost reports for a number of years from similar privately- and publicly-managed facilities. Although studies published to date do not yet attain this level of rigor, it is still possible to draw several conclusions and to formulate a number of hypotheses that merit further testing.

1 Preliminary Findings and a Basis for Comparison

Not surprisingly, reported costs per inmate-day are highly sensitive to

- i. the assumptions made about public sector overhead and indirect costs; and
- ii. the definition of variable costs used to adjust for differences in inmate populations across facilities in a particular jurisdiction.

Some of the more extravagant claims made on behalf of prison privatization can be traced to inappropriate handling of these issues. This chapter reviews the evidence from a number of recent privatization studies, with particular attention paid to data reported for Tennessee, Louisiana and Florida. *These three reports seem to indicate that the cost savings attributable to privatization have been (and will continue to be) far less than 10 percent of state spending on comparable facilities.*

1 Johnston (1998), p. 35. Once CCA merges with the REIT that it created in July 1997 (i.e., CCA Prison Realty Trust), then slightly more than 2.5 percent of all U. S. adult inmates will be housed in facilities managed by a single company.

2 Sundquist (1998), Wade (1998). Death-row inmates would remain in a state-operated facility. Although the sponsors of the bill later decided that they lacked the support needed to gain passage this year, they will “probably” try again in 1999. Locker (1998), Humphrey (1998).

3 Bates (1998).

4 See Murrell (1997) for a statement of the arguments against privatization and Logan (undated) for a refutation of the most common objections.

5 The US-GAO (1996) report concluded that existing evidence was inconclusive. This report has been strongly criticized by those generally favorable toward privatization initiatives. See, for example, Logan (1996) and Thomas (1996). See Florida Corrections Commission (1996) and Zupan (1996) for more extensive annotated bibliographies.

Reports for California, Arizona, Texas, and the United Kingdom paint a far rosier picture of the gains to be realized from privatization, but the aggregate nature of the data published in these reports makes it difficult to evaluate these claims. Nevertheless, in every study that itemized expenditures and adjustments, much of the reported difference between public and private sector cost estimates can be traced to differences in the allocated burden of state-level overhead costs. If this is reported difference is to reflect actual cost savings, then privatization must induce cutbacks in state spending on central office operations before taxpayers realize this benefit.⁶

The review of two public and one private facility undertaken by the Tennessee Fiscal Review Committee (1995, hereafter cited as the FRC report) stands out as the most detailed of the studies now available. To a considerable extent, this report could serve as a model for future privatization studies. Supplemented with data gathered for the same three facilities by the Washington State Legislative Budget Committee, the Tennessee privatization experience suggests some systematic differences between privately- and publicly-managed prisons. In particular, audited prison cost data for the fiscal year ending June 30, 1994 indicate that

- i. non-medical operating costs per inmate-day were virtually identical in the public and private facilities studied in Tennessee;
- ii. non-medical operating costs were allocated differently in public and private facilities studied in Tennessee: more was spent on corporate overhead and administration (including monitoring by state officials) in the private facility (and correspondingly less was spent on security);
- iii. the level of spending on prison employees differed substantially between the public and private facilities studied in Tennessee: the amount spent on wages and salaries per inmate-day was higher in the publicly-managed prison;
- iv. the *nature* of labor costs also differed between the public and private facilities studied in Tennessee: benefits paid to administrative staff at privately-managed prisons averaged almost 80% of salary; benefits paid to other employees at these facilities averaged 14%; in contrast, the ratio of benefits to salary paid to staff at public facilities ranged from just under 22% to almost 32%;
- v. the bulk of reported cost savings at the privately-managed prison studied in Tennessee can be attributed to differences in per-inmate medical expenditures and allocated state overhead costs. (Labor cost savings were offset by the increased administrative cost cited above.)

These findings have yet to be confirmed for other years and other jurisdictions. (They were, in fact, not directly stated in the FRC report itself; they were merely implied in the data.) These findings do, nevertheless, indicate a number of hypotheses that merit further study. In particular, the supplemented FRC report suggests that

- i. privatization changes the way taxpayer dollars are spent on prison inmates: less is spent on employees having direct daily contact with prisoners; more is spent on prison-level

⁶ These "cutbacks" in overhead cost are defined relative to the central office expenses that would have been incurred had the prisons *not* been privatized. The *only* justification for assigning different overhead rates to private and public facilities is that the central office expenses are smaller in a system with one or more private prisons.

- administration, monitoring activities by state officials, corporate overhead and corporate profits;
- ii. the lower labor cost found in private sector firms does not alone produce significant savings from privatization; it is offset by increased administrative expenses (including monitoring); significant cost savings do occur when private sector managers cut spending on prisoner health care and induce the state to scale back its own administrative overhead.

How could these hypotheses be tested rigorously? An analyst undertaking such a project would start by selecting roughly comparable public and private prisons and then collecting several years' worth of data on the cost to the state of each facility.⁷ Ideally, these costs would be recorded as line item amounts (wages, salaries, supplies, etc.) allocated to functional areas (administration, security, food service, etc.)⁸ Next, the amounts budgeted for publicly-managed prisons and the amounts paid by the state to private prison management companies would be adjusted to ensure the direct comparability of estimated per-inmate costs. In particular, the analyst would need to identify the costs that depend directly on the number and/or type of inmates and would need to adjust estimated operating costs for any differences found in inmate populations.⁹ Allowances would also have to be made for differences in public and private sector operating responsibilities and in the quality of services received by inmates.¹⁰ Other adjustments to on-site operating cost include the amount spent by the state when monitoring the privately-run facility, the taxes paid to the state by the private management company and allowances for services provided by state employees not working for the local department of corrections.

A final adjustment for state "overhead" cost often proves the most logically complex (and hence the most controversial). In principle, the state overhead allocated to a privately-run prison should be less than that imputed to a publicly-managed one *only if* the amount spent by the state department of corrections on central office activity *shrinks* as more prisons come under private management. If the budget for the state department of corrections central office does not change with the extent of privatization, then per diem overhead allocations should be identical in publicly- and privately-managed facilities.¹¹

7 The task of selecting fully comparable prisons is difficult, if not impossible. Differences in the age, health, gender, and security risk of inmates would imply differences in the reported cost per inmate-day even among equally efficient prison facilities. The same may be said for differences in the size of the inmate population and regional differences in the cost of labor and materials. One could use regression analysis to "correct" for these differences if there were a large enough number of roughly comparable prisons in a given system. In the absence of such data, the only available alternative is to adjust on a case-by-case basis. Not surprisingly, this approach leaves room for considerable disagreement over the appropriate scale of the adjustment factors.

8 This program/performance budgeting approach has become an essential element of the campaign to "reinvent" government.

9 These costs would typically include food service, health care, security staff, and other "variable costs". The amount spent per inmate on these items would, of course, depend on the health, gender, and security risk of the inmate population.

10 For example, in some jurisdictions the state would be responsible for installing and maintaining certain equipment at privately-run facilities. These costs would have to be either (a) added to the amounts paid directly by the state to the private management company or (b) subtracted from the amount budgeted for the state facility before private sector per diem rates are computed.

11 This "incremental" (or marginal) approach to overhead allocation is not generally the one followed in the literature on the cost of corrections. Instead, analysts have generally sought to estimate the *use* of central office services by private and public prison managers. This approach tends to overstate the relative cost of public prisons to the extent that central office expenses are truly

This idealized “model” study provides a standard against which existing research can be measured. The remainder of this chapter provides an in-depth analysis of the methodology used in two recent studies of prison privatization in Tennessee and Louisiana. It also provides briefer discussions of privatization studies for prisons in Florida, California, Arizona, Texas and the United Kingdom.

2 The Tennessee Experience: The 1995 Report of the Fiscal Review Committee (supplemented with data from the Washington State Legislative Budget Committee)

As required by state law, the Tennessee Fiscal Review Committee (FRC) undertook to “compare the full costs of the contractor [authorized to operate a prison to house Tennessee inmates] with the state’s full costs of operating similar facilities.”¹² Three prisons were selected: Northwest Correctional Center (NWCC), Northeast Correctional Center (NECC), and South Central Correctional Center (SCCC). The first two are operated by the state; the last is operated by Corrections Corporation of America.

This study is unique in its attention to detail: it follows the procedure described in the previous section for the “ideal” study, allocating “line item” cost data for each prison to specific management functions (administration, security, etc.). There are, nevertheless, several limitations to the FRC report. It covers a single year, it excludes medical expenses incurred by the private contractor, and it does not directly address the question of whether or not privatization actually saves money for the taxpayers of Tennessee. The first of these limitations is not surprising: the FRC report was intended to serve as a template for future cost studies. Happily, the second and third issues were addressed with considerable success by the Washington State Legislative Budget Committee (LBC) as it tackled its own version of the prison privatization question.¹³

Operating Cost Estimates:

By combining the data found in the FRC report with that available from the Washington State LBC, it is possible to compare the pattern of spending at public and private facilities and to gain some insight into the profitability of the latter.¹⁴ For the sake of completeness (and to illustrate the nature of adjustments needed to ensure the comparability of data), Tables 1-3 reproduce the cost data found in FRC report (Appendices A, B, C and the CCA Statement of Department Expenditures). Adjustments

fixed. In the tables that accompany this chapter, we use the overhead allocations as reported by the jurisdictions in question and discuss the extent to which these reported allocations reflect an incremental approach.

12 Fiscal Review Committee (1995), p. 1.

13 Washington Legislative Budget Committee (1996), Appendix 3. In particular, LBC analysts both estimated the medical expenses incurred by CCA on behalf of prisoners at SCCC and obtained an unofficial report of these expenses directly from CCA. The LBC analysts also collected data on the fees paid by Tennessee to CCA for operating SCCC. Bob Thomas of the LBC graciously provided spreadsheets containing the supplemental information (as promised in the LBC report itself). This information was collected after the FRC report was published.

14 It is also possible -- as suggested by Logan (1996) -- to reconcile the apparent differences between the conclusions found in the Tennessee and Washington studies.

to operating costs (reported by management function) include: netting out commissary revenues against commissary expenses, allowing for changes in food services inventories and non-comparable programs, eliminating depreciation expenses as a public facility expense (because there is no corresponding set of expenses in the private facility) and adding monitoring costs to the expenses reported for the private facility. These three tables indicate how sensitive the reported cost per inmate is to the scale of operations at a particular facility. Although the privately-managed SCCC appears to have the highest per diem operating cost (\$33.78 as opposed to \$33.06 at NWCC and \$30.91 at NECC), it also has the smallest number of prisoners (1053 as opposed to 1070 and 1149 at NWCC and NECC respectively). Adjustments for scale and for amounts actually paid to the private management company lead to somewhat different conclusions.

Table 4 reflects a different approach to the task of comparing public and private facilities. Instead of analyzing the *cost incurred by CCA* of operating SCCC, this approach starts with the *revenues received by CCA* and adjusts this data for differences between public and private management responsibilities.¹⁵ Unfortunately, the FRC did not report medical expenses for CCA; it is therefore necessary to estimate these costs in order to (a) compute CCAs operating surplus and (b) compare private per diem rates with those derived for the state-run facilities NWCC and NECC.

The first half of Table 4 reports the operating surplus earned by CCA using two different estimates of medical costs: these are deducted — along with “official” reports of non-medical operating costs — from the revenues received by CCA to derive the benefit (before taxes) that the company realizes from operating the prison facility.¹⁶ It is clear from these estimates that operations at SCCC make a significant contribution to corporate overhead.¹⁷

The second half of Table 4 provides two estimates of the *cost to the State of Tennessee* of the privately-operated facility. To estimate this cost, revenue received by CCA was reduced by estimated medical expenses and augmented by the relevant adjustments for state expenses contained in the FRC report. These expense estimates were further reduced by an estimate of the tax revenue received by the state from CCA operations.¹⁸

Per Diem Estimates Reconciled:

Table 5 illustrates the impact of these various approaches on per diem rate estimates — and hence on the estimated cost savings to be realized from privatization. Once cost reports are adjusted

15 This is the approach followed by the Washington State Legislative Budget Committee as it reviewed the research available at the time. It is also the approach used in most other privatization studies.

16 The first surplus estimate assumes that CCA medical expenses are equal (on a percentage basis) to the average of the amount spent at state-run facilities. (This is the basis for the per diem rates found in the LBC report.) The second surplus estimate uses an unofficial report of CCA medical expenses (a fax from D. Massengale at CCA to Bob Thomas at LBC).

17 It is not clear from these data whether or not CCA is earning a profit over and above the facility’s allocated share of corporate overhead of \$970,417. Using one estimate of medical expenses, CCAs operating surplus (i.e., facility revenue net of facility expenses) is below the share of corporate overhead allocated to SCCC. Under an alternative estimate of medical expenses, the reverse holds true.

18 The LBC supplemental data contained tax revenue estimates.

for differences in the average daily population of inmates (ADP)¹⁹, we find the surprising result that the non-medical per diem operating cost of the privately-managed SCCC is virtually identical to the cost of the two public facilities.²⁰ This conclusion obtains whether (a) one starts with individual line item costs and aggregates to find total cost or (b) one starts directly with management fees received by the private prison operator. It is also independent of the way in which one handles estimates for taxes paid by CCA to the State of Tennessee.²¹ It follows that the savings to be realized from the privatization of SCCC must arise elsewhere.

When official state overhead allocations and medical expense estimates are included in the estimated cost of operating the three facilities, the picture changes yet again: the estimated *total* cost per inmate day at the privately-run SCCC is as low as \$37.65, while the estimated total cost of the public facilities ranges from \$40.16 (at NECC) to \$40.19 (at NWCC). (See Table 5.) In other words, the differences among these estimated per diem rates can be attributed to a lower overhead allocation for SCCC (a \$.78 difference); a credit for taxes paid by SCCC (a \$.83 difference); and lower medical costs (\$3.07 at SCCC as compared with \$4.37 at NWCC and \$4.89 at NECC).

These tables indicate that (for at least the fiscal year ending June 30, 1994) privatizing SCCC saved money for Tennessee taxpayers, if at all, by reducing spending on prisoner health care, by inducing "cuts" in the central office (or state overhead) expenses of the Tennessee Department of Corrections, and generating tax revenues for other parts of the state government²² Other savings from restructuring employee compensation appear to be offset by the increased cost of monitoring by state employees. Obviously, this estimate of cost savings understates (overstates) the benefit of privatization to the extent that savings in DOC state-level overhead expenses amount to more (less) than \$.78 (i.e., \$2.38-\$1.60) per prisoner.²³ It also understates (overstates) the benefit of privatization to the extent that health care is qualitatively better (worse) in the private facility.

Spending Patterns Compared:

There are more insights to be gleaned by returning briefly to the *operating cost* data reported in the FRC study. Even though public and private operating costs appear to be roughly comparable,

19 These adjustments reflect the assumption that not all operating costs vary directly with the number of inmates. A sufficient, but not necessary, justification for this assumption would be "economies of scale" in prison operations.

20 Slight differences in the "equalized" operating cost estimates reported by the FRC and the LBC can be attributed to differences in the way that size adjustments were handled in the two reports. The Washington State study allocated FRC adjustments (for non-comparable programs, supervision of industrial work crews, etc.) to specific line items and recomputed variable cost estimates accordingly.

21 It is not clear from the FRC report whether or not the cost data given for SCCC include taxes paid by CCA. The per diem rates given in Table 5 reflect the assumption that these data *do* include taxes paid (since the report was supposed to indicate the *full* cost to CCA of its operations).

22 Here "cuts" refers to the differences between observed state-level overhead expenses and the overhead expense that the state would have incurred had SCCC been publicly managed.

23 The per diem rates reported in Table 5 use the LBC estimates for overhead allocations. The LBC allocations for the publicly-run prisons are lower than those found in the FRC report, as the LBC analysts sought to estimate an *average* annual cost for major maintenance at all three facilities. The FRC report uses *observed* major maintenance expenses for SCCC, an approach that -- for the year in question -- appears to understate the expected annual cost of maintenance.

Tables 6-8 provide evidence of some systematic differences between public and private prisons. From Table 6, it appears that CCA is spending considerably more per prisoner on administration and less on security. This result obtains even when monitoring costs are excluded from the per diem estimates. Table 7 provides evidence of the substantially lower labor costs at the private facility: \$16.89 per prisoner/day at SCCC as opposed to \$19.63 at NECC and \$20.96 at NWCC. Much of this savings comes from the smaller amount spent on security staff: \$9.96 per prisoner at SCCC as opposed to \$12.57 at NECC and \$14.55 at NWCC.²⁴ The average employee benefit rates (i.e., the ratio of fringe benefits to salary) found in Table 8 indicate that the *nature* of employee compensation also differs between the public and private facilities in Tennessee. CCA administrative employees enjoyed a benefit rate of almost 80 percent, while the rates received by other CCA employees ranged from just under 13 percent to just over 14 percent. The average rate for CCA employees was 21.84 percent. In contrast, there was much less variance in benefit rates across functional areas in the two public facilities: the rates ranged from a low of just under 22 percent to almost 32 percent. The average benefit rate was 29.19 percent at NECC and 28.38 percent at NWCC.

These differences in the structure of employee compensation at public and private prisons have been strongly criticized. Bates (1998) cites testimony given before the Tennessee state legislature indicating that SCCC has an employee turnover rate that is more than double the one found at Tennessee public facilities. According to Bates (ibid.), many staff members who continue to work at SCCC blame this high turnover on low wages and poor treatment by supervisors. The long-run consequences remain to be seen. Nevertheless, Bates (ibid.) notes that members of the state legislature who oppose privatization are quite ready to blame last year's higher reported incidence of violence and drug usage among inmates on the inexperience of the SCCC staff.

In conclusion, the FRC report provides a detailed look at the structure of prison costs and suggests a number of hypotheses whose testing must await the availability of additional data.

3 The Louisiana Experience: Archambeault and Deis (1996)

The basic question addressed by William Archambeault and Donald Deis (A&D 1996) was quite similar to the one underlying the Tennessee FRC report: "How does the full cost per inmate-day in a publicly-managed prison (i.e., Avoyelles Correctional Center) compare with the full per diem cost of housing an inmate in either of two privately managed facilities (i.e., Wackenhut's Allen and CCA's Winn Correctional Centers)?" On one level, A&D appear to adhere more closely to the model for the "ideal" study proposed in section 1 of this chapter: they use data from five years (instead of just the single year found in the FRC report); and they use management fees paid to private prison operators to address directly the question of taxpayer savings. They find that the publicly-managed prisons are 12 to 14 percent more expensive to operate than the privately-managed alternatives. (A&D, p. 439) Nevertheless, the aggregate nature of the data presented and a variety of analytical quirks call into question the strength of this conclusion.

24 These per prisoner data were derived from the "observed cost" information found in the FRC report. As a result, they do not reflect adjustments for the scale of operations or the LBC allocation of general adjustments to specific line item categories (like salaries, wages, materials, etc.)

A review of the methodology used by Archambeault and Deis helps identify the range of difficulties that arise when using data that cover a span of years. Table 9 reproduces the data used in the A&D study, along with the adjustments made in the interests of comparability. An analyst wishing to use this data must make a number of assumptions about its consistency, accuracy, and appropriateness, as well as choose a basis for making intertemporal comparisons. These assumptions will, in part, determine the insights to be gleaned from regression results. Consider each of these issues in turn.

Consistency and Accuracy:

Archambeault and Deis' discussion of the annual state budget allocation for Avoyelles (see the top of Table 9 in this report) provides an example of a classic data consistency problem. They observe (pp. 428-9) that this facility generally tends to be "under budget" and that the warden therefore ends up returning unused funds to the state at the end of each fiscal year. Unfortunately, final data were not available for FY 1995-96 when Archambeault and Deis finalized their report. As a result, they used the full annual allocation for Avoyelles thereby (probably) overstating public sector costs. Table 10 illustrates an alternative approach: the gross appropriation for FY 1995-96 is reduced by same *proportion* (1.7 percent) as the gross appropriation for FY 1994-95.

Louisiana budget data collected by the Washington State Legislative Budget Committee also illustrate the difficulty of obtaining accurate estimates. The Washington State LBC estimates for insurance costs at Allen and Winn are respectively \$83,732 and \$83,061; the data reported by Archambeault and Deis are \$66,534 and \$66,001, a difference of almost 26 percent.²⁵

The aggregate nature of the Avoyelles budget reported by A&D makes it difficult to evaluate the scope of the costs covered. However, the data reported by Washington State researchers suggest that some relevant costs may have been omitted. The WA-LBC cost estimates for FY 1995-96 include allowances for a state-funded "record system analyst" at both Allen and Winn (at a cost of \$26,255 and \$29,193 respectively). Table 10 reflects this adjustment.

Appropriateness:

The fact that data are reported precisely does not guarantee that they provide relevant information. The discussion of vocational education costs found in A&D illustrates this point. The cost concept of interest is the full burden borne by the state for each prison. It is therefore appropriate that A&D add grant money awarded by the state to Allen (for its vocational education programs) to the other costs reported for this institution. It is also appropriate that A&D augment the cost reported for Avoyelles by the value of services obtained from the local technical school. Ideally, this adjustment would reflect the *opportunity cost* to the state of the time and materials used. In other words, the operating cost reported for Avoyelles should be adjusted upwards only to the extent that

25 Bob Thomas graciously provided us with the spreadsheets used to generate the tables found in the WA-LBC (1996) analysis of Louisiana prison costs. Oddly enough, the ratio of the A&D insurance cost estimate to the corresponding LBC estimate is identical out to five decimal places. This suggests that the DOC Risk Management Division inadvertently used a different algorithm when deriving the two sets of cost estimates from previously reported data. This may be due to the fact that A&D reported the cost of "fire and property" insurance, whereas the LBC reported the cost of "property and boiler" insurance. One would suppose that the appropriate figure would cover the cost of fire, property *and* boiler insurance.

other divisions of state government spent money to acquire these goods and services. Time and materials donated by volunteers have no opportunity cost to the state and hence would not be reportable as a prison operating cost.

A similar problem arises when adjustments are made for the “prison industries” operated at the Allen and Winn facilities. Before computing private sector per diem rates, Archambeault and Deis deducted the costs incurred by CCA and Wackenhut when inmates are assigned to work in prison industries. They reasoned that since the state received the profits from these ventures it should also bear the costs. This is not the relevant frame of reference: the adjustment should reflect the net benefit to the state of these activities. The adjustment should also be made in a way that renders the private sector data comparable with those reported for the publicly-operated facility. Ideally, an estimate of the *value* of services rendered should be subtracted from the cost of each of the three prisons. However, since no value is assigned to the work done by inmates at Avoyelles, the same procedure should be followed for Allen and Winn. The cost to CCA and Wackenhut of running their respective prison industries simply becomes one of the services they provide under the terms of their contracts. This is the approach followed in Table 10: the benefits imputed to prison industries (and originally subtracted from the state’s cost of operating Allen and Winn) are added back before per diem rates are computed.

The perennial problem of allocating overhead costs provides yet another version of this opportunity cost problem. In principle, the share of state overhead cost allocated to privately-managed facilities should be lower than that allocated to public facilities (all other things being equal) *only if* the fact of privatization reduces the amount spent on the “central office” of the state department of corrections.²⁶ In all other cases, the overhead amounts allocated on the same basis to all institutions, no matter who manages them. It is unlikely that overhead cost allocations based on the methodology found in OMB Circular A-27 follow this rule. In Table 10, “indirect cost allocations” used by Archambeault and Deis are subtracted from the other costs reported for each facility so that per diem operating costs of *facilities* (excluding state corrections overhead) can be computed.²⁷

Intertemporal Comparisons:

The Archambeault and Deis study illustrates a number of problems that arise when comparing data reported at different points in time. These include (i) adjustments for inflation, (ii) the treatment of “pre-paid” costs, and (iii) the treatment of accrued liabilities. Consider each of these issues in turn.

The data reported for a given fiscal year should reflect consistent assumptions about prevailing prices. Archambeault and Deis failed to allow for this when they constructed the time series used to adjust private sector costs for the effects of prison industries and the taxes paid by CCA and Wackenhut. As discussed in the previous section, the credit for prison industries should be deleted altogether. A further problem with these adjustments is the fact that they are all expressed in prices

26 Again, the relevant point of comparison is the amount that would have been spent on state overhead if all prisons had remained under state supervision. Bob Thomas (of the Washington State LBC) also makes this point in a letter dated March 7, 1997 and addressed to William Archambeault.

27 Analysts at the Washington State LBC also followed this approach.

appropriate to the fiscal year FY95-96. Although Archambeault and Deis say that the prison industries adjustments reflect a 4 percent rate of inflation, the cost savings actually reported for Allen and Winn do not do so.²⁸ It also appears from the text of A&D (1996) that no adjustment for inflation was even contemplated when past observations for tax benefits to the state were constructed. As a consequence, past estimates for these state benefits are likely to be too high — and past estimates for per diem rates at privately-managed prisons are likely to be too low.

The treatment of ACA accreditation costs is curious for several reasons. Since the ACA is chartered as a non-profit organization (not as a government agency), it is not clear why Archambeault and Deis treat the accreditation fees paid to the ACA by CCA and Wackenhut as a benefit to the state government.²⁹ Even if it were appropriate to reduce the estimated cost to the state by the amount of these accreditation fees, the full amount should not be allocated to a single year: the accreditation is good for three years. It would be more appropriate to treat these fees as prepaid expenses, i.e., an asset to be consumed over time.

The treatment of insurance costs poses a somewhat different intertemporal “smoothing” problem. The cost of risk management insurance at Avoyelles appears to reflect the actual number of claims made in a given year, since the costs reported do not correspond to differences inmate populations.³⁰ A more realistic approach would be to compute the *expected* (or average) annual cost of such claims and use this as the basis for computing annual per diem rates.

The treatment of accrued pension and compensated leave liabilities poses yet another intertemporal smoothing problem. Archambeault and Deis (1996, p. 434) chastise the authors of the Washington State LBC study for deducting from the Avoyelles budget a contribution of \$410,000 used to help amortize the unfunded pension liability accrued for employees working at the facility prior to 1988. Archambeault and Deis claim that privatizing Louisiana prisons has the potential to reduce this accrued liability. In response, Bob Thomas (1997) cites the Legislative Actuary for the State of Louisiana as his authority for assuming that this liability would be invariant to the extent of privatization. The revised operating cost estimate in Table 10 follows the approach found in the LBC study.

Archambeault and Deis augment the cost budgeted for Avoyelles by the amount of unused sick and annual leave accrued by current employees.³¹ It would be more appropriate to base this adjustment on the *expected* (or average) annual leave accumulation — this would more accurately reflect the average annual cost of operating a state facility.

28 See Table 9. The reported year-to-year differences in cost savings are directly proportional to annual changes in the prison population.

29 The ACA web site indicates that publicly-managed prisons are not exempt from inspection fees.

30 Specifically, the reported cost of insurance fell by 40 percent between FY 93-94 and FY 94-96 even though the number of prisoners housed at Avoyelles rose slightly. There is also no cost reported whatsoever for risk management insurance at Avoyelles in FY 95-96.

31 These accrued leave hours represent a future liability to the state, as departing employees may be compensated for up to 300 hours of annual. Hours in excess of this limit are used to compute retirement benefits.

Interpreting Regression Results:

These data problems combine to make it difficult to interpret the regression results found in Table XI-8 of Archambeault and Deis (1996, p. 449). The simplest specification (Model A) reflects the assumption that per-inmate variable costs are independent of the size of the facility and tests to see whether or not the fixed cost of operating a prison is significantly different in the private sector.³² This is a reasonable starting point, but the regression coefficients should not be computed until the data are adjusted for inflation.³³ Since this adjustment was not made, the coefficient reported for “average inmates per day” does *not* provide an estimate of the impact on total cost of an increase in the average daily population. Nor does the coefficient for the public/private dummy variable indicate the impact of privatization.

The specification of Model B has the same “inflation problem” as Model A, with a further wrinkle. Archambeault and Deis assume that the number of “Vo-Ed Slots Filled” helps explain the total cost of operating a prison facility. When they find that the coefficient for this variable is negative and statistically significant, they conclude that “lower operating costs are associated with increases in the use of vocational education” (p. 439) and that “placing inmates in vocational education programs is a less costly strategy than alternative work assignments” (p. 440).

Unfortunately the reported coefficients do not support this conclusion. Ignoring (for the moment) the inflation adjustment problems mentioned above, the negative coefficient for inmates placed in vo-ed may simply reflect economies of scale in prison operation. To see why, note that the “average number of inmates per day” will generally be positively correlated with the number of inmates placed in vocational education in a given facility.³⁴ Note also the specification of Model A is not quite right: over at least part of the relevant range of inmate populations, the marginal cost of an additional inmate is likely to be falling as the inmate population grows.³⁵ It is quite likely that the “prediction errors” of the simplistic Model A are correlated in some way with the differences between the growth rates in inmate population and vo-ed placement. This correlation implies nothing about the relative cost effectiveness of vocational education, prison industries or roadside trash pickup. It is merely the result of the “linearity” restriction imposed by the specification of Model A.³⁶

Model C presents another version of this specification problem: in this model, the privatization dummy is replaced by the number of security staff positions at each facility. The inflation and

32 I.e., the cost of operating a prison is assumed to take the form $C(x) = F_i + vx$, where the index i is either "private" or "public."

33 In other words, the data should be adjusted for inflation so that all observations reflect the same assumptions about prevailing prices. For example, if FY95-96 were chosen as the "base year" and if the relevant rate of inflation were assumed to be 4 percent per annum, then observations for FY91-92 would be increased by the factor $(1.04)^4$, observations for FY92-93 would be increased by the factor $(1.04)^3$, etc.

34 The larger the inmate population, the more inmates there are to place.

35 In other words, the prison "technology" exhibits economies of scale.

36 An alternative specification would have been to use the *proportion* of inmates placed in vocational programs as an explanatory variable. Nevertheless, this would still only establish a correlation between prison costs and vo-ed.; it would not prove that vocational education actually caused cost savings.

correlation problems described above again make it difficult to interpret these coefficients.³⁷ The approach used in the Tennessee FRC report provides a much more useful method of uncovering the sources of cost savings.

The Net Effect:

It is clear from Table 10 that the cumulative impact of these additional adjustments may drastically reduce the estimated cost savings from privatization: for the fiscal year 1995-96, it appears that the actual savings in *operating* costs is more likely to be below 5 percent than above 12 percent. However, as in the Tennessee case, the *total* cost savings from privatization will increase if it induces cutbacks in state-level overhead.

4 The Florida Experience: (i) The Florida Department of Corrections ; (ii) The Florida Correctional Privatization Commission; and (iii) The Florida Office of Program, Policy Analysis and Government Accountability

The controversy over the appropriate measure of operating costs in Florida prisons provides yet another indication of just how hard it is to get all sides to agree on whether or not privatization saves money. Current state law helps identify the participants in this debate. Chapter 89-526 of the Florida state statutes, enacted in 1989, first authorized the state Department of Corrections (DOC) to enter into contracts with private prison management companies. The subsequent Chapter 93-406, adopted in 1994, created the Correctional Privatization Commission (CPC), to expedite prison privatization; it is housed in the state Department of Management Services and operates independently of the Department of Corrections. Chapter 957.05 qualifies the authority of the CPC, requiring it to demonstrate — before any contract is signed — that private prison management will result in *at least a 7 percent* savings (relative to the cost of allowing the state Department of Corrections (DOC) to run the prison).³⁸ Chapter 957.07 also empowers the state Auditor General to decide whether or not this condition has been satisfied before any contract with a vendor has been signed.

To provide for on-going independent oversight, Florida state law requires the Office of Program Policy Analysis and Government Accountability (OPPAGA)³⁹ to review the performance of all management companies that operate private prison facilities in Florida (this may include both vendors under contract to the CPC and those under contract to the DOC). A separate oversight board, the Florida Corrections Commission, was established in 1994 and is “charged with reviewing the

37 For example, if we continue to the regression interpret coefficient as a measure of fixed cost, then the results reported for Model C indicate that the annual fixed cost for operating a prison is -\$5,000,000.

38 The CPC is state housed in the state Department of Management Services; it operates independently of the Department of Corrections.

39 Although the OPPAGA is a unit of the Office of the Auditor General, it reports directly to the state legislature.

effectiveness and efficiency of [Florida's] correctional efforts, recommending policies, and evaluating the implementation of approved policies.”⁴⁰

Not surprisingly, these distinct entities do not always favor the same measure of privatization benefits. In its *Annual Report* for the fiscal year 1996-97, the DOC argued that *all three* privately-managed adult prison facilities were *more expensive* than similar publicly-run facilities would have been.⁴¹ Using a somewhat different approach, the OPPAGA (1998) reached a similar conclusion. Nevertheless, the OPPAGA report included responses from the Correctional Privatization Commission, the Corrections Corporation of America, and Wackenhut proposing alternative methodologies — ones that led to conclusions directly opposed to those reported by the DOC and the OPPAGA.

Tables 11-13 (reproduced from the DOC and OPPAGA reports) help sort out this difference of opinion. The Department of Corrections estimates, found in Table 11, are somewhat suspect: the per diem rate for the men's public prison is derived as the *average* of nine other facilities; all but one of these public facilities is substantially larger than any of the private facilities being analyzed.⁴² Given the economies of scale in prison operation, this approach understates the public sector cost of running a prison comparable in size to Bay or Moore Haven.

Nevertheless, Table 12 shows how the OPPAGA (1998) reached a similar conclusion with from a more appropriate starting place: it compares two private men's facilities (Bay and Moore Haven) with a single comparably-sized public facility. In its analysis, the OPPAGA started with the management fee due to CCA and Wackenhut (for running Bay and Moore Haven respectively); it then deducted monitoring costs paid by the management companies, property taxes *not* paid, and medical insurance co-payments collected from prisoners and retained by the prison operators. For the publicly-managed Lawtey prison, the OPPAGA used the annual cost of operations, health services, and education programs reported for this facility by the Department of Corrections in its *Annual Report*. All three cost estimates were then adjusted for differences in scale economies, the scope of management responsibilities and the quality of services provided.

The OPPAGA inferred from its calculations that Moore Haven was more expensive to operate than its public sector equivalent; it also argued that the Bay facility was only 0.2 percent cheaper. The OPPAGA nevertheless rated the performance of both CCA (at Bay) and Wackenhut (at Moore Haven) as “satisfactory,” while noting in passing that neither private facility achieved the 7 percent cost savings required by law.

Table 13 reproduces the response by CCA to this finding. The adjustments proposed by this management company substantially change the interpretation of the data: they indicate that the private

40 Commissioners are appointed by the Governor and with the approval of the state Senate. The Commission's mission statement appears on its web site, located at <http://www.dos.state.fl.us/fgils/agencies/fcc/>.

41 These estimates are reproduced and analyzed in Florida Department of Corrections (1998).

42 Apart from the one public facility with an ADP of 733, the remaining public prisons housed between 1214 and 1719 inmates on average. In contrast, the observed average daily populations for the privately-operated Bay and Moore Haven facilities were 708 and 706 respectively. If these two prisons were assumed to operate at 95 percent of capacity, they would house approximately 713 inmates on average. Each of these private facilities has a contract maximum of 750 beds.

management at Bay and Moore Haven *saved* taxpayers respectively 8.3 and 6.0 percent of state cost of running the facility. This difference arises primarily from three simple changes: an increase in the CCA's credit for taxes paid to the state, an increase in CCA's credit for the "Inmate Welfare Trust Fund Net Revenue"⁴³; and a decrease in the state's adjustment for "medical costs for higher medical grade inmates at Lawtey" (OPPAGA (1998), p. 38).⁴⁴ The OPPAGA itself rejected these three CCA amendments, observing (i) that CCA sought to claim credit for more tax revenue than was properly attributable to its Bay facility,⁴⁵ (ii) that it retained custody over Inmate Welfare Trust Fund balances,⁴⁶ and (iii) that Lawtey inmates had considerably more medical needs than those at the Bay facility.

This debate is further complicated by an adjustment that the OPPAGA could have made but ultimately rejected. As in Louisiana, the state retirement system was not fully funded by past payroll deductions. To eliminate this shortfall, a surcharge of 5.78 percent was included in the the payroll costs reported for Lawtey. The OPPAGA justified leaving this surcharge in place by stating that

it is still a cost to the taxpayers. Privates do not pay this and thus should be able to reduce costs in comparison to state by at least 5.78% of payroll. (OPPAGA, p. 36).

This reasoning is not generally consistent with the basic question at issue, to wit, "How much money will privatization save for Florida taxpayers?" If the unfunded portion of pension liabilities was incurred *in the past*, then prison privatization does not help *taxpayers* avoid its consequences. Any decrease in DOC contributions toward this *existing* liability would necessarily be offset by increases elsewhere in the Florida state budget.

Although there are many differences of opinion over particular line items, the OPPAGA report tends to support the hypotheses suggested by the Tennessee data. The public and private facilities reviewed appear to have quite similar non-medical operating costs; the potential cost savings can be traced to medical expenses and to overhead allocation policies. If this conclusion is confirmed over time, it then follows that prison privatization in Florida saves money through cutbacks in spending on prisoner health care and state-level DOC staff.

5 Experience with Privatization Elsewhere

The cost comparisons reported by other states are generally less elaborate than those found in the three cases reviewed thus far; they also tend to predict higher cost savings from privatization. For

43 This trust fund is an account containing the revenue (in excess of expenses) from the prison commissary, vending concessions and inmate telephone service.

44 A fourth small adjustment by CCA remains unexplained: the "unadjusted" per diem reported by CCA for Lawtey exceeds that found in the OPPAGA report by \$.36.

45 According to the OPPAGA report (p. 59), CCA sought to claim credit for taxes paid on income from other facilities.

46 According to the OPPAGA report (p. 13), this trust account is established in the name of the private contractor operating the prison. However, current law requires the contractor to obtain the approval of the CPC commissioner before using these funds for anything other than the purchase of items for resale. In contrast, state profits from the prison commissary and inmate phone usage are used to offset prison operating costs.

example, Sechrest and Shichor (1994) report savings on the order of 25 percent from the privatization of community correctional facilities in California, and Thomas (1997, p. 93) concludes that “operating cost savings [in Arizona] quite probably falls in the range of 13-17 percent.” Unfortunately, these studies essentially report only aggregate costs, making it impossible to evaluate or interpret their findings.

Two other analyses of privatization — one for Texas and one for the U.K. — have at least one theme in common: much of the difference in estimates of public and private sector costs per prisoner can be traced directly to differences in state overhead allocations.

The Texas Case:

A Texas law passed in 1987 authorized prison privatization only if the state can demonstrate that it would lead to “a savings of not less than 10 percent over an equivalent state-run program.” (Texas Sunset Commission (1991, p. 7). In its review of the state’s prison system, the Texas Sunset Commission compared public and private sector costs to “construct and operate a 500-man pre-release center, and found that “taking into account the tax revenues paid to local governments organized by the state, the private prisons were operating at 14 percent below the state.” (*Ibid.*)

Despite the aggregate nature of the reported data, it is clear that the rule for allocating state overhead allocation contributes substantially to this cost difference. Table 14 reproduces the cost analysis found in Exhibit C of the Sunset Commission report. Once again, day-to-day operating operations account for a relatively small part of the difference between public and private sector costs. The combined contract payment and monitoring cost at a hypothetical facility designed by CCA is reported as \$29.71 per inmate day; the cost at a comparable facility designed by Wackenhut is reported as \$29.54. The estimated state cost per inmate day of operating these same facilities is estimated to be \$31.24 and \$31.50 respectively. The remainder of the 14 percent cost savings lies in the presumed tax benefit to the state from privatization (\$2.19 per inmate day) and the estimated decrease in administrative costs at the Texas Department of Criminal Justice (a difference of \$1.36 per inmate day).

The U. K. Experience:

Woodbridge (1997, p. 29) predicts “an operational cost saving of 8 to 15% in 1996-97” from prison privatization. Table 15 provides the aggregate data used in the U.K. study, and reports per diem rates for adjusted operating costs. Two things are immediately obvious: (i) the average cost per inmate day is much higher than in the studies from the United States; and (ii) the difference in cost between the public and private sector prisons is much larger than in the United States. Without more detailed cost data it is difficult to identify the reason for this difference. Nevertheless, it is clear that the allocation of central office costs contributes substantially to the reported differences between in public and private sector per diem estimates.

6 Recommendations for Further Study

This survey of recent cost studies does not resolve the question of whether privately-managed prisons are cheaper than publicly-managed ones. The evidence is mixed, with the more detailed studies indicating the smallest cost savings from privatization.

Nevertheless, it is possible to draw some preliminary conclusions. There do appear to be some consistent differences between the public and private facilities, particularly if the Tennessee experience can be applied to other jurisdictions. It appears likely that in privately-managed facilities, the wage bill for non-administrative staff will be lower and prison-level administrative expenses will be higher; that health care costs will be lower and that the *imputed* cost of state overhead will be lower.

These generalizations suggest a number of questions for further study. These include:

1. Do the higher administrative costs found in the privately-managed prisons offset the savings from different staffing patterns and compensation packages?
2. How can health care costs be cut without sacrificing quality?
3. Do the differences in *reported* public and private overhead rates reflect the overhead costs actually *avoided* through privatization?

A yet broader question lurks in the background of this debate: “Is privatization *necessary* for cost savings, or does the mere *threat* of privatization suffice?” In other words, will the risk of being “reinvented” induce an appropriate set of changes in public sector practices? This question is familiar from other public sector contexts. Experiments with “market testing” in Indianapolis indicate that public employees can successfully compete against private firms and win city contracts. For the last two decades, the rationale for deregulating telephones, airlines, trucking, and electric utilities has also depended, in part, upon this sort of threat from *potential* (not actual) competitors.

It remains to be seen whether or not these market analogies — and their policy implications — readily translate to the corrections context. Nevertheless, these analogies do suggest an alternative the question of when and how privatization saves money. A more appropriate form of this question is likely to be “Does *competition* make it possible to provide an appropriate level of service at a lower price?”

Insert table 1 — Tables 1 through 15 are in the file app3_tab.pdf. The file can be downloaded from the same site as the text of the report.

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Appendix 2

The Performance of Privately Operated Prisons: A Review of Research

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There are good and bad public sector prisons, just as there are good and bad private sector prisons. As Thomas and others have noted (Casile 1994; Thomas 1997a), whether improvements in quality can be expected depends upon how well or poorly public-sector institutions are run by the respective government agencies. In a public system with good management, good labor relations, and adequate funding, the potential for improving quality by contracting prisons to private contractors is less than where these conditions do not exist in the public sector.

Despite the paucity of evidence, those who argue for the private operation of prisons do so based on one or two premises. They claim privatization introduces competition into an otherwise public monopoly and this enhances services throughout the system while lowering the overall costs. Secondly, they claim that private prisons can deliver the same or better services at a lower cost than the public sector because “the marketplace” compels efficiency, ingenuity, and innovation.

Moore (1998) has published a recent review of the privatization research. He argues that private companies save money through “new management approaches, new monitoring techniques, and administrative efficiencies (p. 15).” Since labor is about two-thirds of correctional operating budgets, labor cost savings, according to Moore, have been achieved through efficient facility design, reduction in administrative personnel, minimization of overtime, and greater freedom to manage personnel. Moore offers little evidence of these innovations and does not indicate how such savings translate into affective inmate supervision and management. He cites the Archambeault and Deis study (which we review in great detail), claiming the private sector can reduce significant incidents, such as prison disturbances, relative to the public sector prisons. We found that evidence to be misleading, and, in some cases, quite inaccurate. Moore makes the assumption that “... incidents lead to lawsuits, which increase personnel costs.” He argues that market pressures and the competition for contracts result in better direct services to inmates. This is typical of the argument-without-proof that is often found in this literature. Anecdote is combined with “glittering generalities” to produce a conclusion having little or no foundation. Rather than critically evaluating each study on its own merits, Moore’s review of the prison quality literature merely cites those conclusions reached by the individual authors.

In this paper, we take a more systematic and critical approach to reviewing the research literature on privatization. We examine the relative performance of publicly and privately operated prisons. However, we also look beyond that comparison to see if there is evidence that privatization has an effect on the entire public prison system and whether there is evidence that privately operated prisons introduce ingenuity and innovation into the management of correctional institutions.

We critically analyze the literature that has accumulated which compares the quality of publicly and privately managed prisons focusing on studies done in the United States. There have also been evaluations conducted on prisons in the United Kingdom and Australia. Since we are unfamiliar with the way these systems function, and we are unsure of the applicability of these studies to privately operated prisons in the United States, we have excluded those studies from our analysis.

We review evaluations done in Massachusetts, Kentucky, California, Tennessee, Arizona, Louisiana, New Mexico, Florida, as well as the Washington State review of the literature. We systematically analyze these evaluations in terms of the methodology employed, in particular, whether the evaluations compared institutions on the basis of performance measures and/or an audit/compliance approach. We examine the evaluations with respect to how well they meet other methodological criteria. These criteria were also identified by the Government Accounting Office (1996: 13) and

include whether equivalent facilities (and inmates) were compared; whether multiple indicators or data sources were utilized for cross-validation; and whether the assessments were based on one-shot or multi-year comparisons. Finally, we review the reports to assess the types of innovations (if any) employed in the private (or public) sector that are intended to produce improvements in the quality of services provided to inmates.

Although we are very critical of most of the studies that have been conducted, in our conclusion of this paper, we try to build upon these criticisms and propose an optimal design for assessing performance among institutions. This design can be used to evaluate aggregate measures of institution performance regardless of whether one is interested in the private/public comparison or in an understanding of those aspects of institution operations that produce positive or negative outcomes.

Massachusetts and Kentucky

The Urban Institute undertook a study between 1987 and 1988 to fill the void of empirical findings available to aid states and local governments in making choices about private corrections (Urban Institute 1989). While prison population growth and associated costs had led some to advocate the privatization of corrections, opponents of privatization questioned the propriety, legality, and constitutionality of private prisons. Advocates had argued that competition and less red tape would enable private contractors to achieve lower costs and faster procurement of facilities and equipment than was possible for government agencies.

Nevertheless, at the time of this study, there had been little empirical data used to test the assumption that the cost and quality of private sector correctional facilities were superior to that of public sector facilities. The Institute's objective in this study was to assess and identify any differences in cost, service quality, and effectiveness between publicly and privately run facilities and to identify reasons for any differences that were found. Legal, propriety, and philosophical issues of private corrections were intentionally not addressed by the study.

The study compared three pairs of facilities, one pair of minimum security adult facilities in Kentucky and two pairs of facilities which housed violent juveniles in Massachusetts. Each pair consisted of one private and one public facility.

Common methodological procedures were employed during the collection of data in both states. The procedures included:

- 1 Extraction of data from agency records reflecting the number of escapes or attempted escapes, returns to prison after release, results of facility inspections, and cost data.
- 2 Surveys of inmates and staff at each institution using a modified version of the Prison Social Climate Survey (PSCS) questionnaire designed by the Office of Research and Evaluation of the Federal Bureau of Prisons (Saylor 1984).
- 3 Interviews with operations and oversight personnel at each facility.
- 4 A physical inspection of each facility by Urban Institute project staff using a visual inspection rating form designed for the inspections.

The data collection took place between January 1987 and September 1988. It appears that considerable effort was made to select pairs of facilities that were similar in mission and in the types of inmates they housed. The authors acknowledge some major differences in the physical characteristics of the facilities. For example, the Kentucky facilities housed minimum security adults while the Massachusetts facilities housed violent juveniles. The public sector adult facility housed more inmates than did the private sector adult facility (the public facility had an average daily population of 353 while the private facility had an average daily population of 206). And, the juvenile facilities all housed small numbers of inmates. Three of the facilities had 15-bed capacities and one of the facilities had a 16-bed capacity. Presumably each facility was operating at capacity throughout the duration of the study.

Some concern was expressed about the comparability of the inmate populations in the matched facilities, particularly the adult facilities in Kentucky. However, after an examination of the inmate characteristics in each pair of facilities, the evaluation team believed the comparison populations were reasonably equivalent. It appears to us, however, that the initial concerns expressed by the researchers were well founded. The differences appear greatest in the adult population, with the public sector facility housing the more difficult population. Conversely, the private sector facilities appear to have the more difficult juvenile population, with a larger segment of more serious criminal offenders.

In the adult population, the public sector facility had 14 percent more violent offenders. The private facility had 11 percent more new offenders while the public facility had 10 percent more returnees with new offenses. The public facility inmates had a median number of years to serve that was 3 years greater than the inmates in the private facility, with 38 percent of the public inmates serving more than 10 years as compared to 22 percent of the private facility inmates serving sentences of more than 10 years. Additionally, the median age of the public sector inmates was 5 years greater than the median age of the inmates in the private sector facility, with 15 percent of the public facility inmates over the age of 45 compared to 2 percent of the inmates in the private sector facility.

For the juvenile population, the primary differences were in race and offense. The public facilities were composed of 50 percent black and 27 percent white inmates, while the private facilities were composed of 30 percent black and 48 percent white inmates. While 52 percent of the juveniles in the public facilities were committed for offenses against the person, 79 percent of the juvenile population in the private facilities had committed an offense against the person. Furthermore, public facility populations were composed of inmates who committed more property (27 percent) and miscellaneous offenses (18 percent) than their private facility counterparts (12 percent property and 6 percent miscellaneous offenses).

Although the study employed common data collection methods in both states, the analysis and reporting were produced independently for each state. Consequently, there was considerable loss of comparability in the application and interpretation of the measures and in the construction of the tables that were used to summarize the findings. It seems that this lack of integration defeats any benefit that might have derived from a common methodology. Admittedly, the differences in the nature of the facilities and their populations might have diminished the comparability anyway, particularly given the univariate nature of their analysis.

The report describes the sampling method employed for obtaining the adult inmate observations. The warden initiated the process by drawing several numbers from a hat. These numbers were used to

select inmates from a list based on whether the 2 or 3 numbers drawn by the warden appeared in the last digit of the inmates DOC identification number. A stronger sampling design for the Kentucky inmates would have increased the comparability between the sample and the population. The remainder of the staff and inmate observations from both states were intended to be a census of the population.

The authors used a chi-square test of statistical significance throughout the report, although it is only relevant to the tables of figures for the Kentucky inmates where a sample was drawn. The inferential test was inappropriate for the remaining data since these were population characteristics of staff and inmates at the facilities. Their use of the chi-square statistic as a measure of importance is inappropriate both because (except for the adult sample) the study is an analysis of the populations and also because it confuses statistical significance and substantive significance. The evaluators attribute substantive significance to differences in group means simply because the chi-square was statistically significant, while the metric and substance of the measure suggest that there is little importance in the observed difference.

The principal findings of the study were that the quality of services and programs were superior at the privately run facilities. The method for determining superior performance in the provision of services was based on counting the number of measures (from each of the four types of data: agency records, inmate and staff survey questionnaires, interviews with facility officials, and visual inspection ratings) on which each private or public facility exceeded, or performed better, than its comparison facility. Based on this method, the private facilities uniformly had a larger number of positive evaluations on the set of measures. Many of the differences that favored the private facilities were obtained from the staff questionnaire data. Ironically, the authors admit that juveniles in both the public and private facilities had virtually indistinguishable responses to questionnaire items about service delivery .

The greatest deficiency of the study was its reliance on univariate analyses. The statistical analysis consisted of univariate group mean comparisons. This method of statistical analysis created comparability problems in spite of the researchers' efforts to select comparable pairs of facilities. The reality is that without an experimental design, it is virtually impossible to obtain two facilities that are similar enough to provide meaningful comparisons without statistically adjusting for potentially confounding aspects of each facility. A multivariate analysis would have been more appropriate.

There were no coherent or systematic models specifying desirable performance outcomes and structural or operational processes that would be expected to accelerate or inhibit those levels of performance. The absence of theories or models to guide the analysis resulted in a much more voluminous and unwieldy report. Performance models would have allowed the evaluators to test for institutional differences in a more systematic, precise manner, explicitly acknowledge preexisting differences, and adjust the expected outcomes accordingly. The methods employed resulted in arbitrary decisions and attributions about degrees of comparability and levels of performance, and in general obfuscated the meaning of any public and private sector differences in the measurement set.

Statistical models of the sort proposed by Saylor (1996) and Camp et. al. (1997; 1998) could have minimized the need for presumptions about comparability and would have made the determination of performance differences, and the interpretation of those differences, straight-forward. Such performance models would specify certain outcome measures and the process measures that are believed to influence or control those selected outcome measures. The complexity of these models

would necessarily be limited by the small number of observations available. However, with thoughtful preparation, meaningful models that fell within the limits of the number of staff and inmate observations could have been identified. This same criticism can be applied to virtually every study we reviewed. Rather than repeat that criticism throughout the report, we highlight the problem here and in our summary of this research literature.

The study methods did meet the subsequent GAO (1996) criteria for evaluating the quality of service delivery in correctional facilities; however, there were still quite a few deficiencies as we have noted. There is no discussion of the types of innovations employed to achieve better quality of services and programs.

California Evaluation

In adult corrections, California entered into contracting out for prison services around 1991 by allowing cities, counties, and private companies to operate Community Corrections Facilities (CCFs). Originally, these facilities were intended to house only inmates who had been returned to custody for parole violations. But given the crowding pressures in the state of California, the decision was soon made to allow new admissions into the facilities. Originally, there were 12 of these facilities, but by the time of the Sechrest and Shichor study (1994), the number had declined to 11.

Sechrest and Shichor (1994) conducted an exploratory study of 3 of the 11 facilities. Two of the facilities were run by public entities, one by the police department of a small community in the San Joaquin valley and the other directly by the city administration of a small city in the Mojave Desert. The privately operated facility was run by Management and Training Corporation (MTC) of Utah. It is important to note that none of the comparison facilities were actually operated by the California Department of Corrections (CDC).

Two types of data were collected for the quality comparisons. First, surveys were administered to staff and inmates at each of the three study facilities as well as staff and inmates at two CDC facilities: the California Institution for Men at Chino and the California Rehabilitation Center at Norco. Additionally, interviews were conducted with the wardens at the three study facilities. The survey data and on-site visits were used to assess conditions of confinement. The second source of data came from official inmate data as provided by the Offender Information Services Branch of the CDC. In addition to providing background information about the types of inmates at the respective institutions, the official records also allowed the inmates to be tracked for recidivism (parole violation for a new offense, technical violation of a condition of parole, or no violation).

The survey instruments used were taken from the surveys used in the study of private facilities in Massachusetts and Kentucky undertaken by the Urban Institute (1989). Unfortunately, because of study constraints, the surveys were administered to a fairly small number of inmates, and these inmates were not chosen randomly. As such, it is not clear what confidence can be placed on the results from the inmate surveys. The survey of staff suffered from the same problems, although the number of surveys is even smaller (68 total surveys from all 5 facilities). Since the results cannot be generalized to the staff and inmate populations from which they were drawn, we see no reason to review the results. We simply do not know what they mean.

There are also methodological problems in terms of using the data on recidivism. We concur with the summarization of the California study drawn by the General Accounting Office (1991: 31):

... Sufficient data were not available to adequately complete the analysis comparing the inmates released from the community correctional facilities to inmates released from other correctional institutions in the state.

In summary, the California study's methodological limitations prohibit drawing any overall conclusions about quality of service.

Tennessee Evaluation

The Tennessee prison system, like prison systems in many jurisdictions, came under intense capacity pressures in the 1980s that resulted in litigation (*Grubbs v. the State of Tennessee*, 1985). As a result, the state legislature approved a substantial building program that started in 1985 and resulted in the building of six prisons along similar architectural lines as well as a special needs facility. In 1991, the state adopted legislation enabling the contracting out of correctional services to private contractors. A decision was made to turn over one multi-custody facility to a private contractor (Corrections Corporation of America as it turned out) to see what could be learned about best practice. The enabling legislation required a research component to assess quality and cost (Tennessee Select Oversight Committee on Corrections 1995). As stated:

TCA 41-24-105 (d) The contract may be renewed only if the contractor is providing at least the same quality of services as the state at a lower cost, or if the contractor is providing services superior in quality to those provided by the state at essentially the same cost.

As a result, a bi-partisan committee from both houses of the General Assembly, the Select Oversight Committee on Corrections (SOCC), brought together staff from the Tennessee Department of Correction (TDOC) with executives from CCA to formulate a methodology for conducting the quality and performance assessment. With the assistance of the Vanderbilt Institute of Public Policy Services, formal meetings between TDOC and CCA produced a comparative methodology that was admittedly not an academic research project, but it fulfilled the requirements of the legislation. Importantly, both the public and private sectors agreed to the essence of the comparative methodology. Essentially, the process entailed that an audit/compliance check would provide the basic methodology for comparing the South Central Correctional Center (SCCC) operated by Corrections Corporation of America (CCA) with the two state-operated facilities, the Northeast Correctional Center (NECC) and the Northwest Correctional Center (NWCC). The three facilities chosen for comparison were all based on the same general architectural design as discussed above. SOCC wanted to insure a "level playing field" for all three facilities, consequently, in addition to similar physical design, all facilities came on line at approximately the same time. By mid-1992, all three facilities were operational.

There were six elements in the comparative methodology used, although only three of the elements actually received weight in computing the final aggregate score.⁴⁷ The audit portion counted for 60 percent of the total score. A list of 200 elements was compiled. Joint teams comprising staff from both TDOC and CCA conducted the audits. Ratings of compliance in the areas of Administration, Safety and Conditions, Health Services, Mental Health, Treatment, and Security were compiled as well as an overall rating of compliance. Two inspections were held at each of the three facilities. In general, the results showed comparable levels of performance at each of the institutions. On the first inspection, the overall compliance rates for the two public-operated facilities (NECC and NWCC) were respectively 90.67 percent and 90.08 percent. For the SCCC facility operated by CCA, the overall compliance rate was 84.53 percent. Both of the public institutions scored slightly better than the private facility, although the differences are modest. On the second inspection, the three facilities were virtually identical with 95.28 percent and 97.23 percent compliance at NECC and NWCC, respectively, and 97.48 percent compliance at SCCC.

A security and safety index was the second element that received weight, and accounted for 25 percent of the final aggregate score. The parties agreed not to assign an objective score on this dimension, even though the factors considered included disciplinary reports, use of force, assaults (both inmate-on-inmate and inmate-on-staff), deaths, injuries, escapes, and a residual category for other security and safety concerns. SOCC felt that scoring this area relied too heavily upon professional judgment. The working assumption used in the evaluation was that all institutions were in full compliance with safety and security standards, and the review would only note deficiencies in safety and security practices.

As might be expected, even though the evaluation reports on differences in the factors of safety and security, the conclusion is pretty mild. “Each of the institutions met the security and safety requirements of the two annual inspections and an ACA audit. Their respective scores were exceptionally high and almost identical. The administrative choices of how and when to use force, how to dispose of disciplinary charges, or how many disciplinary tickets to write is really the prerogative of management. However, in reviewing the entire period, in our judgment there was very little difference in security and safety among the three facilities” (Tennessee Select Oversight Committee on Corrections 1995: 56).

The final element that received weight (15 percent) was an index of programs and activities. Generally, this was a review of the numbers of inmates in education programs and work status. The indicator that received the most attention in the report was inmates in job waiting status. Because of a lack of an operational industry program at SCCC (operated by CCA) and NWCC by the second year

47 The elements not used were the nature of inmates, professional standards, and a survey of staff and inmates. As noted in the report, there is a need to make level-playing field comparisons, and as such, a need to control for the nature of inmates. However, this was not done, and the report showed that there was substantial variation in inmate characteristics at the three facilities. For example, 47.5 percent of the inmates at SCCC (operated by CCA) were black, as compared to 22.6 percent at NECC and 78.2 percent at NWCC. While these percentages may reflect the racial backgrounds of the regions of Tennessee where the prisons are located, the prisons themselves are hardly comparable on this item. Similar differences were noted for custody classification of inmates.

The professional standards, those set by the American Correctional Association (ACA), State Fire Marshal reports, State Education Department, and local and state health and sanitation standards, were considered minimum standards. However, the audit items created as discussed above closely mirror items of concern in CCA accreditation inspections.

The surveys were intended only to provide subjective measures of satisfaction from staff and inmates and to provide insights into operational issues.

of operation, these two institutions had higher percentages of inmates in job waiting status. At the time of the review, SCCC was not in compliance with the policy that inmates job structures comprise 6 hours. CCA responded, though, that they changed their practice to be in compliance.

In determining a final weighted rating score to compare the institutions, the scores on security and safety as well as program and activity were meaningless as all three institutions received the maximum number of points on these scores. The only scores that differed among the three institutions were for the percentage of compliance captured in the second audit. The scores for the first audit (where CCA scored lower than the two public facilities) were not used. Since the CCA facility had a slightly higher compliance rate (97.48 percent as compared to 97.23 at NWCC and 95.28 at NECC), it came out slightly higher on the final weighted score (finals scores: SCCC, 98.49; NWCC, 98.34; NECC, 97.17). But as SOCC (1995: 68) noted, “In reviewing the ratings we considered the range of difference of up to 3 percent among the three facilities as essentially comparable. Therefore, our conclusion was that all three facilities were operated at essentially the same level of performance.” Despite this conclusion, the New York Times ran an article at the time the Tennessee evaluation was released that concluded that there was strong evidence that CCA ran a better facility than the two public comparisons in terms of quality and cost (Butterfield 1995).

The Tennessee evaluation is often cited as one of the more sound methodological attempts at comparing private and public prisons. For one, it compares institutions that were of a similar architectural design, were opened at about the same time, and were designed to house inmates of similar custody levels. Nonetheless, there are some serious shortcomings to the Tennessee evaluation.

First, the review is based solely on operational audits of the three facilities. This means that no performance measures were used in actually comparing the prisons, even though some attempt was made to gather performance data related to inmate misconduct, programs provided to inmates (primarily education), and the like. Generally, the position taken was that on the measures that could be developed as performance indicators (measures of safety, security, and program activity), there were no differences among the institutions. All institutions were comparable and received the maximum number of points in these areas. However, even a cursory examination of the actual tables presented on misconduct, education, and the like makes this conclusion suspect.

Second, it is not clear that the facilities provide an apples to apples and oranges to oranges comparison. Even though all three facilities were multi-custody, they housed quite different types of inmates in terms of the socio-demographic characteristics reported, age and race, criminal history, and custody classification. Of course, these differences did not have as much impact upon the Tennessee evaluation as they would have if factors other than operational compliance had been used to calculate the final weighted scores of performance.

Third, the evaluation is a one-shot comparison even though data were collected over two years. For whatever reason, the compliance data from the first audit at each institution is reported but not used in determining the final comparative scores.

Fourth, only a single source of data, the compliance audit, was used to construct the final scores for the three institutions. As mentioned previously, this flows post hoc from the decision to award all three institutions the maximum number of points on safety and security as well as programs and activities. It is not that multiple data sources were not compiled, it is that they were ineffectively used (if used at all) in drawing the final comparisons between the private prison and the two public prisons.

Fifth, there was no attempt to document how the private sector had employed innovations in maintaining or improving quality while at the same time holding down or maintaining costs. There is not even any reference as to how the respective institutions were staffed. While not stated directly in the report, it even appears that private sector innovation was deliberately thwarted by making the private sector provider, CCA, abide by TDOC policy in running SCCC. In other words, it appears that Tennessee took the position that SCCC was simply another TDOC facility, to be run by TDOC policy, and that CCA would simply be given the opportunity to see if they could out-TDOC the TDOC. If this were the case, then obviously this limits the knowledge that can be gleaned about the benefits of privatization. Additionally, the design of the facility was set by the state, and the private contractor (CCA) did not have the opportunity to incorporate potential design efficiencies into the facility. Presumably, though, design considerations would impact more upon cost than quality.

Finally, there is no mention in the evaluation about the consequences of privatization for the TDOC and how TDOC operations may have changed.

Washington State Review

As part of a wider inquiry into the privatization of government services, the Legislative Budget Committee (LBC) of the state of Washington was asked to submit a report by January of 1996 on the feasibility of privatizing Washington State Department of Corrections facilities. Part of the feasibility study included an examination of quality issues.

The researchers did not collect original data for their assessment of the impact upon quality created by contracting for correctional services. Instead, they reviewed studies conducted by Logan (1991) and the Tennessee Select Oversight Committee (1995). Both of these studies are reviewed at length elsewhere in this report.

The LBC also performed cost analyses of public and private prisons in Tennessee and Louisiana. They collected published data for conducting this component along with additional data from the respective state agencies and private contractors. The LBC researchers also went onsite to observe operations. While we are not concerned with the cost analyses here, they did make some qualitative observations about operations in Tennessee and Louisiana. It is these observations that are of interest here.

Review of Quality

The LBC researchers concluded that the Logan (1991) and Tennessee (Tennessee Select Oversight Committee on Corrections 1995) studies demonstrated no significant differences in quality between the publicly and privately operated prisons. They actually do not provide any information about how they reached this conclusion. This is surprising since their conclusion is at odds with Logan's claim that the private contractor provided better quality than the state and federal prisons in his study.

Qualitative Observations of Operations in Louisiana and Tennessee

The LBC researchers examined several questions to address the issue of whether similarities exist between the inmate populations and behaviors both within and between states. The LBC sought to examine whether the experiences with privatization in Louisiana and Tennessee could be generalized to the state of Washington, and this led to the inter-state comparisons. For our purposes, the within state comparisons are of more interest as they address how the private and public prisons compared in Louisiana and Tennessee.

The LBC researchers concluded that inmates in the public and private prisons within each state behaved about the same. They based this conclusion in part upon an examination of the number of escapes, the major infraction rate, the minor infraction rate, and the percentage of inmates in school. In part, though, it appears that the conclusion was based upon subjective evaluations. The LBC researchers note that “(t)here were comments made to us in both Louisiana and Tennessee about a belief of under reporting of infractions and incidents at the private prisons, but headquarters administrators said they thought all of the prisons were safe and secure” (Thomas, Gookin, Keating, Whitener, Williams, Crane, and Broom 1996: A4-4). In fact, in Louisiana, both the major and minor infraction rates were higher at the state-operated prison, although little emphasis is given to this fact.

Other areas briefly covered in the Washington study are demographic and criminal history characteristics of inmates, classification policies, inmate idleness, and program opportunities. Most of the relevant comparisons for these factors were between states. However, the LBC researchers did note that the private prison in Louisiana run by CCA had a lower percentage of inmates enrolled in education as a result of CCA losing federal grant monies upon which they were dependent. Otherwise, the public and private prisons were seen as fairly comparable. As the LBC researchers note: “The prisons we visited appeared clean and orderly. ... Staff were professional both in appearance and performance. There did not appear to be major differences in operations.” (Thomas et al. 1996: A4-9)

There are several shortcomings to the LBC report with regards to quality assessment. First, the LBC review depends upon reviewing performance data (such as escapes, infractions, etc.), but it is not clear how the individual data elements were pulled together to reach a general conclusion. Likewise, even though there is recognition that reported incidents depend upon the nature of inmates and reporting procedures, there was no attempt to adjust rates for these factors.

Second, as discussed in the reviews of the studies by the Tennessee Select Oversight Committee (1995) in Tennessee and Archambeault and Deis (1996) in Louisiana, the evaluations do seem to provide more apples-to-apples comparisons than are generally found in other evaluations. However, unanswered questions remain about how much the institutional averages for inmate behavior are influenced by race differences (e.g., Tennessee) or classification differences (e.g., Louisiana).

Third, the analysis does not address the time dimension. Generally, even though they review data from two separate states, the data are for a single point in time. This does not allow for an assessment of how quality in the public and private sectors may vary over time.

Fourth, there was no systematic attempt to obtain information on sources of innovation available to private sector operators to improve *quality*. This was not the case for private-sector costs. The LBC does attempt to disaggregate sources of cost savings for private-sector operators into savings from using different staffing patterns, savings from providing different employee benefits, and savings from

salaries. In general, they claim that the private-sector operators use staff in more than one area, and they have more flexibility in using staff. In addition to providing little detail about these claims, the LBC researchers do not go on to discuss how these changes affected quality in the respective prisons.

Finally, there is only limited information on the impact of privatization on public-sector operations in Tennessee and Louisiana, and most of those insights pertain to costs. In noting that the cost savings in Louisiana have become smaller over time, the LBC offered this possibility (but no direct evidence):

One explanation for the convergence of costs over time may be the effect of competition. This is an argument made by the private companies that was also mentioned by some state correctional officials. Lean budget years may also have made a difference. For some years the inflationary increases built into the private contracts has been greater than the increases in the corrections budget. So while the per diem cost for the private prisons has inflated, it has not inflated for the public facility (Thomas et al. 1996: 12).

It is worth emphasizing that the Washington State study is a presentation and analysis of data that can also be found elsewhere (Archambeault and Deis 1996; Tennessee Select Oversight Committee on Corrections 1995). While the results of the LBC study generally mirror those of the Tennessee Select Oversight Committee about the experiences with privatization in Tennessee, the LBC conclusions about the experiences in Louisiana conflict with the data analysis presented by Archambeault and Deis (1996).

Arizona Evaluation

The Utah-based firm Management and Training Corporation (MTC) won a contract from the state of Arizona in 1993 to operate a 450-bed minimum security, mixed gender institution. The institution is now known as the Marana Community Correctional Treatment Facility. MTC began receiving inmates in October 1994. Generally speaking, the contract stipulates that MTC run the Marana facility in a manner similar to that in which the state would have operated the prison. MTC must abide by all applicable policy stipulating how Arizona state prisons are run (Nink 1998). By law, the contract with MTC could not be renewed unless there was evidence of either 1) cost savings and comparable quality or 2) comparable costs and superior quality. Dr. Charles Thomas was selected to conduct the corresponding evaluation.

Thomas was faced at the outset with a number of serious methodological problems. First, the Marana facility is a dual gender facility, but there are no dual gender facilities operated by the state of Arizona to serve as a point of comparison. Twenty-two percent of the inmates incarcerated at Maranna are female. Second, the prisoner population profile is different from those of the publicly operated minimum security prisons in Arizona. In particular, Marana houses a much higher percentage of DWI inmates (24.8 percent) than is true of all other Arizona facilities (with the exception of Papago, 98.9 percent, which is almost exclusively a DWI center). Also, the Arizona Department of Corrections contractually agreed not to send to Marana prisoners who “have serious or chronic medical problems, serious psychiatric problems, or are deemed unlikely to benefit from the substance abuse program” (Thomas 1997a: 73). Third, the classification of the inmate population “tilts” toward being less serious at Marana than at the other Arizona facilities (Thomas 1997a: 106). In particular, all of the inmates at Marana are public risk 1 or 2 inmates (with 1 being the lowest risk), as they are, for the most part, at the other Arizona prisons. However, whereas the other Arizona prisons have inmates

with internal risks greater than 2 (i.e, inmates who require more supervision), Marana has practically no inmates with an internal risk factor greater than 2 (Thomas 1997a: Appendix A, Table 3: A9). This is important as higher risk classification scores are generally predictive of misconduct. In other words, 14.11 percent of public risk level 1 or 2 inmates at publicly operated Arizona prisons have an internal risk greater than 2. Only 0.24 percent of the inmates at Marana have a similar classification. Fourth, the contract with MTC calls for providing a “heavier” load of programming to Marana inmates than is the case in publicly-operated minimums. And, finally, the physical design of Marana is unlike that of other Arizona facilities, primarily because it is newer.

Within these constraints, Thomas decided to compare cost and quality performance measures at Marana against the average for all minimum security institutions under public operations. Arguably, Thomas did not have many good options, but it is not clear that the choice he made is completely satisfactory. Very different types of institutions make up the full contingent of minimum security facilities in Arizona. We reserve this discussion for later. As Thomas notes in his chapter on comparing quality, “Any or all differences could be caused by nothing more or less than the fundamental dissimilarities between the Marana Community Correctional Facility and the fifteen state-operated facilities” (Thomas 1997a: 108).

Even recognizing the serious limitations to the study, Thomas drew 13 conclusions from his study, 7 of which pertain directly to the issues associated with quality as determined in the Arizona evaluation. We largely ignore Thomas’ review of existing literature on quality comparisons as the relevant studies that Thomas reviewed are also reviewed as part of this report. We also exclude his conclusions about cost. Thomas’ seven conclusions about quality of operations in Arizona are worth reporting in full, however. They provide the basis for our examination of the methodological issues raised in the Thomas study. The conclusions appear in full in both the Executive Summary and body of the report (Thomas 1997a: ii-iv, 157-159):

Conclusion #4: There is a high risk that operating cost and performance comparisons of the Marana Community Correctional Treatment Facility could yield misleading results because there is no state-operated prison in Arizona that houses inmates similar to Marana or runs similar programs.

Conclusion #7: The performance comparison on the dimension of protecting the public safety interest as measured by the frequency of escapes, major disturbances, and injuries caused to visitors revealed that the record for the Marana Community Correctional Treatment Facility was superior to that of the state-operated Level Two (minimum) prisons.

Conclusion #8: The performance comparison on the dimension of protecting staff and prisoners from the risk of personal injury or death caused by homicide, battery, assault, and arson revealed that the record of the Marana Community Correctional Treatment Facility was superior to that of the state-operated Level Two prisons.

Conclusion #9: The performance comparison on the dimension of educational, treatment, and work programs resulted in a best professional judgment that the dissimilarities between the programs offered at the Marana Community Correctional Treatment Facility and those found at the state-operated Level Two prisons were so great that no fair comparative conclusions could or should be reached.

Conclusion #10: The performance on the dimension of compliance with professional standards as measured by routine Department performance audits, litigation initiated by either prisoners or staff members, inmate grievances, and compliance with in-service training requirements for staff members revealed that the overall record of the Marana Community Correctional Treatment Facility was superior to that of the state-operated Level Two prisons.

Conclusion #11: A balanced consideration of the entire set of individual performance indicators revealed that the overall performance record of the Marana Community Correctional Treatment Facility was superior to that of the state-operated Level Two prisons.

Conclusion #13: Notwithstanding the conclusion that, when compared with all state-operated Level Two prisons, the quality of performance at Marana was superior to that of the state-operated prisons, it was found that one or more individual state-operated prisons had performance records that were equivalent or superior to that of Marana.

Thomas justified drawing these conclusions by pointing to the necessity to have the information for policy purposes (Thomas 1997a: 103). Also, he claimed that the limitations cause the findings only to have “fuzzy” rather than “crisp” edges (Thomas 1997a: 104).

Nonetheless, Thomas recognized the risk associated with the comparisons he makes and that while Marana fared the best in his comparisons against the average for Level Two prisons in Arizona, some individual prisons had better performance measures than Marana. To Thomas’ credit, he did report the performance measures individually for the 15 publicly-operated prisons.

Of the conclusions about quality listed above, Conclusions 7, 8, and 10 are based on direct examination of data presented by Thomas. As such, we review each of these conclusions in more detail. Thomas’ other conclusions regarding quality are more subjective or global, and we do not discuss them specifically, although these quality conclusions (Conclusions 4, 9, 11, and 13) are reviewed in general.

Conclusion 7, the conclusion about public safety, is based on comparing rates of major incidences, escapes, and injuries to visitors. Thomas concluded that Marana’s performance was “superior.” However, as Thomas noted, none of the facilities (including Marana) had a single major disturbance, only 4 escapes occurred at the 15 state facilities (3 from Papago where the DWI cases are incarcerated) while there were none at Marana, and no injuries to visitors were reported at any minimum security prison (including Marana). None of these findings are surprising given that the facilities house minimum security inmates. What is surprising is that Thomas concluded, even with the cautionary remark in the *body* of the report that “readers must refrain from making more of this difference than is fair and reasonable” (Thomas 1997a: 111), that Marana was *superior* to the state facilities because 2 of the 15 state-run facilities had escapes.

It seems that reasonable commentators could conclude that Marana was exactly equivalent to 13 of the 15 state-operated facilities on the dimension of public safety, and that Marana -- and the 13 publicly-operated prisons -- were marginally better than two of the publicly operated facilities. The term marginal seems appropriate because there was a difference on only one of the three indicators, and the frequencies for the one indicator were not unusual. While escapes are rare, they do nonetheless occur (from private as well as public prisons).

Similar problems exist for Conclusion 8 about protecting staff and inmates. Thomas again gave ample warning about the tenuous nature of his conclusion, nonetheless concluding that Marana was superior. The rates of the types of serious misconduct considered by Thomas are very low at any minimum security prison. In essence, most of the forms of misconduct (like inmate-on-inmate assault), occurred only a few times -- if at all -- and at a limited number of institutions. Thus, comparisons of Marana to 15 other facilities is fraught with difficulties, especially when one considers that 22 percent of the inmates at Marana were female, a group with low rates of the types of misconduct considered.

In addition to Marana, three publicly operated facilities had perfect records on offenses related to protecting staff and inmates from serious injury. Two of the three publicly operated facilities (Globe and Maricopa) housed male inmates.

Thomas reported the rates of all Type A offenses (serious) charged and found guilty at each of the 16 prisons in his study. (He also reported comparable information for the less serious Type B and Type C offenses, but we ignore these for our purposes, since less serious offenses typically involve a great deal of discretion and, therefore, are often unreliable indicators of the "true" underlying pattern of misconduct). What is interesting about the Type A offenses is that they occur often enough to provide some confidence in the respective rates, although collapsing all serious offenses together means information is lost about what types of offenses are being reported at the respective institutions.

The rate at which Type A offenses are charged at Marana (0.33) compared very favorably to the rate (0.55) for the average of the 13 publicly operated facilities listed in Table 6 (Thomas 1997a: Appendix A, page 12). Nonetheless, in addition to the two female minimum-security institutions, two other male institutions (Globe and Piacho) had lower or comparable rates of Type A offenses (0.20 and 0.33 respectively). When we factor in that 22 percent of Marana inmates are female and females commit almost no Type A offenses (the rates for charging inmates at the female prisons in Arizona were 0.04 and 0.00), the rate of 0.33 at Marana is not as impressive.

Assuming that the 22 percent of the females at Marana were charged with Type A offenses at the rate of 0.04 (the highest rate noted in an Arizona female, minimum-security prison), then males at Marana were charged for Type A offenses at the rate of 0.41. At this adjusted rate, we see that Globe and Piacho compared favorably to Marana, as did San Pedro where the rate was 0.37. This still means that Marana was doing well, with a lower rate than 8 of the male, publicly operated minimum-security facilities. Nevertheless, Marana was higher than 3 of the publicly operated males facilities, and it was obviously higher than the rate at the two publicly operated female facilities. At best, Marana is comparable to the best public facilities, but it is hard to argue that Marana is superior if we trust the data on Type A offenses.

Regarding Conclusion 10, the factors considered included the comprehensive annual quality audits conducted by Arizona DOC (including an audit of Marana), litigation filed against the prison, inmate

grievances, and compliance with staff training requirements. Marana was the only minimum security institution that did not receive an overall rating of excellent on the audit. Thomas implied, however, that the internal audits may have been stacked against Marana. Regarding litigation, there were only 14 lawsuits initiated by prisoners. This involved inmates at 8 of the 15 publicly operated facilities and none at Marana. There were two lawsuits initiated by staff, both at publicly operated prisons. For the rate of inmate grievances, the rate at Marana (0.26 per 100 inmates) was second only to Papago where the rate was 0.20. On the dimension of training, there was no difference between the publicly operated prisons and the Marana facility operated by MTC.

Despite the mix of evidence on performance -- including the fact that Marana did not score as highly as some state-run facilities, that some kinds of infrequently occurring events transpired at some of the fifteen state facilities but not at Marana (e.g., litigation), and the problematic audit review -- Thomas nonetheless concluded that, on balance, a superior ranking “must” be assigned to Marana.

Thomas was faced with a host of methodological problems, some of which may have been insurmountable. Nonetheless, an evaluation was mandated before the contract could be renewed, and as Thomas correctly noted, the conditions of policy reviews seldom meet the pristine conditions of laboratory research. In this context, let us review then how this research effort fulfills the conditions of sound comparative research.

First, the review seemed to use both performance and audit data, relying most heavily upon performance data. The audit data came from the normal audit cycle of the Arizona Department of Corrections. As such, the audit data are suspect as Thomas implied in his analysis. Unlike the audits performed as part of the Tennessee evaluation (Thomas 1997a: 73), where the protocols were developed by both public and private officials, and where audit teams were comprised of members from both the public and private sectors, the Arizona auditors were all Arizona Department of Corrections employees conducting a standard Department of Corrections audit. At the very least, this creates the appearance that bias may have been built into the audit of Marana. In our opinion, Thomas was correct to not emphasize the audit results in his analysis. However, we are not so sanguine about his uses of the performance data, as noted in the review above.

Second, it is abundantly clear that this evaluation does not provide an apples-to-apples comparison. Thomas himself was aware of this fact, as was the Arizona Department of Corrections when they contracted for the evaluation. It seems there was no comparable facility to Marana in the entire Arizona prison system. Still, this does not justify the strategy Thomas followed of comparing the Marana facility to the average of the other publicly operated facilities. If an average had been used, it should have been an average of facilities that most closely resembled Marana. Using Thomas’ approach, the comparisons are not that informative. More informative are the comparisons made in the body of the text of Marana to individual state facilities, but these comparisons do not provide the basis for the findings presented in his 13 conclusions. For the most part, the 13 conclusions presented by Thomas are based upon comparisons of Marana to the averages for the 15 publicly operated facilities with the exception that Thomas does point to the facility-by-facility comparisons as conditioning the other conclusions (see Conclusions 4 and 13).

Third, the study suffers from being a one-point-in-time comparison. A problem not noted above, but which may be relevant, is the timing of the study. Generally, the Marana facility was in an activation phase for most of the course of the study, which probably had some influence upon the types of

behaviors observed there. Whether patterns noted for this time period will hold as the facility matures is unknown.

Fourth, there was no attempt to document how MTC employed innovations to facilitate changes in quality (or cost for that matter). In part, this inattention may have resulted from the model of privatization followed in Arizona. Basically, the State of Arizona has taken the position that a private contractor should be given the opportunity to demonstrate it can out perform the state in running an Arizona prison according to Arizona Department of Corrections policy. Some states take the position that a private contractor should be given a great deal of flexibility and freedom in developing its own foundation of policy and procedures, while holding the contractor to some minimum standards such as those developed by ACA. While their approach may make some things easier for the Arizona Department of Corrections (conducting audits for one thing), it certainly provides little room for the private contractor to innovate. This means that differences in quality must arise from better performance by the private contractor's line staff and management.

Fifth, there was no attempt to assess whether the operation of the Marana facility by MTC has brought about system changes to the Arizona Department of Corrections.

Louisiana Evaluation

The State of Louisiana has funded an evaluation of its prison privatization efforts. Archambeault and Deis (1996) have produced a report comparing 3 institutions which have the same architectural design, accommodate approximately the same number of inmates, were built and activated at approximately the same time, are located in rural areas of the state, and house inmates of comparable security levels. Allen Correctional Center is operated by Wackenhut Corrections Corporation (WCC). Avoyelles Correctional Center is operated by the Louisiana Department of Public Safety and Corrections, and Winn Correctional Center is operated by the Corrections Corporation of America (CCA).

The primary purpose of the Archambeault and Deis evaluation was to compare the two privately operated and one publicly operated facilities on measures of cost and performance. The performance data used in this report came primarily from official records normally reported to the Secretary of Public Safety and Corrections by all adult correctional institutions within the state. The researchers made one field visit to each of the three sites. Based on the site visits and supporting documentation, Archambeault and Deis characterized the management philosophies existing at the time of the study. They rated the Wackenhut operated facility as most authoritarian, the publicly operated facility as intermediate, and the CCA operated facility as the least authoritarian of the three. At the time of the study, WCC employed 335 staff, the public facility 384 staff, and the CCA facility 340 staff. The CCA facility employed more women and minorities than the other 2 prisons, while the public facility employed predominantly white and male staff.

According to Archambeault and Deis, the Louisiana Department of Public Safety and Corrections Secretary, Richard Stalder, standardized the policies and procedures of the three prisons in 1992 and instituted a common reporting procedure that was used by the evaluators as their primary source of data. In a letter to Archambeault, written by Robert C. Thomas, the Principal Management Auditor/Supervisor for the State of Washington's Joint Legislative Audit and Review Committee,

Thomas expressed his concerns about the validity of the reporting mechanism (Thomas 1997b). In his letter, Thomas raised the possibility that “...different incentives can be at work in the private facilities than in the public facilities (p. 3).” Although we agree with this criticism, without further information, it is difficult to sort out the relationship between reporting incentives and the actual behavior underlying these reports. While private prisons may have an incentive to under report unfavorable incidents to bolster the impression that they are performing well, there is a counterbalancing incentive for private prisons to report all significant incidents as failure to report could provide grounds for contract termination. On the other hand, a public facility may want to over report incidents as an argument to receive more resources, unless the public facility is in “competition” with private sector providers of prison services.

Because it is difficult to disentangle accurate reporting from this subtle incentive structure, we assume for the present purposes that the reporting mechanism is a true reflection of underlying conduct. Nonetheless, we prefer that reporting mechanisms occur more as a by-product of institution operations than as an additional requirement. As an example of what we mean, consider two separate reporting mechanisms used by the Bureau of Prisons for representing serious inmate misconduct. One mechanism is similar to the one adopted by Louisiana. On a daily basis, institutions report any serious incident (e.g., fire, serious assault, disturbance) to both the Regional and Central Offices. There is a certain amount of discretion in what people choose to report. The second mechanism of reporting these incidents occurs as a by-product of the normal adjudication process that occurs in the Bureau of Prisons institutions. A serious assault will typically result in an administrative action culminating in an adjudication of the misconduct by a disciplinary hearing officer (assuming that the assailant is known). Whether or not there is a sustained finding (conviction), all of the procedures and actions will be recorded in an automated database of disciplinary hearings. The Bureau is able to cull aggregated information on disciplinary actions for any and all of its institutions from this individual level database. We have data demonstrating that this latter mechanism has much less reporting discretion than the former.

To establish comparability of the three institutions, Archambeault and Deis assessed information on the physical plant, its history of expansions, State-imposed policies and standards, comparability of ACA standards, and the number and ethnicity of inmates during the evaluation period. While acknowledging that a limitation of their study was that they lacked information on the characteristics of the inmate populations, the evaluators minimized this limitation by stating that an “ideal evaluation design” would include such data. We would characterize information on the characteristics of the inmate population as fundamental in a comparison of institution performance measures. Almost every institution performance measure used by Archambeault and Deis was a summary or aggregate indicator of individual performance data. Since it is well known that inmate behavior whether prosocial or antinormative is strongly correlated to criminal history, demographics (age, race, ethnicity), and other social and actuarial predictors, these background data are a sine qua non of valid institution performance comparisons. What may appear to be differences in institution performance may be nothing more than differences in the background characteristics of inmates housed in the different institutions that predispose them toward more or less favorable behavior.

Over 200 measures were collected and analyzed by Archambeault and Deis. These measures covered issues about safety, risk, effectiveness, performance, and cost. The data covered several years (fiscal years 1992 through part of fiscal year 1995) and represented monthly occurrences of the phenomenon. Typically, the researchers would compute an average of the monthly data and use that average as the

performance indicator. In some cases, the researchers compared averages for different periods of time when they thought changes in reporting or other artifactual problems might influence the data. Unfortunately, the researchers did not capitalize on the trend data to evaluate performance over time.

The performance measures included data on escapes, assaults on staff and inmates, assault outcomes (i.e., whether they involved serious injury), sex offenses, aggravated sex offenses, institutional disturbances, deaths due to violence, suicide, or illness, disciplinary actions, gunshots, grievances, drug tests, communicable diseases, inmate education and vocational training participation, GED's earned, basic literacy, college participation, and various indicia of medical care. Staffing data included use of sick and maternity leave, resignations, and grievances. Each performance measure was analyzed separately; however, scales of these measures were also constructed and analyzed.

As an example of how Archambeault and Deis evaluated the three institutions, consider the first performance measure—escapes from the institution. Over the study period, the public institution reported no escapes, the CCA-operated facility reported 5 escapes and the WCC-operated facility reported 3 escapes. Archambeault and Deis submitted the month-to-month data to an analysis of variance and contrasted the three average escape rates using a Scheffe post hoc comparison technique. Using these methods, there was no statistical difference among the average of the monthly escapes over the study period. The F- and Scheffe tests used by these researchers were probably inappropriate techniques to compare such rarely occurring events and since they were measuring population differences, not samples, the use of any statistical test to compare the averages may have been inappropriate. Even more important is the interpretation of the absolute differences in the number of escapes for the 3 institutions. Protecting the public is one of the most significant missions of a prison system and clearly the public institution was doing a much better job than either of the two private institutions. The researchers do acknowledge the public institution's superiority but also claimed that "each of the three prisons are fully meeting the obligation of protecting the public (p. 121)." From our point of view the two private prisons were deficient in this obligation.

In chapters V through X of their report, Archambeault and Deis analyzed the remainder of nearly 200 performance measures. This was clearly an ambitious assessment of the comparative quality of the three institutions. On some of the more important dimensions, data were also collected and reported on the four other adult correctional institutions in Louisiana: Hunt, Dixon, Angola, and Wade. Comparisons involving all 7 institutions were made primarily on serious misconduct such as escapes, serious assaults on staff, inmate on inmate sex offenses, other serious inmate offenses, and institutional disturbances. While the three primary comparison sites had almost identical inmate population counts over the period of this study, the other four institutions used in some of their comparisons had widely discrepant population counts. It appears to us that Archambeault and Deis reported these performance measures without accounting for the large differences in the average monthly inmate populations of the other four comparison institutions. Angola had an average monthly inmate population almost 4 times as high as the 3 comparison institutions. Another institution, Wade, had an average monthly population almost 20 percent lower than the 3 comparison sites. The comparison of raw averages is meaningless given the huge disparity in the monthly inmate population counts.

Since these serious misconduct measures were important indicators and the raw data were available, we re-computed the performance measures by taking the data reported in Archambeault and Deis and dividing the average monthly counts by the average monthly inmate population then multiplying the

result by 1,000. This results in a performance measure that is an average monthly rate per 1,000 inmates. A completely different picture emerges when you compare the raw counts, i.e., the average number of incidents versus the rates adjusted by the average monthly population. Table 1 represents the monthly counts, Table 2 the rates. Whereas Archambeault and Deis reported that the risk of assaults by inmates on staff resulting in serious injury is marginally higher at the public facility than the two privately operated facilities, Table 2 indicates that at least one other public facility had an equally low rate of such assaults. The data in Tables 1 and 2 represent information on staff and inmate safety. We are not confident that a statistical test is warranted, thus, for each performance indicator, we have color coded the best rate in blue, the second best rate in green, and the worst rate in red. It is clear that when the data are represented as counts, Dixon (public), and perhaps Allen (WCC) and Avoyelles (public), were the best performing institutions on these performance indicators. Angola (public) was the worst by far. Looking at Table 2, using the more appropriate rates, Dixon (public) was still the best, Hunt (public) perhaps the second best, and Angola (public) -- while still the worst -- did not look nearly as bad. It is not clear why the penitentiary at Angola should be included in any of these analyses, since by reputation, this facility houses the most hardened prisoners in the Louisiana system. Data on the background characteristics of these inmates would go a long way toward answering these issues of comparability.

We have also included other counts and rates in Tables 1 and 2, for which there is no information reported by Archambeault and Deis on the other public institutions, as well as information on total disciplinary actions and gunshots. We did not color code disciplinary actions and gunshots because, unlike Archambeault and Deis, we are not convinced that lower rates indicate better performance. Archambeault and Deis cite Clear and Cole (1997) who argue that high levels of disciplinary infractions indicate staff and inmates are intolerant of each other. We can think of other scenarios in which high levels of misconduct can be interpreted as a sign that management is strict about enforcing rules but fair in the disciplinary process. Alternatively, low levels of misconduct may indicate a lax environment, and tolerance of nuisance behaviors that invite more serious misconduct. Misconduct data can be very misleading unless we are knowledgeable of the institutional context. Looking at Table 2, we can see that Angola, which had the worst record with respect to serious incidents, had the lowest overall misconduct rate in that time period. Dixon, which had the best record with respect to serious incidents, had a total disciplinary rate intermediate to the lowest and highest rates among the 7 institutions. If misconduct were related to serious incidents, we would expect institutions with the highest misconduct rate to have the highest serious incident rate. The data argue against any conclusion that low rates of misconduct indicate better performance.

The urinalysis “hit” rate was another important indicator of institution safety and security although Archambeault and Deis treat the indicator as a measure of health risk. The rate at which inmates are randomly detected using drugs is an indication of the extent to which an institution is able to control the importation and use of drugs. These data were only available on the 3 comparison institutions. The data showed that the public institution was much more likely to use urinalysis to test for drugs and that the random tests revealed that the public institution had far fewer inmates testing positive for drug use than either of the privately operated facilities. Overall, these data seem to indicate that each institution had certain safety and security deficiencies and each had certain strengths; however, the best performing institution was a publicly operated one during the period of this study while the worst was the notorious penitentiary at Angola. All of these conclusions should be tempered by the fact we have no basis for determining whether these differences resulted from institution management or

merely from housing inmates with different propensities toward violence and other serious misconduct.

Other data were collected by Archambeault and Deis to indicate health risk. Information on communicable diseases, including HIV infection and tuberculosis, were analyzed. Archambeault and Deis used information on the incidence and prevalence of HIV and tuberculosis. They used various indicators of HIV and AIDS which depended on the level of seriousness of the infection and the year in which the data were recorded. For example, they separately assessed group I, group II, group III, group IV-A, group IV-B, group IV-C, group IV-D, group IV-E, and the number of inmates receiving AZT for fiscal years 1992-1993. In fiscal years 1993-1994, they categorized the infection into separate subgroups that depended on the T-cell count and whether the cases were characterized as category A, B, or C and levels 1,2, or 3. Similar measures were compiled on tuberculosis cases. The researchers also created a composite health risk of these measures and included the drug testing measures. This resulted in an index composed of 60 indicators.

They found that the WCC-operated facility had the highest medical risk score, the CCA-operated facility the second highest, and the public facility the lowest. We question the validity of this composite health risk predictor. Unless they could measure the quality of care delivered by the different institutions, it is difficult to credit or fault an institution for its level of health problems. Health problems can be related to the demographic characteristics of the inmate population and totally unrelated to the health care delivery system at the institution. The drug assessment did indicate the public institution had the lowest drug utilization rate and the highest use of random and total number of drug tests and the lowest percentage of inmates testing positive among the random tests. This is evidence that the public institution was actively combating drug use at least partly through the use of testing.

In Chapter IX of their report, Archambeault and Deis assess the work environment of correctional personnel. Their first set of indicators examines the relationship between the number of positions allocated and the actual number of staff working on a daily basis. They found that the public institution had more positions allocated to custody but a lower proportion of those positions were used on a daily basis. In their comments, Archambeault and Deis provide the explanation for this discrepancy. When the public facility opened, many of the personnel transferred from other state institutions. Employees with more tenure accrue more leave and therefore, more staff were needed to cover the same shifts. Archambeault and Deis did not have sufficient data to investigate this possibility.

Chapter X of their report examined the use of administrative remedy procedures by the inmates, indicators of education and vocational opportunities, inmates' medical duty status, and the number of inmates evaluated and transferred to pre-release programs and community correctional centers. The WCC-operated facility had the highest monthly total of administrative remedy complaints. The public and CCA-operated facilities were almost identical in those rates. The public facility was the least likely to accept a complaint.

The CCA-operated facility had the most complaints regarding medical care and quality of life. The WCC-operated facility had the most complaints regarding property, legal issues, rules, threats, communication, records, finances, institution programs, discipline, and classification. The public facility had the most complaints about discrimination and protection.

Data on program enrollment and completions in education and vocational training programs indicated that the CCA-operated facility was doing a better job in providing educational and vocational training to inmates than either the public or the WCC-operated facility. However, the authors noted that the public institution involved more inmates and volunteers in the education process, had more inmates enrolled who completed the basic literacy program, and had more inmates enrolled in college courses. Archambeault and Deis concluded that the CCA-operated facility was far more effective in its education performance than the WCC-operated facility or the public facility. This conclusion was partly based on efficiency ratings in which the CCA-operated facility had higher rates of completions on some indicators.

Finally, Archambeault and Deis collected data on the duty statuses for inmates and whether the institutions screened inmates for transfer and community rehabilitation and work centers. The CCA-operated facility had the most occurrences of screening and highest ratio of transfers to the community centers. The CCA-operated facility also had the highest ratio and most inmates on some form of limited duty status. In the absence of any additional contextual information, it is almost impossible to make any sense of the limited duty status data.

Archambeault and Deis concluded that the two private prisons outperformed the public institution on most of the performance measures, including critical incidents, safer working environment for staff, a safer environment for inmates, judicious use of disciplinary actions, more efficient use of security personnel, higher inmate program participation, and higher use of inmate transfer to community settings. The public institution was credited with outperforming the private institution on measures of escape, aggravated sex offenses, substance abuse, the breadth of education and vocational training in the number of inmates served, and the breadth of treatment, recreation, social services, and habilitative services to inmates.

As we have already noted, a re-analysis of the safety and security data using the information on all of the Louisiana institutions shows that the public facilities were the best and the worst. However, this conclusion and any other conclusion should be strongly tempered since Archambeault and Deis were unable to collect information on characteristics of the inmate population that could have been used to control for potential inmate population differences among the institutions. We suspect that the penitentiary at Angola probably houses the most hardened and violent prisoners incarcerated by the State and that there are structural reasons (both architectural and sociological) that make it a difficult prison to manage.

In Thomas' (1997b) letter (mentioned earlier), he was also critical of Archambeault and Deis' conclusion on the role of privatization for other jurisdictions, although as far as we can tell, that conclusion was misstated in the Thomas letter. Thomas wrote that Archambeault and Deis claimed, "Private prisons have a definite place in any state's total prison system (p. 3 of the Thomas letter)." The closest comment we can find in the Archambeault and Deis report is the statement "Privately operated prisons have a definite place in the planning of any state's total prison system (p. 573)." Thomas argued that the conclusion was unwarranted by the study and that a private alternative may not be in the best interests of the state. In fact, the Archambeault and Deis conclusion was more guarded and those authors went on to state that privatization of prison beds should be limited to ensure that the incentive to compete is not lost.

The intent of the Archambeault and Deis evaluation was strictly to compare the public versus the private operation of the facilities. If there is an innovation to be found, it might be the staffing patterns used by Corrections Corporation of America. The public facility used predominantly white (81.5 percent) males (76 percent). The CCA-operated prison used many more female staff (42 percent) and many more minority staff (50.3 percent). The WCC-operated facility was somewhere in between, using mostly white male staff (63 percent). Since staffing is one of the most important components of correctional service, the use of more women and minorities might be considered an innovation if it could be shown to be related to the successful management of the institution. If Archambeault and Deis did point to an innovation it would have been the management philosophy of the CCA-operated facility. They considered CCA's approach to be the least authoritative, involving staff in the organizational decision making and giving "employees a vested interest in the overall success of the prison organization (p. 66)."

It was difficult to conclude how or whether the Louisiana public correctional system had changed in any way in response to the privatization of its two facilities. The Secretary of Public Safety and Corrections did introduce a reporting system to monitor all of the institutions; however, this system might have been implemented in the absence of privatization.

New Mexico Evaluation

The discussion of the New Mexico evaluation is taken primarily from the report by Harer, Karacki, and Gaes (1995).

Charles Logan has published, "Well kept: Comparing quality of confinement in private and public prisons," as both a National Institute of Justice monograph and a condensed version in the *Journal of Criminal Law and Criminology* (Vol. 83, pp 577-613, 1992). Logan's comparison of private and public institutions is based on contrasting the operations of two women's prison in New Mexico and a Federal institution. Women prisoners in New Mexico were originally housed in a state facility which operated primarily as a diagnostic and orientation facility for men. To meet the needs of the female inmates, a private facility was built and operated by the Corrections Corporation of America (CCA) under contract to the state. Logan later collected a limited amount of data from a Federal women's facility to do a comparison of all three kinds of operations.

In both his monograph and paper, Logan first outlined a theoretical model, the Confinement model, which he used to form the basis for comparisons among the three institutions. He then proceeded to develop institution performance indicators (IPI's) which represented the various dimensions of his Confinement model. Logan's Confinement model is succinctly represented in his own words:

The mission of a prison is to keep prisoners--to keep them 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. (Logan 1992: 580)

Thus, the dimensions which Logan used to compare institutions were security, safety, order, care, activity, justice, conditions, and management. We have little quarrel with Logan's conceptual framework, although we believe there are critical goals not adequately addressed by this model. In

Logan's approach to corrections, inmate programs are merely activities to "keep them busy." But, as the mission statements of most modern correctional systems imply, rather than merely "to keep them busy," prison programs are intended to provide inmates with a positive influence in their lives, afford them the opportunity to improve their skills, and provide a socializing agent so that they come to accept the moral and legal norms of society.

One of the fundamental problems with Logan's study is that with only three institutions to compare, he was limited in the kinds of analyses that could reasonably be used. Furthermore, he was really comparing the management of essentially the same New Mexico female inmate population over time by two different management groups (public versus private) housed in two different facilities. Almost as an afterthought, he contrasted this before/after longitudinal assessment to a population composed of imprisoned federal women. The appendices to Logan's NIJ monograph also include reports, written by two consultants, which described the state and private institutions and the events culminating in the transfer of female inmates from the New Mexico State prison to the privately run institution.

Logan used a large number of performance indicators which were quantitatively combined; however, the large number of measures used does not compensate for the very small sample under analysis.

Other problems with this study, however, arise from the ways in which Logan analyzed and interpreted the institution performance indicators that he used to compare the operations of the three facilities.

The Probable Bias in Institution Performance Indicators Based on Staff Perceptions

Almost all of the differences which favor the private facility over the two public facilities in the Logan study were based on staff perceptions as measured by the Prison Social Climate Survey (Saylor 1984) administered to staff at the three institutions. There are many reasons why staff surveys could have biased the results in favor of the private facility.

Clearly, staff at the private facility would be keenly aware that the success of their employment could depend, in part, on the responses they provided to the researcher. This most obvious, and potentially fatal flaw of the research, was discussed only superficially and then dismissed in the Logan report.

A second biasing influence was the fact that many of the staff selected for the private facility had worked in the public facility previously. It is likely that they would want to justify their decision to leave the state government to work in the private facility by favorably responding to the survey questions.

A third biasing influence in the measurement of these perceptions was the fact that the private facility was brand new, with many new staff as well as some experienced former state corrections staff. The facility built by the private corrections company was considered to be very well designed and staff were excited by working in this new environment. Yet, one wonders how their attitudes would have changed over time as the challenge of working in a new and exciting environment gives way to the daily routine of operating a correctional facility. We were so curious about the possible change in attitudes of staff over time that we asked the Corrections Department of New Mexico if we could re-administer the Prison Social Climate Survey at the private facility two years after the private operation began. However, management at the private facility would not allow this.

Another important biasing influence on staff perceptions was the low response rate among state and Federal employees. The private facility response rate was 72 percent while the two public facility response rates were less than 50 percent. Data from the Federal facility were collected in the very first year the Prison Social Climate Surveys were administered for the entire Bureau of Prisons. In subsequent administrations, the Bureau of Prisons has achieved no lower than a 72 percent response rate and as high as an 88 percent response rate from 1989 through 1994. Low response rates could be construed as indicating that only staff who had negative perceptions of the institutions were motivated to complete the Social Climate survey at the two public institutions.

The last important biasing influence in Logan's comparison across the three institutions and, perhaps the most damaging, is that Logan did not have a full complement of measures for each institution for computing an overall index of "quality." In particular, approximately 30 percent of the measures that were used in the comparison were missing for the Federal facility.

To exemplify this problem, suppose we are asked to rank order three employees on their overall performance based upon 10 performance indicators. For two employees, data are available on all ten measures; however, for the third employee, we only have information on 7 measures. Knowing this, should we still try to rank order all three employees on the overall performance index? Obviously not, yet this is exactly what Logan proceeded to do.

Interpreting Institution Performance Indicators

Another problem with the Logan study was what we believe to be the often questionable way in which Logan interpreted the institution performance indicators (IPI's). In all, Logan used 333 IPI's, most of which were based on staff perceptions measured by the Prison Social Climate Survey. For each of the 333 IPI's, Logan assigned a ++, +, =, -, or -- value to indicate whether an institution was much better, better, equal, or worse, or much worse than the comparison institution(s). It is noteworthy that a set of indicators and measures of correctional effectiveness derived from the professional judgment of multiple correctional experts and practitioners was available to Logan, namely the American Correctional Association's (ACA) standards. Logan chose to ignore the ACA measurement scheme, preferring his own instead. Logan himself admitted that "Interpreting each measurement item was often difficult." He also pointed out that many items could quite legitimately be interpreted and scored in many different ways. Yet despite his initial cautious remarks, he proceeded to make specific judgments, a priori, about whether a measurement item was positive or negative without consulting correctional experts. We found some of his judgments somewhat naive. A few examples should demonstrate this. We will focus here on only the relatively objective measures he culled from institution records for the institution security dimension.

In his section on security, Logan examined a number of objective indicators related to inmate contraband, drug use, misconduct, staffing patterns, and furloughs. Other than his inclusion of furloughs, we think these are valid issues related to institution security. Unfortunately, the way these measures were interpreted by Logan makes little or no sense from any sound correctional management point of view.

Logan compared the state and privately run prisons by looking at the rate shakedowns (i.e., contraband searches) were occurring and the proportion of shakedowns in which contraband was found. He gave the state facility credit for performing shakedowns more often; however, he gave the privately run facility more credit for finding contraband a lower proportion of time. This latter

judgment makes little sense. It may very well be that the state officials were doing a better job of finding contraband, were less tolerant of contraband, or both. These explanations would have led to an opposite conclusion from Logan's. Whereas Logan saw merit in finding less contraband, it is also reasonable to assume that finding more contraband is a reflection of thorough and well-trained security staff.

A second example involved the privately run facility, as well as the state and federal facility. Logan found that among inmates suspected of using drugs, fewer tested positive for opiates in the Federal facility than in either the state or privately run institution. Yet, Logan gave the Federal institution a demerit for conducting fewer tests among inmates suspected of drug use, while giving the privately run institution the highest rating for conducting the most urinalysis tests. The important issue here is whether inmates were using drugs in the institution. Conducting more tests might be construed as wasting money. How could the Federal institution be given credit for having the lowest opiate usage rate and simultaneously be judged inadequate in its drug testing policy while achieving a better result?

Another objective dimension reported by Logan was the rate at which inmates committed significant misconduct incidents during the 6-month period of the study. This is an example where Logan used his judgment, rather than conduct a statistical test. He found that the privately run prison which had a 0 rate of significant incidents was judged better than the federal prison which had a rate of .01 significant incidents in a 6-month period. These rates were not statistically different from each other, yet in Logan's judgment, the privately run facility performed better on this measurement item. Since there is so much reporting discretion in these kinds of incidents, we are not sure it is a fair assessment to conclude that the privately operated facility had out-performed the publicly operated facility when the rates for both facilities were so low.

In his analysis of institution security, Logan evaluated furlough rates as well. He claimed that furloughs indicated the extent to which prison administrators exposed the community to dangerous criminals. He reasoned that the higher the exposure (i.e., more furloughs), the lower the rating for the institution. Many correctional administrators look favorably at furloughs as a way of easing an inmate's transition back into society. Most correctional systems use furloughs on a very limited basis for inmates that are already close to their release date and who are thoroughly screened to minimize the risk to a community. A study conducted by Harer (1994) demonstrated that prison furloughs are one of the best predictors of an inmate's post-release success, when controlling for other risk predictors. Inmates who receive furloughs for the purpose of establishing community ties before release are less likely to be re-arrested or have their supervision revoked for the first three years after their release.

The final objective measure Logan used in the security section of his paper was the custody staffing levels of the different institutions. The Federal prison received 2 demerits (--), compared to the state and privately run institutions. The private, state, and Federal prisons had inmate-to-staff ratios of 3.1, 2.3, and 8.1 to one, respectively. How is it that the Federal institution, which had the lowest urinalysis rate, and an extremely low incident rate, could be judged unfavorably because it used fewer custody staff, by far, than the other two institutions, yet still managed to operate a safe and humane environment? A related problem with this interpretation is Logan's failure to understand the management context. The Bureau of Prisons considers all of its staff to be correctional officers first. Thus, teachers and vocational training instructors have both responsibilities as instructors and custodial staff. Under this model, if safety and security is still maintained, why would you debit an institution? The real issue here is whether a performance indicator is an outcome or a process measure. In the case of security, the primary outcomes are those that measure whether inmates and

staff are at risk to be assaulted or harmed. Other measures, such as staff to inmate ratios, shakedowns, and even furloughs are process measures that should be regarded as related to outcomes, but not as outcomes themselves.

The bottom line on the comparison between the private and the Federal facilities was that on objective dimensions, the Federal facility seemed to perform better. Since we regard the perceptual measures as likely biased, comparisons based on these measures strike us as highly questionable.

Although Logan has done a remarkable job conceptualizing the dimensions of confinement, we strongly believe that his lack of institutional experience limited his ability to compare the correctional institutions on specific performance indicators, especially since he relied on his own judgment about those performance indicators. His lack of a fundamental understanding about how prisons operate and how they are managed limits the usefulness of "Well Kept."

Putting the Public-Private Comparison in Perspective

In considering the history that led to the transfer of all female inmates from WNMAC, which served as the publicly-operated facility in this analysis, to a new CCA facility, which stood as the privately-operated facility, our impression is that we would have been surprised had the new facility not been perceived as an improvement over the past by those staff who were surveyed for the purpose of this study.

First of all, as DiIulio commented in an appended section of the report, before the CCA facility opened, "New Mexico's women prisoners could be described as correctional 'orphans' who were housed in 'a make-shift' wing of Western New Mexico Correctional Facility, a large high-security institution for males." He further added that, "Before that, the women prisoners experienced frequent moves between different facilities, none of which was equipped to meet the needs of female inmates." DiIulio's comments seem to indicate that the conditions of confinement for the female offenders were not particularly favorable.

Moreover, when it is considered that the State correctional system was under court order to improve conditions (WNMAC in June 1988 was found to be in non-compliance in over one-third (35.7 percent) of the 42 compliance provisions audited), it certainly appears that problems existed in the operation of WNMAC. Our sense is that while State of New Mexico prison authorities attempted to provide for the female offender population at WNMAC, there were serious limits as to how successful this effort could be. This is suggested in the comments of Charles W. Thomas, a correctional consultant, who, in his assessment of WNMAC in October 1988, was very positive about institutional staff but was highly critical about institutional design features and the security problems these design flaws created. Indeed, our assumption is that the contract with CCA to operate a new female facility was intended, in part at least, to overcome problems which existed at WNMAC.

The point is that WNMAC was not just any State-operated facility for female offenders, but was instead a facility with major inadequacies, and CCA, far from being just another privately-operated female facility, was intended to replace WNMAC and presumably in the process to overcome the inadequacies of WNMAC. Under these circumstances, could CCA be anything but better?

Other Methodological Problems

In this last section, we list other methodological problems with the Logan study.

- Logan gave equal weight to each of his quality dimensions and sub-dimensions. Thus, a rating on security was considered just as important as a rating on activity. Most correctional experts consider security and safety to be the primary objectives of sound prison practices and would not rate all dimensions equivalently.
- Logan gave equal weight to each of his empirical measures, for example, the serious assault rate had no more weight as an index of "OVERALL" prison quality than how often inmates used the recreational facilities.
- He made no attempt to show if, and by how much, the subjective measures predicted, or were associated with, the objective measures.
- He ignored the magnitude of differences in item scores between institutions, forcing quantitative (interval scale) differences between institutions into a tripartite (+, -, and =) scale, while often making conceptually questionable decisions about whether high or low on the item score means "+". He then combined and re-quantified the tripartite difference measures using a conceptual method of scoring similar to ice hockey. We question the adequacy of this measurement process. A quantitative method could have been used.
- Although he purported to be looking only at three all-female institutions, Logan, without acknowledging it, introduced survey response bias by including responses by staff at the New Mexico State prison who worked with male inmates when making comparisons of staff Climate survey responses across institutions.
- Inmate survey data showed that the public New Mexico State facility outperformed the private facility in every dimension except "activity" (GAO report p. 28). This was contrary to the results based on staff perceptions. Why was there this discrepancy between inmate and staff perceptions? Are we to discount inmate perceptions based upon some underlying vested interest? Or perhaps the greater vested interest lies with the staff who had a financial stake in the success of the evaluation.

Although we find Logan's conceptualization of a theoretical framework from which to compare institutions appealing, for the reasons given above his attempt to evaluate the relative merits of public and private facilities falls far short of a rigorous or conclusive analysis. There was no indication in the report whether the State of New Mexico had changed its policy or procedures in response to the privatization of its female population. Furthermore, there is no indication in the report that there had been any innovation on the part of CCA in its management of the women prisoners.

Florida Evaluation

A recent study by Lanza-Kaduce and Parker (1998) compared the recidivism rates of inmates released from prisons operated by the Florida Department of Corrections to those inmates released from a

prison operated by the Corrections Corporation of America and a prison operated by Wackenhut Corrections Corporation. The at-risk release period for the offenders was 12 months and recidivism was defined either as a rearrest, a new offense, a new commitment, a technical violation, or a summary measure based on the first four indicators. Inmates from public facilities were matched with inmates from private facilities on the basis of classification (minimum, medium), offense category, race, prior incarcerations (0, 1, 2, or more), and age (25 or less, age 26 to 30, age 31 to 35, age 36 to 40, and age 41 or older). Of 300 releases from private prisons, only 196 matched pairs could be found. In fact, the researchers had to relax their categories to find even 196 matched pairs. The researchers also identified whether an inmate had participated in educational, vocational, substance abuse, behavioral education, or pre-release training. A seriousness of recidivism score was constructed based on the nature of the recidivism. The score ranged from 0 to 5. Zero indicated no recidivism, 1 indicated a technical violation, 2, a misdemeanor, 3, a drug or weapon possession offense, 4, a property offense, and 5, a violent or personal offense.

Lanza-Kaduce and Parker (1998) reported the following results: (1) private releasees had a lower recidivism percentage on every one of the 5 indicators except technical violations. The overall measure indicated a recidivism percentage of 17 percent for the inmates released from private prisons and 24 percent for inmates released from the public institutions. For the overall measure, this translated into a recidivism rate of 172 per 1,000 released inmates for the private institutions and 237 for the public facilities. The recidivism scale measuring seriousness indicated that public sector releasees were more likely to commit drug/weapon possession offenses, property offenses, and violent offenses. The mean level of seriousness on this 0 to 5 point scale was 3.43 for the public sector releasees and 2.32 for the private sector releasees.

Lanza-Kaduce and Parker (1998) also reported on the relative recidivism rates among releasees from the privately-operated facilities who successfully completed one or more of the programs previously listed against those who failed, dropped out, refused to participate, or were removed. Among the successful completers, 15 percent recidivated, while 40 percent of the noncompleters recidivated. We find this final result fraught with issues regarding selection bias. One can draw no conclusions about program effectiveness when you compare dropouts with those who complete a program. Under these circumstances, it is impossible to disentangle program effects from the inmate's underlying motivation to succeed (Pelissier, Rhodes, Gaes, Camp, O'Neil, Wallace, and Saylor 1998).

A critical assessment of this study has been written by the Florida Department of Corrections, Bureau of Research and Data Analysis (1998). The analysts writing this report noted four significant problems with the Lanza-Kaduce and Parker study. The first problem focuses on the putative equivalency of the private and matched public inmate releasees. The Bureau of Research and Data Analysis (BRDA) paper notes that while Lanza-Kaduce and Parker selected inmates who were minimum or medium custody, this is not the same as using the level of custody which was apparently higher, on average, for the inmates released from the public facility. Furthermore, publicly released inmates were more likely to have longer sentences, another indicator of the seriousness of the instant offense. Publicly imprisoned inmates served, on average, a much longer time than the privately held prisoners and inmates released from a public facility were more likely to have a term of supervision. This latter difference is quite important. As the BRDA researchers point out, the differences in supervision indicate that the inmates released from public institutions were more serious offenders, who were more closely monitored, thus magnifying re-arrest or other recidivism measures. This makes

the use of technical violations inappropriate. If an offender is not under supervision, he or she cannot be technically violated.

The BRDA researchers also found that offenders in the private sample had, on average, a less serious previous record. This was based on the number of prior incarcerations. Finally, the BRDA researchers were critical of the broad age categories used by Lanza-Kaduce and Parker. As the BRDA group noted, age is the most significant determinant of recidivism and either an exact match should have been used or a multivariate analysis controlling for age and some of these other variables should have been conducted.

A second, even more serious problem in the Lanza-Kaduce and Parker analysis is that 35 percent of the inmates included in the private sample had also spent a significant amount of time in a public facility. It would be impossible to disentangle the effect of the private “dose” from the public “dose.” This might suggest a research design in which one compared exclusively private, exclusively public, and mixed public-private incarceration. But even this might be meaningless unless we can have assurances that the decision to select or place inmates into these facilities is not somehow entangled with their propensity to recidivate -- the problem of selection bias at a broader level.

As a third criticism, the BRDA researchers also criticized Lanza-Kaduce and Parker for using relatively small sample sizes. However, we would argue, if all of the other problems of this study could be addressed, the sample size was probably sufficient. A fourth, and more serious error, was the way in which Lanza-Kaduce and Parker procedurally measured recidivism. According to the BRDA group which had the original data, Lanza-Kaduce and Parker evaluated the recidivism of inmates released from private facilities in the period June 1, 1996, to September 30, 1996. The period for the inmates released from public facilities was January 1, 1996, to September 30, 1996. As we noted before, recidivism was assessed from the day of release until 12 months had been reached. Because there is a lag between the occurrence of a recidivism event and the recording of that event into the automated records, the recidivism differences reported by Lanza-Kaduce and Parker may be an artifact of the recording process. The recidivism data were gathered in November 1997, thus the publicly released inmates had, at most, a 23-month release period, while the privately released inmates had, at most, an 18-month release period. Depending on how long the lag is between the event and the recording of the event, this discrepancy between public and private release periods could seriously bias the results in favor of the private facility.

While this particular study of the relative differences in recidivism among privately and publicly incarcerated inmates had serious errors, we are skeptical that any such study can circumvent the problems associated with matching inmates and precluding selection bias. Aside from these methodological problems, what are the theoretical implications of such a contrast? On what theoretical basis would we expect privately and publicly operated prisons to be different in ways that would affect recidivism? If the issues revolve around programming, then it is certainly possible to evaluate inmate programs recognizing the same methodological problems with matching and selection bias. However, the public sector can also develop and deliver programs. In fact, many programs delivered in public prisons are the result of a contractual arrangement with a private provider. Finally, even if we could develop a satisfactory design to compare the recidivism rates of publicly and privately operated prisons, we would want to know what it is about the nature of operations at either the public or private facility that reduces criminality. Knowing this, we would export that knowledge to all of our prisons.

Summary of Existing Studies

For the most part, those who have evaluated private corrections in comparison to public corrections have concluded that the private correctional facilities performed as well or better than the public institutions. However, in our assessment of these evaluations, we find that most of these studies are fundamentally flawed, and we generally agree with the 1996 GAO report that there is “little information that is widely applicable to various correctional settings (p. 11).” We think this conclusion is still warranted despite the two recent evaluations conducted in Louisiana (Archambeault and Deis 1996) and Arizona (Thomas 1997a), and the recidivism study conducted by Lanza-Kaduce and Parker (1998).

In our opinion, the strongest of the existing studies are the Tennessee evaluation and the Washington State review. The Tennessee evaluation found that Corrections Corporation of America was running a prison on par with the two new facilities operated by the Tennessee Department of Corrections. The review conducted by Washington State noted that while it would be hard to generalize the findings to Washington (and, by implication, other states), it does appear that the experiences with privatization in Tennessee, Louisiana, and Florida have been positive. Even in these studies, though, there are serious shortcomings in the analyses (Thomas et al., 1996).

The most significant problem with all of these studies is that they fail to develop a coherent model of institution performance in terms of cost and quality of operations. Such a model would include the structure of the relationship between process and outcome measures. The model would also make explicit those factors that must be controlled to make institutional comparisons meaningful (Camp, Saylor and Harer 1997; Camp, Saylor and Wright 1998; Office of Research and Evaluation 1998; Saylor 1996). In this review, we have criticized researchers either for not using statistical adjustments or for incorrectly using univariate statistics. In most cases, it seems to us that researchers are inappropriately using univariate statistics to infer population differences when, in fact, they are using population data. We also were critical of Logan for not using statistics to assess the degree to which the private and public institutions were different. We think descriptive statistics could help in clarifying the strength of the differences between institutions, but this must be done in conjunction with a model that allows us to understand the relationship between outcome and process variables while simultaneously controlling for the important substantive differences among the institutions.

In Table 3, we summarize some of the other characteristics and failures of these studies. Most of the studies do not use a variety of different measurement approaches; fail to study equivalent inmate populations or have insufficient information on the comparability of the offenders; use inappropriate or no statistics; and, use a single point in time, rather than a longitudinal assessment. Most also fail to explain the nature of private innovation, the impact of privatization on the entire system, or how innovation affects performance in terms of cost and quality of operations.

Practically all of the evaluation research literature that has been produced on privatization has been designed to compare the relative performance of the public or private operation of a prison. The issue has been framed as a competition and the scorecard has been based on cost and quality. Although this will continue to be an important issue in the future, there are other fundamental ways of framing the research questions. A second, yet complementary approach, is to ask the following two questions: How does privatization change the provision of correctional services, especially in terms of changing

operations in public sector prisons, even in public systems that are generally considered to be well run and accountable to the public interest? How does public sector management of prisons influence the operations of privately managed prisons within its jurisdiction? The ways in which these systemic changes take place depend on the approach to privatization each jurisdiction takes.

Since the majority of experience in managing inmates comes from the public sector, the private sector must begin from that knowledge base. Indeed, there has been a great deal of public sector innovation in corrections, some of it borrowed from private sector operations in other industries. Unit management, objective classification of inmates, strategic planning, and the concept of direct supervision all preceded the introduction of private sector management. There is no evidence to contradict the assertion that basic management philosophy, technology, and correctional expertise have been transferred to the private sector from the public sector. Often, there is a direct transfer of personnel and policies. The question, then, is how does the private sector add value to prison operations. One can even take a broad view of this issue and consider the increased flexibility of a system that might use privatization to alleviate crowding or handle special needs populations.

The usual response is that market pressures force the private sector into a more efficient use of resources. In particular, the market supposedly creates incentive for efficiencies in two general areas. First, labor is more efficiently utilized in the private sector. This is important because labor costs typically account for 65-70 percent of the operational costs of a prison. Second, there are efficiencies realized from more flexible purchasing practices.

However, despite the claims about cost savings and increased value, in reality there have been no empirical studies documenting innovations in the private sector in the use of labor or the purchasing of goods and services. What is needed are case studies that document the innovations developed by the private sector that produce added value in the use of labor or in purchasing practices (Camp 1998). We also need to document how the labor use and purchasing practices of public sector prisons change as a result of the dynamic interplay between public and private sectors.

It appears to us that the private sector's approach to corrections has been to build upon correctional practices that already exist in well-run public prisons. The private sector does not appear to argue that they run prisons in a dramatically different way based on different philosophies of managing inmates. However, there has been little attention given to documenting the private sector approach to innovation or to the impact of competition from the private sector on the practices of the public sector.

A corollary to these systemic questions is the issue of whether the private sector is delivering too little or the public sector is delivering too much. Does the private sector save on costs by providing fewer essential services to inmates than the public sector? If so, what are the short- and long-term consequences of this lack of services? Is there a possibility that public sector prisons provide "too much" quality to inmates? That is, do they provide services to inmates that are not as readily available to some law-abiding members of society (usually indigent citizens)? While most correctional administrators (public and private) agree that U.S. prisons should meet American Correctional Association (ACA) accreditation standards at a minimum, there is probably much less agreement as to how far above the bar set by ACA standards those prisons should operate to perform effectively. How much education is excessive? Is a community standard the appropriate standard for medical care? Should we provide inmates with job training when other poor, law-abiding civilians may have less access to such training? Privatization brings these paradoxical public policy issues into sharper focus.

Quite similar to these arguments is Harding's (1997) contention that the next generation of privatization research should look for evidence of system-wide changes. Some evidence of such changes can be found in Vagg's (1994) description of the introduction of privatization into the English penal system. Vagg, who reserves judgment on the merits of privatization, notes that the introduction of the first private remand⁴⁸ prison in England—The Wolds, which opened in 1992—may have improved accountability for how inmates are treated in public sector prisons as well. As he notes (Vagg 1994: 307), "... private prisons have the potential to offer improved prison regimes; and ironically, in England, they were a key factor in persuading the administration that standards were necessary, if only for the purpose of monitoring contractual compliance ...". According to Vagg, the English government had been reluctant to establish prison standards such as ACA standards which are used in the U.S. With the need to oversee the Wolds contract, performance indicators were specified that the contractor, Group 4 Remand Services, Ltd., had to meet. Standards were established for security; health, safety, and hygiene; reception, registration, and discharge; regime activities (such as the grievance procedure); inmate services; and other prison functions. The standards went so far as to specify the amount of time that prisoners should spend out of cell, a key point as there was public concern about unsentenced inmates being locked in their cells for extended periods in older remand centers under public control (see James, Bottomley, Liebling, and Clare 1997). This explication of a system change introduced by adding privately operated beds is not typical in the evaluation literature on privatization. Similar efforts must be undertaken in the United States.

There are well over 100 adult correctional institutions currently being operated by private corrections companies. Yet we have analyses on only a handful. Even if these studies were rigorous and methodologically sound, the private institutions captured in these analyses may, or may not, represent the performance of the industry as a whole.

In the next section of this critique, we propose a model designed to address many of the problems we have noted throughout this paper.

Outline of How the Taft Evaluation Meets the Criteria of a Sound Evaluation

The proposed evaluation of the experiences of the Federal Bureau of Prisons with the private Federal prison operated by Wackenhut Corrections Corporation in Taft, California addresses many of the criticisms of existing evaluations of privatization. A complete discussion of the proposed evaluation can be found elsewhere (Office of Research and Evaluation, 1998). The discussion proceeds by addressing each of the areas covered in the summary table of existing quality evaluations.

System Impact: The system impact of the private operation of the Taft prison upon other operations in the Federal Bureau of Prisons is addressed by the modeling approach that will be used in the evaluation. At about the same time that the Taft prison was built, three other low security institutions were built by the Federal Bureau of Prisons in Yazoo City, Mississippi, Elkton, Ohio, and Forrest City, Arkansas. These three institutions are the institutions against which Taft will be compared. Taft and two of the comparison institutions also have minimum-security camps as part of the facility. In

48 A remand prison in the United Kingdom functions the same as a jail in the United States criminal justice system.

this discussion, though, we focus primarily upon the main facilities that house the low-security inmates.

In order to ensure that the institutions are compared on measures that are adjusted for features that are unrelated to institutional performance, it is necessary to develop models of the outcome measures that follow the procedures suggested by Saylor (1996) and Camp and colleagues (Camp, Saylor and Harer 1997; Camp, Saylor and Wright 1998). In essence, this means that both Taft and the three BOP comparison institutions will be evaluated against the performance of all of the other low security institutions in the BOP. As such, it will be possible to see how outcome measures at the Taft institution, the three comparison institutions, and the other low security BOP institutions change over the 5 years of the evaluation. This should provide information about how BOP operations change in response to the experience of having a private-sector institution as part of the BOP.

Innovation: As has been noted previously, innovation is touted as one of the reasons that private-sector companies can operate prisons more efficiently than the public sector without sacrificing the quality of services provided to inmates and the public. However, descriptions of how private-sector operators actually “do” corrections differently are usually missing (Camp 1998). To capture this component in the Taft evaluation, a full-time, on-site researcher has been placed at Taft. It is the role of this researcher to document the more qualitative aspects of how Wackenhut operates differently than the BOP. In addition, by examining organizational charts and work patterns, a close examination of the use of staff by Wackenhut and the BOP is planned.

Measures: The evaluation of Taft will use many different sources of information. There will be an audit/compliance component. All of the institutions, Taft as well as the BOP comparison institutions, are subject to ACA accreditation during the study period. In addition, there are plans to make use of periodic reviews conducted by the BOP. The Office of Research and Evaluation also plans to gather information through the annual survey of staff. Taft will participate in the staff survey, the Prison Social Climate Survey, as do all other BOP correctional facilities. A corresponding inmate survey of the social climate will also be administered at Taft and the comparison institutions. The inmate survey of the social climate is conducted on an “as needed” basis unlike the staff survey which has been conducted every year since 1988. Official records will comprise an integral part of the evaluation data. For example, Wackenhut uses the same disciplinary process as the Federal Bureau of Prisons and enters the disciplinary data into the same centralized database used by all BOP correctional facilities. Finally, numerous and periodic site visits to Taft and the comparison institutions are already, and will continue to be, part of the data collection effort for the evaluation.

Points in Time: As has been mentioned, the time frame for the evaluation is a 5 year time period. Therefore, the study is less likely to be influenced by atypical performance by any of the institutions over a relatively short period of time.

Equivalent Facilities: The Taft facility, as well as the three formal comparison institutions, were all built on an almost identical architectural plan at about the same time. While the wardens at all four facilities have been free to enhance the physical plant, there have not been any major renovations such as the construction of new buildings or the relocation of security fences at any of the four study facilities.

Equivalent Inmates: All of the study institutions house low-security inmates as defined by the Federal Bureau of Prisons classification system. None of the institutions have units for special needs inmates, such as units for those with severe medical or psychological problems or residential drug-treatment

programs. Each of the institutions receives inmates as proscribed by BOP policy. There is no attempt to send specific types of inmates to any of the institutions. Nonetheless, assignment of inmates to the institutions is not random. For example, Taft is located near Los Angeles. Taft receives a large number of Hispanic inmates because of the BOP policy of locating inmates near their point of release when this does not conflict with other BOP management concerns. Any discrepancy between the institutions in the characteristics of the inmates, though, will be addressed in statistical models used to generate the comparison measures.

Model Approach: Statistical models will be utilized that are appropriate for the different types of data collected as part of the Taft evaluation. For example, Saylor (1996) has demonstrated how residuals from regression models can be utilized to assess whether institutions are performing better, worse, or the same as expected on measures of inmate per capita cost and staff perceptions of crowding. Camp and colleagues (Camp, Saylor and Harer 1997; Camp, Saylor and Wright 1998) have demonstrated how hierarchical linear models can be used to assess institution influences on measures obtained from staff surveys, such as organizational commitment or evaluations of institutional operations. While the details of the models employed in the respective studies are beyond the scope of this discussion, the use of the measures derived is quite straight-forward. With all of the models used in the analyses, the end result is the ability to evaluate how institutions perform relative to other institutions, *after* controlling for factors that are known to be unrelated to management performance. As an example, consider evaluations of institutional operations. Experienced and inexperienced staff at the same institution differ in the evaluations that they provide of institutional operations. If we compare two institutions for “typical” staff perceptions of institutional operations, we would certainly want to control for any differences in the institutions in the proportions of experienced and inexperienced staff providing the evaluations.

Statistical Approach: Most of the statistics employed in the Taft evaluation will be used to statistically adjust comparison measures. For the most part, the emphasis is not upon making inferences to some population of prisons. For the most part, we are dealing with the population of low-security, Federal prisons. There will be some use of inferential statistics when the data come from samples of staff or inmates at the respective institutions.

Type of Facility: All of the institutions in the Taft evaluation house only adult offenders.

Security Level: All of the institutions are designed to house low-security inmates. For the most part, that is the type of inmate that is housed at the facilities.

Gender of Inmates: All of the inmates are male.

Concluding Remarks

Most evaluations of the respective strengths and weaknesses of public and private prisons have not relied upon strong theory to guide the evaluations. In the Taft evaluation, the theory of what constitutes a “good” prison as outlined by academics such as Charles Logan (Logan 1990) is supplemented with the collective practical knowledge of practitioners in the Federal Bureau of Prisons. Management at the Bureau have developed a performance measurement system called the Executive Staff Management Indicators (ESMI) module. ESMI is organized around six goals. Within

each goal, vital functions that support the achievement of those goals are outlined. The organization of these performance measures is based upon the collective wisdom and years of corrections experience reflected in the current and past compositions of the executive management staff at the BOP.

This theoretical approach guides the choice of measures to evaluate the performance of Taft and the three comparison BOP institutions. The data used in the evaluation will come from multiple sources. Therefore it will be possible in some instances to test for consistency in conclusions suggested by reliance upon different sources of information. The data itself will be adjusted by statistical models to control for differences between the institutions that are not related to performance. This information, in turn, will be supplemented with an examination of organizational innovations in correctional practices at Taft.

The proposed evaluation of Taft avoids some of the more obvious problems that have plagued existing evaluations of privatized prisons. The proposed evaluation does not, however, circumvent all problems. For example, the evaluation is still for only one jurisdiction, the U.S. Federal Government, for one private company, Wackenhut, and for only low- and minimum-security inmates. Likewise, all of the inmates are male. The study does, we think, point the way for collecting systematic evidence about the types of changes privatization produces in the operations of public systems, how private firms innovate in providing services to inmates, and whether public and private firms can provide comparable services to inmates given the constraints faced by the Federal Bureau of Prisons. To date, we have not generally found that this type of information is readily available in existing evaluations.

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Table 1. Average Monthly Counts							
	Institution Operated By: Wackenhut Corrections Corporation (WCC), Corrections Corporation of America (CCA), State of Louisiana (Public)						
	WCC	Public	CCA	Public	Public	Public	Public
Institution	Allen	Avoyelles	Winn	Hunt	Dixon	Angola	Wade
Mean Inmate Population	1206.9	1227.2	1214.9	1775.5	1367.4	4741.8	1021.9
Performance Measure							
escapes	3	0	5	5	4	6	1
assaults on staff with injury	1.78	1.06	2.26	1.64	1.31	24.11	1.33
assaults on staff/serious injury	0.0455	0.1389	0	0	0.139	0.278	0.556
assaults on staff/non-serious injury	1.73	0.917	2.261	1.639	1.167	24.08	1.278
Cat. I,II,III incidents	28	38.5	30	55.8	26.4	154.1	22.3
aggravated sex offenses	11.1	4.3	8.5	6.1	2	27.9	3.9
aggravated cat I sex offenses	2.023	2.028	1.217	2.861	1.056	7.222	1.611
aggravated class II sex offenses	9.114	2.222	7.283	3.251	0.9444	20.667	2.778
institutional disturbances	0.9555	4.5	4.457	17.556	1.444	26.694	1.694
major inst. disturbances	0.114	0.194	0.0455	0.0278	0	1.0556	0.0833
minor inst disturbances	0.841	4.306	4.413	17.556	1.444	24.694	1.694
assaults/inmate on inmate	13.455	26.278	17.421	28.083	18.417	67.778	14.083
assaults/serious injuries	0.136	1.056	0.304	0.1389	0.3043	0.5556	0.111
assaults/non-serious injuries	13.318	25.222	13.978	27.944	18.028	67.222	13.318
assaults/weapon	2.523	3.861	2.652	0.0833	0.1111	0.0556	0.0556
assaults/no weapon	10.932	22.417	11.63	19.778	16.417	38.639	11.778
assaults/weapon and serious injury	0.068	0.528	0.261				
assaults/weapon and no serious injury	2.455	3.333	2.391				
assaults/no weapon/serious injury	0.068	0.528	0.043				
assaults/no weapon/no serious injury	10.864	21.889	11.587				
total disciplinary actions	374.1	859.8	459.6	567.1	687.2	1009	1779
schedule A disciplinary actions	42.3	282.3	153.9	103.4	102.2	258.9	396.7
schedule B disciplinary actions	325.9	515.4	291.7	399.1	558.9	697.8	1274.1
monthly gunshots	0.25	2.25	0.152	0.9722	2.5833	7.222	1

Table 2. Average Monthly Rates / 1,000							
	Institution Operated By: Wackenhut Corrections Corporation (WCC), Corrections Corporation of America (CCA), State of Louisiana (Public)						
	WCC	Public	CCA	Public	Public	Public	Public

Institution	Allen	Avoyelles	Winn	Hunt	Dixon	Angola	Wade
Mean Inmate Population	1206.9	1227.2	1214.9	1775.5	1367.4	4741.8	1021.9
Performance Measure							
escapes	2.4857	0	4.1156	2.8161	2.9253	1.2653	0.9786
assaults on staff with injury	1.4749	0.8638	1.8602	0.9237	0.958	5.0846	1.3015
assaults on staff/serious injury	0.0377	0.1132	0	0	0.1017	0.0586	0.5441
assaults on staff/non-serious injury	1.4334	0.7472	1.8611	0.9231	0.8534	5.0782	1.2506
Cat. I,II,III incidents	23.2	31.372	24.693	31.428	19.307	32.498	21.822
aggravated sex offenses	9.1971	3.5039	6.9965	3.4357	1.4626	5.8838	3.8164
aggravated cat I sex offenses	1.6762	1.6525	1.0017	1.6114	0.7723	1.5231	1.5765
aggravated class II sex offenses	7.5516	1.8106	5.9947	1.831	0.6907	4.3585	2.7185
institutional disturbances	0.7917	3.6669	3.6686	9.8879	1.056	5.6295	1.6577
major inst. disturbances	0.0945	0.1581	0.0375	0.0157	0	0.2226	0.0815
minor inst disturbances	0.6968	3.5088	3.6324	9.8879	1.056	5.2077	1.6577
assaults/inmate on inmate	11.148	21.413	14.339	15.817	13.469	14.294	13.781
assaults/serious injuries	0.1127	0.8605	0.2502	0.0782	0.2225	0.1172	0.1086
assaults/non-serious injuries	11.035	20.552	11.505	15.739	13.184	14.176	13.033
assaults/weapon	2.0905	3.1462	2.1829	0.0469	0.0812	0.0117	0.0544
assaults/no weapon	9.0579	18.267	9.5728	11.139	12.006	8.1486	11.526
assaults/weapon and serious injury	0.0563	0.4302	0.2148	0	0	0	0
assaults/weapon and no serious injury	2.0341	2.7159	1.9681	0	0	0	0
assaults/no weapon/serious injury	0.0563	0.4302	0.0354	0	0	0	0
assaults/no weapon/no serious injury	9.0016	17.837	9.5374	0	0	0	0
total disciplinary actions	309.97	700.62	378.3	319.4	502.56	212.79	1740.9
schedule A disciplinary actions	35.048	230.04	126.68	58.237	74.74	54.6	388.2
schedule B disciplinary actions	270.03	419.98	240.1	224.78	408.73	147.16	1246.8
monthly gunshots	0.2071	1.8334	0.1251	0.5476	1.8892	1.5231	0.9786

Appendix 3

Legal Issues Relevant to Private Prisons

by

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TABLE OF CONTENTS

Appendix 3

Legal Issues Relevant to Private Prisons

1.	Introduction	1
2.	The Legality of Delegating Correctional Services to Private Contractors Generally ...	3
	A. The Current Limits of Federal and State Delegation Principles	4
	B. Addressing Possible Due Process Concerns in Correctional Privatization	7
	1. Basic Due Process Principles Governing Delegation Scenarios	7
	2. Specific Ways of Addressing Due Process Concerns in Correctional Privatization	9
3.	Liability for Private Prison Conditions	13
	A. The Impact of Privatization on Liability Exposure	13
	1. Inmates' Overwhelming Reliance on Section 1983 Cases to Redress Grievances ..	14
	2. Are Private Prison Contractors Amenable to Suit under Section 1983?	15
	3. Do Private Prison Officials Have a 'Qualified Immunity' Under Section 1983?	17
	4. Private Contractor and Governmental Liability Exposure in Section 1983 Litigation	19
	B. The Role of Indemnification, Insurance and Monitoring in Reducing Liability and Litigation Costs	21
	1. Indemnification and Insurance	21
	2. Monitoring to Safeguard Against Liability Resulting from Government Duties	24
4.	Employment and Labor Relations Issues	27
	A. Potential Civil Service Impediments	27
	B. The Significance of Private Correctional Firms' Independent Contractor Status	28
	C. Effects of Privatizing an Existing Unionized Facility	30
	D. The Right to Strike	31
	1. No-Strike Clauses	32
	2. Strike Notification/Mandatory Delays	32
5.	Inmate Labor Questions	34
	A. Constitutional Dimensions	34
	B. Federal prisons and inmate labor	35
	C. State Prisons and Inmate Labor	35

6.	Other Important Legal Issues	37
	A. Access to Private Prison Records	37
	B. Private Contractor Access to Criminal History Records	39
	C. Bankruptcy	40
	D. Use of Force	43
	E. Environmental Law Concerns	45
7.	Regulating Interjurisdictional Private Prison Contracting	47
	A. Interjurisdictional Contracting Out and Legal Problems	48
	B. Some Regulatory Solutions	52
8.	Legal Dimensions of Contracting	56
	A. Regulatory Purposes and Contract Specificity	56
	B. The Importance of Objective Standards	58
	1. Special Attention to Staffing and Training	59
	C. Effective Contract Performance and Enforcement	60
	1. Contract Term and Renewal	60
	2. Bolstering Good Performance	61
	3. Contract Enforcement through Termination	61
	4. Contract Enforcement Through Fines and Penalties	62
	5. Dispute Resolution	63

1. Introduction

The legal issues affecting private prisons have attracted nearly as much attention as the moral, cost, and performance-related issues surrounding the correctional privatization movement. From questions about the constitutionality of delegating the incarceration function in the first place, to the legality of private prison guards going on strike, the legal dimensions of correctional privatization have often elicited great concern from public correctional officials and the general public. Specific concerns have, however, changed over time, as practical experience and legal precedent have provided answers to many previously unresolved questions. For example, a fundamental issue that arose in the mid-1980s along with the birth of the private prison industry was whether private prisons would be considered “state actors” amenable to inmate civil rights suits and subject to all of the constitutional standards applicable to public prisons. Over the past several years, courts have affirmatively answered that question. Likewise, the Supreme Court last year ruled on another significant matter, deciding that private prison guards may not share public correctional officers’ qualified immunity from suit in federal civil rights actions.¹

While a host of subsidiary legal and contractual matters continue to receive attention and provoke discussion, governments are becoming more active in passing legislation, issuing regulations, and insisting on contractual provisions that limit contractor discretion in important areas of public policy. Public correctional authorities and their lawyers are becoming more sophisticated about the pitfalls of private prison contracting and how governments can protect themselves from both a cost and performance standpoint. One highly-publicized example of this phenomenon involves states passing legislation to address the growing number of private prisons that accept prisoners from outside the state.

Few attempts have been made to address the entire breadth of legal issues surrounding private prisons in a relatively succinct form.² This appendix makes such an attempt, employing a straightforward presentation that should be useful to correctional specialists and laypersons alike. It relies on a variety of sources for its information, including private prison contracts and requests for proposals (RFPs), law review and other journal articles, federal and state statutory and case law, survey information gleaned from federal and state officials summarized in other parts of this report, and interviews with public and private correctional authorities and specialists.

This appendix traces the legal system’s accommodation of prison privatization as the latter has evolved over the past 15 years. The report begins with the broadest constitutional questions, raised at the outset of the privatization debate, and concludes with a discussion of the latest efforts of state legislatures to gain greater control over the incarceration of out-of-state inmates in private prisons within their borders. Only legal issues that significantly turn on private entities as prison operators are examined.

1 *Richardson v. McKnight*, 117 S. Ct. 2100 (1997).

2 One such early effort, which was quite detailed, nevertheless failed to treat some issues in depth, e.g. public access to private prison records. Moreover, this study is now a decade old and has been superseded in many subjects by recent legal developments. *See* I. Robbins, *The Legal Dimensions of Private Incarceration* 396-413 (1988).

The focus of the report is on practical issues of a kind most likely to confront public and private corrections officials. It also focuses on contracts for the management of private prisons, rather than on contracts for the design and construction and management of future correctional facilities: except for detailed public finance issues that vary from jurisdiction to jurisdiction, there are few issues of any significance peculiar to private prison design construction. Finally, the report addresses both publicly- and privately-owned facilities managed by private contractors, although there is a slightly greater emphasis on publicly-owned prisons. Where relevant, legal distinctions that turn on ownership are noted (e.g., in the case of potential contractor bankruptcies).

This report does not make any recommendations *per se*, but occasionally notes where certain statutory or contractual mechanisms have yielded positive and negative results. The major issues are arranged by section.

2. The Legality of Delegating Correctional Services to Private Contractors Generally

When the whole enterprise of correctional privatization has been challenged, the legal basis for such an action has often been couched in terms of constitutional ‘delegation’ issues. At the heart of these constitutional considerations is the worry that political accountability and disinterested decision making may be lost when administration and operation of places of incarceration are turned over to the private sector -- something that, prior to the mid-1980's, had not been encountered. Critics have also raised particular concerns about private correctional contractors’ financial interests leading them to minimize releases and maximize sentences to keep their facilities filled. These core concerns have seemed to reinforce doubts about the overall propriety of delegating the state’s power to incarcerate to private, for-profit corporations.

Despite these worries, no serious delegation challenge has been mounted against a statute or contract allowing the private sector to incarcerate inmates. Although delegation concerns were prominently raised in the 1980s as a potential roadblock to correctional privatization,³ few observers today believe that, with certain safeguards in place, a government may not legally contract out its power to incarcerate.⁴ There now appears to be broad agreement that delegation concerns, if any, do not hinge on the overall policy choice of entrusting the day-to-day management of prisons to private parties, but rather on the details of how such transfers of responsibility are structured (including the rules by which such prisons are intended to operate), and who has ultimate authority for a number of decisions affecting inmate rights and welfare.

As discussed below, the often diffuse “delegation” concerns expressed about prison privatization tend to subsume or confuse several discrete legal issues, including the federal constitutional “delegation doctrine,” state constitutional delegation standards, the due process requirements of the U.S. Constitution (made applicable to states and local governments through the Fourteenth Amendment), and specific questions about statutory enabling authorization that may vary from jurisdiction to jurisdiction. It is apparent, however, that while modern challenges to correctional privatization may be couched in terms of “delegation,” the analytical basis for these challenges will usually turn on due process concerns. A due process analysis is particularly sensitive to the need to have state correctional officials retain responsibility for promulgating many kinds of prison rules and making final decisions on release-related matters such as sentencing, parole, discipline, ‘good time’ awards, work assignments, and possibly classification. A second type of delegation challenge is often based on inadequate privatization enabling legislation.

3 See, e.g., Field, Note, *Making Prisons Private: An Improper Delegation of a Government Power*, 15 Hofstra L. Rev. 649 (1987); Robbins, *The Legal Dimensions of Private Incarceration*, *supra* note 2 at 396-413.

4 Perhaps acknowledging the contemporary importance of privatization generally, as well as the history of private prisons in this country, no one appears to have convincingly argued that the running of prisons, as opposed to the decisional control over the incarceration of inmates in the first place (a police power), is so much a ‘core’ governmental function that it may *never*, even with proper safeguards, be delegated to private parties as a *legal* (as opposed to moral or ethical) matter. While at least one article has made that argument, it tends to ignore the details of delegation jurisprudence and the degree to which government oversight and accountability can be built into a prison privatization arrangement. See *Making Prisons Private: An Improper Delegation of a Government Power*, *supra* note 3.

A. The Current Limits of Federal and State Delegation Principles

Delegation principles at the federal and state level safeguard against the transfer of government powers to public and private bodies without proper constraints. However, reflecting political reality as much as legal doctrine, courts today are unlikely to invalidate an entire prison privatization arrangement on delegation grounds.⁵ The reason is twofold. First, in the modern era, courts have given political leaders wide discretion in determining how to implement policy decisions, including reliance on the private sector.⁶ The tendency is to view most of the functions transferred to private agencies (as well as subordinate public agencies) as largely or purely *administrative* in nature. Only delegated rule making and adjudication functions -- which directly purport to exercise a government power -- are usually deemed to require special judicial scrutiny.⁷

Second, the delegation doctrine at the federal level has effectively become moribund over the last half-century,⁸ a telling reflection of the rise of the administrative state. Delegations to administrative agencies have been so liberally construed that private delegations have tended to be viewed in the same light despite their significantly different factual and ethical attributes. Reflecting this trend, the Supreme Court has sometimes enunciated the principle of nondelegation, but has almost without exception sustained the constitutionality of challenged delegations. As discussed below, rather than invalidating private delegations outright, the Court has used the due process provisions of the Fifth and Fourteenth Amendments of the Constitution to protect the fundamental interests of those affected by a delegation. At the state level, courts have breathed more life into state constitutions concerning delegation questions, but their analysis has generally tended to recapitulate the due process concerns identified by federal courts.

The weakness of the federal delegation doctrine is starkly indicated by the fact that in the area of *private delegations*, as opposed to delegations of power to executive branch agencies, the Supreme Court has not invalidated a delegation since the New Deal-era case of *Carter v. Carter Coal Co.*⁹ Since that time, the Court has only haphazardly addressed the delegation doctrine, and even then, only in public delegation contexts where property, rather than liberty, interests were at stake.¹⁰ Insofar as these cases collectively have any indirect application to the privatization context, they simply stand for the proposition that delegations of legislative and policy-making power must be narrowly

5 Possible exceptions may include privatization arrangements where due process is violated or where little or no statutory authority for the delegation exists. See pp. 5-6 *infra*.

6 See e.g. *Berman v. Parker*, 348 U.S. 26, 33-34 (1954) (upholding reliance on private companies to implement federal urban redevelopment policy).

7 See generally Lawrence, *Private Exercise of Governmental Power*, 61 Ind. L.J. 647, 650-653.

8 See generally, e.g., K. Davis, *Administrative Law Treatise* § 3. See also Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 U.C.L.A. L. Rev 911, 917-920, 926 (1988).

9 298 U.S. 238 (1936). The Court struck down a federal statute allowing a majority of miners and producers to agree on wages and hours that would be binding on minority members of the industry.

10 See, e.g., *Industrial Union Dep't v. American Petroleum Institute (the Benzene Case)*, 448 U.S. 607 (1980); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). The Court did once, in 1958, allude to the fact that it would apply a stricter standard for cases involving liberty interests, see *Kent v. Dulles*, 357 U.S. 116, but this principle, has never received further elaboration.

construed and have a clear, unambiguous statutory basis.¹¹ In particular, these cases favor standards ensuring that elected officials make important policy choices, private officials have a sufficiently clear “intelligible principle” to channel their delegated discretion, and “ascertainable standards” exist by which reviewing courts can evaluate such discretion.¹²

Under a *post-Carter* delegation analysis, a legitimate delegation challenge might be sustained if a new prison privatization arrangement were undertaken with no statutory authorization, or pursuant to a statutory or contractual scheme that left broad areas of sensitive decision-making implicating due process requirements -- for example, disciplinary proceedings or the formulation of release-related rules -- to private correctional officials’ discretion. This is generally how various states have applied their own delegation doctrines: courts have struck down statutes granting rulemaking and adjudication authority to private parties where the state did not retain ultimate authority to accept, reject, or modify administrative rules and review adjudicative determinations.¹³

As a matter of practical and political reality, courts may be wary of invalidating on delegation grounds fully operational privatization contracts, even if they lack what would otherwise be viewed as proper statutory authorization.¹⁴ Moreover, contract provisions agreed to by governments and private contractors may obviate otherwise defective statutes, depriving potential litigants of an actual harm or controversy. Still, in the case of new or planned operations, delegation-type challenges based on deficient legislation might emerge that require statutory remediation.¹⁵

Both for reasons of litigation prevention and sound public policy, few would argue against the long-term wisdom of adopting some kind of meaningful and comprehensive statutory authorization. Adopting some minimal statutory scheme strengthens the public legitimacy of privatization and can ensure that there is some set of minimal standards below which contractual arrangements may not fall.

11 The underlying purpose of delegation principles derives from the separation of powers notions, which protects the polity from uncontrolled discretionary power. The weakness of the delegation principles’ relevance to private delegations is underscored by the fact that insofar as the purpose of the separation-of-powers requirement underlying the delegation doctrine is to protect individual liberty by dispersing power, then private delegations “actually promote that very goal, because power is spread still further [beyond state bodies]. One need not carry the argument that far, however, to see that the separation-of -powers principle is a weak foundation for limiting private delegations.” Lawrence, *Private Exercise of Governmental Power*, *supra* note 7 at 665-66 (1986).

12 See, e.g., *Industrial Union Dep’t*, *supra* note 10 at 686. The meaning of “intelligible principle” has varied somewhat from case to case but generally implies a well articulated rationale as to why a delegation is warranted in the first place. See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

13 See Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, *supra* note 8 at 930-950, for a comprehensive discussion of state law approaches to the delegation doctrine. For example, in one leading case, a court invalidated the Oregon Public Service Commission’s attempt to adopt, without discussion, safety code revisions (including future revisions) proposed by private committees of interested parties. *Hillman v. Northern Wasco County Peoples’ Utility District*, 213 Ore. 264, 323 P.2d 664 (1958), *overruled on other grounds*, *Maulding v. Clackamas County*, 278 Ore. 359, 563 P.2d 731 (1977).

14 This would be especially true in the case of a newly-constructed private facility where millions of dollars of public funds had already been invested in the project.

15 Although even in that case, the speculative or premature nature of some legal challenges may result in dismissal. See, e.g., *Ohio Patrolmen’s Benevolent Ass’n v. Repke*, 1995 Ohio App.; LEXIS 5876 (1995) (nondelegation issue deemed premature, not ripe for review).

To date, however, some 20 states have not expressly authorized private prisons,¹⁶ and of those, five have gone ahead with some form of private contracting for imprisonment.¹⁷ The federal government, though possibly without a broad authorization to privatize,¹⁸ has nevertheless secured congressional authorization to pursue two privatization arrangements.¹⁹ The tendency among many jurisdictions moving ahead with correctional privatization has been to rely on contractual safeguards to address the due process problems potentially raised by an inadequate statutory framework.

In sum, while sound, detailed enabling legislation may help to create a firmer basis for private correctional accountability, only in certain situations is a statutory deficiency likely to give rise to a delegation challenge that jeopardizes an entire privatization enterprise.²⁰ Challenges to

16 The 20 states are Alabama, California, Delaware, Hawaii, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Dakota, Rhode Island, South Dakota, South Carolina, Vermont, Washington, and Wisconsin. The state of Illinois actually expressly *prohibits* private prisons.

17 Kansas, Hawaii, Idaho, Minnesota, and Missouri. Kansas has required its inmates to be placed in private in-state facilities, while the other states have sent some of their prisoners to out-of-state private prisons.

18 The general legislative basis for the Federal Bureau of Prisons entering into contracts for the incarceration of prisoners in the private sector has not been entirely clear. The BOP has, since 1983, maintained that it has the authority to make contracts for the secure confinement of adult prisoners in the private sector. At least one scholarly commentator, as well as the General Accounting Office, have argued that BOP lacks such authority. See Robbins, *The Legal Dimensions of Private Incarceration*, *supra* note 2 at 396-413; U.S. General Accounting Office, *Private Prisons: Cost Savings and BOP's Statutory Authority Need to be Resolved*, GAO Report No. GAO/GGD-91-21 (Feb. 1991) at 45-50. After several years of intensive debate, the momentum to create a more explicit basis for overall federal prison privatization has appeared to die down, and BOP has pushed ahead with new privatization plans specific statutory authority being employed. See fn. 19, *infra*.

BOP maintains that 18 U.S.C. § 3621(b) provides the Bureau with independent authority to contract with the private sector for secure adult prison facilities. The section states:

(b) PLACE OF IMPRISONMENT.-- The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, *whether maintained by the Federal Government or otherwise*. . . .

(emphasis supplied). Because several other provisions in Title 18 specify the kinds of arrangements that BOP may make to obtain prison facilities, and allow the use of only one category of nonfederal facilities -- those operated by state and local governments and furnished to the federal government by way of contract -- some observers charge that the general language in § 3621(b) cannot extend to *private* facilities. The clear inference, they maintain, is that Congress failed to provide for any arrangements such as private incarceration that are not expressly authorized. See 2A Sutherland on Statutory Construction § 47.23 (4th ed. 1984) (designation of specific provisions for executing certain functions implies exclusion of other, more general provision). Thus, 18 U.S.C. § 4002 provides that the Attorney General may contract with state and local governments for "the imprisonment, subsistence, care, and proper employment" of prisoners for up to three years, and 18 U.S.C. § 4003 authorizes the Attorney General to build new prison facilities if such state or local governments are unwilling or unable to enter into such contracts or if suitable facilities are not available at a reasonable cost. There are no provisions addressing places of prisoner confinement in the private sector. By contrast, other statutes involving the confinement of persons have explicitly authorized the use of private sector facilities for such confinement. See, e.g., 18 U.S.C. § 4013 (authorizing the U.S. Marshals Service to contract with private facilities for the housing of federal pretrial detainees); 18 U.S.C. §§ 5040 (permitting the housing of juvenile offenders in private facilities).

19 The BOP's privately-managed facility in Taft, California was authorized in a 1996 appropriations bill (Conference Report 104-863 to Public Law 104-208, Sept. 28, 1996), while the privatization dimension of the federal takeover of the District of Columbia's Lorton, Virginia facility was provided for in the National Capital Revitalization and Self-Government Act of 1997 (Pub. L. No. 105-33 § 11201(c)(1)).

20 Certainly, without a proper legislative mandate defining with some specificity what can and cannot be undertaken in the way of private sector operation of government correctional facilities, the allocation of public and private responsibilities may become confused and public trust eroded. This has been manifested most clearly in the case of states that have sought to gain more control over the housing of out-of-state inmates within the state, see, e.g., the recently-passed Ohio House Bill 293, effective March 17,

privatization based on a lack of proper statutory authorization should be relatively rare because most prison privatization arrangements feature *some* type of statutory authorization sufficient to reflect a general policy choice in favor of correctional privatization. A more potent regulatory challenge involves litigation seeking to invalidate a particular kind of private contractor authority or conduct, based on due process concerns, as discussed below.²¹ Most private prisons operate according to statutes and/or contracts that retain some critical oversight, rulemaking and decision making in the hands of government correctional authorities.

B. Addressing Possible Due Process Concerns in Correctional Privatization

The most serious constitutional challenges to contracting out the management of prisons may arise when private contractors are deemed to have excessive power over prison rulemaking and decisions affecting inmates' basic liberties. These situations indicate issues of possible financial bias and unchanneled discretion in prison management that raise potential due process concerns. While these concerns can give rise to specific civil rights challenges by inmates and their legal representatives, such due process objections may also serve as the basis for courts to invalidate certain arrangements on "delegation" grounds. As with statutory authorization deficiencies, however, it may only be certain aspects of the overall privatization scheme that are so invalidated.

1. Basic Due Process Principles Governing Delegation Scenarios

The Due Process Clause has given rise to an influential line of Supreme Court cases invalidating the delegation of discretionary rulemaking or adjudication powers to financially interested parties.²² It has also generated support for the idea that private delegations are permissible where the private entity's role is subordinated to adequate public involvement, oversight, and/or approval.²³ These standards are applicable to the federal and state governments alike, since the Due Process Clause has the effect of making constitutional restrictions on private delegations applicable to

1998, discussed *infra* in section 7.B.

21 As discussed above, due process considerations and the delegation doctrine share a concern about the exercise of arbitrary, unaccountable government power. Indeed, private delegation cases tend to rely on a due process analysis, due to fuzziness of the delegation doctrine, its origins in separation-of-powers jurisprudence and its general disuse. Due process analysis has in fact guided most of the key federal court decisions invalidating private party delegations, including *Carter v. Carter Coal Co.* But these decisions have unfortunately blurred the separate and distinct nondelegation and due process issues and standards. See Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 *Hastings Const. L. Q.* 165, 204 (1989).

22 In the rulemaking context, see, e.g., *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (striking down local ordinance authorizing majority of landowners to impose set-back requirements on neighbors); *Carter v. Carter Coal Co.*, *supra*. In the adjudication context, see, e.g., *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) (invalidating law authorizing private parties to garnish employee wages before employees can respond to garnishment in court); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (striking down state optometry board's adjudication of conduct by corporate salaried optometrists where board was composed of individual optometrists with a financial interest in reducing corporate competition).

23 See, e.g., *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939) (creation of market controls by producers judged constitutionally acceptable based on government-imposed requirement that 2/3 of producers waive antitrust restrictions); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (industry officials allowed to propose non-binding minimum prices where officials functioned "subordinately" to a public commission); *Fuentes v. Shevin*, 407 U.S. 67, 80-83 (1972) (state-sanctioned prejudgment repossession of property by private companies permissible only if property owners have opportunity to resist seizure before a judge).

the fifty states through the Fourteenth Amendment.²⁴ In general, it would appear that the more *administrative* the role of private companies -- that is, the more they are responsible for carrying out predetermined policy choices by government officials -- the more likely it is that significant privatization schemes will pass constitutional muster.

While explicit direction from the Supreme Court about due process standards in the private delegation context is lacking, the best guidance by way of analogy may come from federal appeals courts that have ruled on regulatory and adjudicatory standards for securities markets adopted by private securities associations pursuant to the federal Maloney Act. The so-called "Todd Standards," first articulated in the case of *Todd & Co. v. SEC*,²⁵ set forth three factors that enabled the regulatory scheme at issue to accord with due process. First, the private entity's rules had to be approved by a governmental authority before becoming effective. Second, all private decisions regarding rule violations and penalties had to be subject to governmental review. Finally, all such private adjudications had to be governed by a *de novo* standard of review, whereby government officials would draw their own factual and legal conclusions about the violation and penalty in each case.²⁶

The Todd Standards are by no means dispositive of the application of due process to private prisons. Indeed, the *Todd* case dealt with property rights, not the liberty interests that are at stake in the case of private prisons. Yet perhaps for that very reason -- the more serious liberty interests at issue in the latter case -- the Todd Standards would seem to suggest by analogy certain baseline requirements for private prisons.

Accordingly, these standards suggest that private prisons should not have uncontrolled power to make adjudicatory or rulemaking decisions that would disfavor inmates' individual liberties. In particular, as discussed in greater detail below, private contractors presumed financial interests should disqualify them from having the power to make sensitive release-related decisions, including those involving sentencing, parole, release dates, furloughs, discipline and other matters affecting 'good time' credits, and specific work assignments and work credits. These types of decisions generally overlap with the release-related rights that were recently deemed by the Supreme Court in *Sandin v. Connor* to define the general contours of due process within prisons.²⁷

Meanwhile, the presumed lack of private contractors' financial disinterestedness should also disqualify private contractors from making *rules* that govern any of these subjects. The reasons are obvious: because private contractors have a *potentially* strong (it need not actually be strong) interest in maximizing their inmate populations, they may have an incentive to write release-related rules and make release-related decisions that affect good time calculations and ultimately disfavor prisoners. In some cases, this potential bias can be avoided by having a contract specify a contractor fee that is

24 See Liebman, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L. J. 650, 652-54 (1975).

25 557 F.2d 1008 (3d Cir. 1973).

26 *Id.* at 1012.

27 In *Sandin*, 515 U.S. 472 (1995), the Supreme Court moved to scale back the scope of prison due process protections arising directly under the U.S. Constitution to those situations which impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Despite this significant, albeit hazy constriction of due process protections within prison confines, the *Sandin* ruling leaves in place any protections that would ultimately affect the timing of a prisoner's release.

independent of the number of inmates housed at a facility.²⁸ As the key due process cases have shown, private rulemaking and adjudication must avoid even the appearance of bias.²⁹

While the “Todd Standards” have never been passed on by the Supreme Court, they provide general guidance to correctional officials attempting to place limits on private prison rulemaking and decision making, particularly since prisons affect liberty interests rather than the mere property interests at issue in the *Todd* case. Translating *Todd* in a relatively straightforward manner to a correctional context suggests the following principles: (1) rules authored by private prison contractors should be reviewed and approved by government authorities before going into effect; and (2) all private contractor decisions relating in any way to matters affecting release should be subject to governmental review and approval.³⁰

2. Specific Ways of Addressing Due Process Concerns in Correctional Privatization

Even with the substantial expansion of private corrections over the past decade, most states and the federal government have yet to craft specific, detailed standards that address each of the principles embodied in the Todd Standards.³¹ To be sure, *contractual* provisions addressing due process concerns can obviate most, if not all potential deficient legislation. In fact, most jurisdictions have appeared to be content to allow contracting parties to build due process protections into their privatization agreements rather than adopt specific legislation on the subject. Most commentators however, believe that a statutory basis for fundamental due process protections is advisable to obviate due process concerns.³² Legislatively enacted due process standards may highlight a bright line public policy choice and ensure that constitutional principles are not sacrificed at the margins by contracting parties.

Few reported decisions exist that purport to apply any kind of due process analysis to general matters of private prison decision making. In Tennessee, appeals courts have twice upheld a section

28 This is the approach taken in the BOP’s contract for the Taft, California medium-security prison.

29 See *In re Murchison*, 349 U.S. 133, 136 (1955) (“our system of law has always endeavored to prevent even the probability of unfairness”).

30 Part of the third *Todd* standard, requiring a *de novo* review, would not appear to be easily translated into a private prison context. First, it would be incredibly burdensome to the system. Second, it is not clear what such a review would look like, since the Supreme Court only requires that “some evidence” support a disciplinary decision. See fn. 42, *infra*. However a major question arises: if the government’s review is not truly *de novo*, must its review be mandatory and automatic (so that a decision is not deemed to have been rendered until the public correctional authority acts) or can the government’s review simply be satisfied by allowing an inmate to appeal as of right the private contractor’s decision? *Todd* suggests that the *de novo* review requirement is the equivalent of an independent decision being entered by a public agency; thus, if there is no *de novo* review, due process would seem to require that a first-instance decision *in all cases* be formally approved or rendered by a public official. This is what many states require in the case of disciplinary hearings. See text at fns 38-40, *infra*.

31 Neither the federal government nor eleven different states with prison privatization statutes attempt to place any type of statutory due process limits on private exercise of government-mandated correctional authority. The states are Alaska, Georgia, Kentucky, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, and Utah. For a comprehensive survey of federal and state regulation of private prisons relative to due process concerns, see Ratliff, *The Due Process Failure of America’s Prison Privatization Statutes*, 21 Seton Hall Legis. J. 371 (1997).

32 See, e.g., R. Crane, *Wanted: A Model Law to Regulate Privatization*, Correctional Law Reporter 83 (April/May 1998); Ratliff, *The Due Process Failure of America’s Prison Privatization Statutes*, *supra* note 31 at 398-409.

of the relevant state code governing disciplinary proceedings by a “private management company” and stated, albeit without any real analysis, that the statute comports with due process. For example, in one of the cases, *Davis v. Rose*,³³ the Tennessee Court of Appeals validated that part of the state code and associated Department of Corrections disciplinary procedures that allow a private contractor panel to recommend disciplinary action subject to review and final approval by a designated Department of Corrections employee.³⁴ In the absence of detailed kind of court guidance, government corrections officials must use their good judgment and general due process case law to determine where to draw statutory and contractual boundaries around private contractor rulemaking and decision making. A brief survey of some of this experience with such line-drawing follows.

a. Rulemaking Generally

Consistent with due process jurisprudence, some states have barred private prison contractors from unilaterally developing or adopting rules affecting disciplinary proceedings or pertaining to other liberty interests.³⁵ A handful of states have also sought to prohibit private operators from formulating rules or procedures for calculating inmate release and parole eligibility dates or developing and implementing procedures for calculating and awarding sentence (good time) credits.³⁶ Some observers have suggested that the best way to deal with rulemaking problems is to require explicitly that private contractors adopt pertinent rules and procedures employed by the contracting agency.³⁷ While notions of fairness might at first blush suggest a presumption that all or virtually all private prison rules should parallel those for public correctional institutions, and be approved by government authorities, such guidance might be ill-advised. According to many privatization advocates, having a boilerplate transfer of government rules would remove room for flexibility and innovation in many areas of prison operation.

b. Disciplinary Decisions

Governments have generally interpreted due process to require that limits be placed on correctional contractors’ ability to render final disciplinary decisions. Such decisions can affect both good-time credits (and hence, release dates) and in-prison privileges. While only three states have explicitly prohibited contractors from taking any disciplinary action against an inmate,³⁸ several states have mandated that any preliminary decisions that are taken by contractors be reviewed and approved

33 1997 WL 83671 (Tenn. App. 1997).

34 See also, e.g., *Jackson v. CCA*, 1997 WL 337021 (Tenn. App. 1997) (same result).

35 See Fla. Stat. Ann. § 957.06; N.C. Gen. Stat. § 148-37; Va. Code Ann. § 53.1-265; Colo. Rev. Stat. Ann. § 17-1-203; Wyo. Stat. § 7-22-112.

36 See, e.g., Va. Code Ann. § 53.1-265 (barring private contractors from [developing and implementing procedures for calculating inmate release and parole eligibility dates]); Tenn. Code Ann. § 41-24-110 (prohibiting private contractor adoption of rules for calculating inmate release or parole eligibility dates, as well as calculation and award of sentence credits).

37 See, e.g., The Council of State Governments (CSG) and the Urban Institute, *Issues in Contracting for the Private Operation of Prisons and Jails* (hereinafter “CSG Report”) 70 (1987).

38 See Ariz. Rev. Stat. Ann. § 41-1609.01; Tenn. Code Ann. § 41-24-110; Va. Code Ann. § 53.1-265. Two states have a different formulation to the effect that private contractors may take short-term or emergency disciplinary action subject to final review by public corrections authorities. See Fla. Stat. Ann. § 957.06; Colo. Rev. Stat. Ann. § 17-1-203.

by public correctional officers.³⁹ At least a few others have done so contractually.⁴⁰ Notably, the BOP's contract for its Taft, California facility does not have such a requirement.⁴¹ Some commentators have also gone so far as to argue that due process requires a public official to participate in disciplinary hearings, at least those involving major rule infractions.⁴² Still, no court has ruled that this is required by due process, nor do the Todd Standards (albeit in a property rights context) seem to suggest this is necessary. There is little guidance as to the type of review to be undertaken by public correctional representatives. In the meantime, the most cautious approach would direct a private contractor to make factual findings and a preliminary determination thereon according to the Supreme Court's "some evidence" standard,⁴³ but not treat that decision as final until the matter is ruled on, or approved by, a public official.⁴⁴

c. *Parole Decisions*

Because most -- but not all -- private prison contractors are paid according to the number of inmates kept in their custody, such contractors may be seen to have a financial interest in parole decisions. This creates a potential - even if not actual - incentive to supply parole boards with biased or misleading information.⁴⁵ Because of this possibility of bias, due process arguably requires that

39 Ariz. Rev. Stat. Ann. § 41-1609-01,-Colo. Rev. Stat. Ann. § 17-1-203; Fla. Stat. Ann. § 957, 06; La. Rev. Stat. Ann. § 15:1177; Tenn. Code Ann. §§ 301-265; Wyo. Stat. Ann. § 7-22-112.

40 See Contract Between Corrections Corp. of America and the Commonwealth of Virginia Department of Corrections, July 11, 1996 (hereinafter "CCA-Va. Contract") at § 4.21, p. 20.

41 See Taft, California Low and Medium Security Correctional Facilities Contract Between U.S. Bureau of Prisons and Wackenhut Corporation, § C.1, Part II.J ("Discipline"). The BOP's contract simply provides for contractor decisionmaking in the first instance, with an appeal as of right by the inmate through ordinary grievance channels. It is an open question whether due process requires a first-instance decision to be automatically reviewed and approved by a public official.

42 That was the position taken by the Council of State Governments (CSG) and the Urban Institute in a jointly authored report issued in 1987. See CSG Report, *supra* note 37 at 10 (1987). Cf. C. Ring, Contracting For the Operation of Private Prisons: Pros and Cons 21 (1987) (suggesting disciplinary panels could be made up of public and private personnel). This is also the position adopted in the contract between the Virginia DOC and CCA. See CCA-Va. Contract at § 4.21, p. 20. Note that Ira Robbins, author of an early study for the American Bar Association of prison privatization, took a more radical position that all disciplinary hearings should be conducted by public corrections officials. Robbins' view, shared by some, is that simple reliance on public involvement at the review stage may in practice turn out to be a rubber stamp on decisions that are effectively made at the hearing stage by private contractors tinged with a financial interest in the outcomes. Vested with considerable discretion, private prison contractors are seen as even less predisposed than their public counterparts to permit the calling of certain witnesses. See I. Robbins, The Legal Dimension of Private Incarceration, *supra* note 2 at 319. According to this view, the dominance of the private contractor in making preliminary disciplinary hearing decisions is seen as subverting the mandate of *Wolff v. McDonnell*. See Note, *Inmates' Rights and the Privatization of Prisons*, 86 Columbia L. Rev. 1475, 1187 (1986) (suggesting that private officials should be excluded from disciplinary committees).

43 In *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445 (1985), the Supreme Court enunciated a standard that permitted revocation of an inmate's good time credits upon a showing of "some evidence" in the record - a lower standard of proof than a "preponderance of proof" standard.

44 In the end the practical realities of efficient administration and deference to be paid to factual determinations by on-site private contractor personnel make it unlikely that a court would insist on a *de novo* standard of review to ensure compliance with due process -- even though that is arguably what the application of the "Todd Standards" might require in a liberty interest context. If, however, an equivalent degree of independent public authority decisionmaking is required by *Todd* in the prison setting, then it would seem necessary for public authorities at least to approve or ratify every first-instance disciplinary decision made by private contractor personnel.

45 That this is a largely a possible, rather than actual problem is partly indicated by the fact that most inmates are allowed to review their files for inaccuracies.

private companies not be given a prominent role in the parole process, including the ability to make overall parole recommendations. Several states have endeavored legislatively to prevent private contractors from being able to play this pivotal ‘yes or no’ recommending role in the parole process.⁴⁶ Wyoming, for example, provides that prison contractors may not “recommend that the parole board either deny or grant parole, provided the contractor may submit written reports that have been prepared in the ordinary course of business unless otherwise requested by the parole board.”⁴⁷ These state efforts represent a safeguard for a corrections agency to ensure that decisions about release itself do not in any way appear tainted. A more relaxed standard might be used, however, if, as in the case of the BOP’s existing private facility, the private contractor’s fee is not tied to the size of the inmate population.

d. Other Direct or Indirect Release-Related Decisions

Public authorities may also need to retain responsibility for decisions concerning the calculation of good time credits and release dates, as well as work assignments, furlough decisions or security classification determinations that might directly or indirectly bear on the foregoing.⁴⁸ All of these decisions may accelerate or delay an inmate’s release date or eligibility for parole, directly affecting his fundamental liberty interests. Even if actual financial bias is not present, constitutional considerations suggest that even the appearance of self interest should be banished. For example, the possibility that private prison administrators could manipulate prisoners’ work assignments to affect their release credits necessitates public decision making. To this end, only a handful of states have enacted statutory restrictions, or insisted on contractual solutions to the same effect.⁴⁹

46 See Colo. Rev. Stat. Ann. § 17-1-203; Fla. Stat. Ann. § 957.06; Miss. Code Ann. § 47-5-1225; Ohio Rev. Code Ann. § 9.06; W. Va. Code § 25-5-14; Wyo. Stat. Ann. § 7-22-112.

47 Wyo. Stat. Ann. § 7-22-112.

48 Although it is unclear how infrequently this might happen, a particular security classification, for example, might determine not only the specific security conditions of incarceration, but indirectly -- though for example, special work assignments that attach to a particular classification -- the maximum good-time credits a prisoner might receive. In the case of furloughs, a private prison operator might be swayed to restrict furlough opportunities to cut down on the loss of per diem revenues associated with an inmate being absent from the prison. Although in most cases, furloughed prisoners remain part of a private contractor’s designated population.

49 For example, only eleven states appear to prevent private prison operators from granting, denying or revoking inmates’ good-time credits. See Ariz. Rev. Stat. Ann. § 41-1609.01; Ark. Code Ann. § 12-50-108; Fla. Stat. Ann. § 957.06; La. Rev. Stat. Ann. § 39:1800.5; Miss. Code Ann. § 47-5-1225; Ohio Rev. Code Ann. § 9.06; Tenn. Code Ann. § 41-24-110; Tex. Rev. Civ. Stat. Ann. Art. 495.004; Va. Code Ann. § 53.1-265; W. Va. Code § 25-5-14; Wyo. Stat. § 7-22-112. Some state DOC’s like Virginia’s, contractually insist that release computations be done by public officials. See e.g., CCA-Va. Contract at § 4.24, p. 22.

With the exception of Texas and the addition of Colorado (at Colo. Rev. Stat. Ann. § 17-1-203), the above eleven states also bar private operators from determining the kind of work that inmates may perform *or* determining the credits that working inmates may receive thereby. Although they do not specifically address the impact of classification on release, seven state statutes appear to prohibit private prison operators from making classification determinations. See Ariz. Rev. Stat. Ann. § 41-1609.01; Fla. Stat. Ann. § 957.06; Miss. Code Ann. § 47-5-1225; Ohio Rev. Code Ann. § 9.06; Tenn. Code Ann. § 41-24-110; Va. Code Ann. § 53.1-265; Wyo. Stat. Ann. § 7-22-112.

Finally, it appears that nine states have prohibited contractors from deciding the type of work or work credits that individual inmates may receive. See Ariz. Rev. Stat. Ann. § 1609.61; Ark. Code Ann. §§ 12-50-108; Colo. Rev. Stat. Ann. § 17-1-203; La. Rev. Stat. Ann. § 39:1800.5; Miss. Code Ann. § 47-5-1225; Ohio Rev. Code Ann. § 9.06; Tenn. Code Ann. § 41-24-110; Va. Code Ann. §§ 53.1-265; W. Va. Code § 25-5-14.

3. Liability for Private Prison Conditions

Of central importance to governments contemplating correctional privatization is the question of how privatization affects liability for the operations of, and conditions in, private prisons. Matters of liability exposure have a critical bearing on accountability and cost: can prisoners' rights be vindicated in a private correctional context, and if so, is there a lesser liability exposure for the government where a private contractor is the principal defendant? For some time, relatively extravagant claims were made by both advocates and opponents of privatization that the advent of private prisons would insulate governments from liability exposure.⁵⁰ Claims were also made that privatization would substantially shield private contractors from the most potent and costly form of inmate litigation -- civil rights suits involving alleged constitutional rights violations.⁵¹

These assertions may have confused some government correctional officials and troubled civil rights and prisoner's advocacy groups, but the impact of privatization on public and private correctional authorities appears to be less dramatic, and potentially more beneficial, than initially thought. As discussed in greater detail below, privatization will not result in any diminution of litigation exposure for private contractors. They will be treated as "state actors" to whom federal constitutional standards apply with equal force. At the same time, due to the nature of most inmate civil rights litigation, governments involved in contracting out correctional management will generally find a slight reduction in exposure to liability.

This section addresses first, the impact that privatization can have on private contractors' and contracting governments' liability exposure, and second, the impact that a broad indemnification arrangement and a contractor's comprehensive general liability insurance policy -- naming the government as an insured -- can have on keeping the relative litigation costs of privatization low. While the second topic is ultimately more salient, its impact cannot be fully appreciated without a review of how privatization affects the calculus of liability between private and public defendants and how it specifically reduces government liability exposure. There follows a review of the importance of monitoring by government, and how effective monitoring can ensure that public correctional authorities avoid acts and omissions of their own that might give rise to liability.

A. The Impact of Privatization on Liability Exposure

One cannot understand the impact of privatization on governments' and private contractors' liability exposure without appreciating the central place that so-called "Section 1983" cases -- federal civil rights claims alleging constitutional violations -- occupy in correctional litigation. The mechanics of Section 1983 affect the liability of governments and contractors in different ways.

50 See, e.g., Wash. Post, March 23, 1986, at F6, col. 2 (describing how some politicians believed that government could escape liability through use of private prisons); M. Walzer, "Hold the Justice," New Republic, April 1985, at 12 (privatization may result in an "escape from the enforcement of constitutional norms").

51 See, e.g., Sullivan, *Privatization of Corrections: A Threat to Prisoners' Rights*, in G. Bowman, et al., eds., *Privatizing Correctional Institutions* 139 (1994).

1. Inmates' Overwhelming Reliance on Section 1983 Cases to Redress Grievances

Prisoners litigating suits involving allegations of deficient prison conditions or individual harm suffered at the hands of prison authorities can bring a variety of legal claims to court, but only Section 1983 cases offer an effective means of addressing *constitutional* grievances and obtaining significant monetary damages. The reasons are clear: under Section 1983 litigation, inmates can seek to remedy violations of their constitutional rights by private contractors as well as by state or local government authorities who have contracted out prison management. Analogous actions against federal correctional officials may be brought under so-called *Bivens* actions.⁵² Inmates can also obtain not only actual, or compensatory damages (reimbursing them for direct harms),⁵³ but also nominal damages (if a constitutional deprivation causes no actual injury),⁵⁴ punitive damages (monetary awards solely for the purpose of setting an example in especially egregious cases),⁵⁵ and declaratory and injunctive relief.⁵⁶ They may also sue state or local officials in their individual capacities.⁵⁷ Equally important, prisoners prevailing as plaintiffs in Section 1983 actions can win attorneys' fees, which provide a significant incentive for inmates bringing lawsuits.⁵⁸ Finally, Section 1983 cases are heard in federal courts, which are perceived as being more fair and impartial than state courts.

By contrast, state court actions alleging negligence or intentional conduct on the part of private contractors and state officials usually face numerous kinds of limitations on the types of relief

52 "Section 1983" refers to the provision's codification in Volume 42 of the United States Code, Section 1983, or as it is most commonly abbreviated, 42 U.S.C. § 1983. Section 1983 actions are designed to offer redress to individuals who have suffered a deprivation "under color of state law" of "rights, privileges, or immunities secured by the Constitution and laws of the United States." Although there exists no comparable statute for suits against federal officials, the Supreme Court recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that similar actions can be brought for violations allegedly committed under federal auspices.

53 Compensatory damages can include those for emotional or mental distress, although the 1996 Prison Litigation Reform Act limits such recovery to cases where mental or emotional injuries accompany a physical injury.

54 See *Carey v. Phipps*, 435 U.S. 247 (1978).

55 See *Smith v. Wade*, 461 U.S. 30 (1983). Punitive damages can be awarded as long as the defendant acted with "reckless or callous indifference to the federally protected rights of others." *Id.* at 56. Most lower courts have also held that a plaintiff who recovers only nominal damages in a § 1983 suit can still be awarded punitive damages. See, e.g., *Brewer v. Chauvin*, 938 F.2d 860, 864 (8th Cir. 1991) (*en banc*).

56 See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). A declaratory judgment usually entails a finding that a governmental statute or regulation is unconstitutional. If a court provides the plaintiff with some type of injunctive relief, the court goes even further -- directing a defendant to refrain from taking certain unconstitutional actions in the future or requiring the defendant to take certain steps to avoid future violations of the Constitution. Compensatory and punitive damages, as well as injunctive relief, are also available to plaintiffs in *Bivens* actions.

57 *Bivens* suits can also be maintained against federal officials in their individual capacities.

58 Fees are authorized under 42 U.S.C. § 1988, although no fees are available for plaintiffs proceeding under federal *Bivens* actions. To be considered a 'prevailing party' under § 1988, a plaintiff need not win the central claim asserted, but can rather succeed on "any significant issue in litigation which achieves] some of the benefit the parties sought in bringing suit." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 791, 792 (1989). Although the Prison Litigation Reform Act has placed a cap on attorneys' hourly rates in prisoner suits, see 18 U.S.C. § 3006A(d), as well as the total fees recovered as a proportion of the relief obtained, see 42 U.S.C. § 1997e(d)(1)(B)(i), the availability of any fees at all still makes Section 1983 an attractive vehicle for prisoner's rights litigation.

that can be obtained,⁵⁹ especially where the common law or state legislatures may have immunized states and/or state officials from suit for actions arising from official conduct.⁶⁰ Moreover, governments generally cannot be sued for the negligent acts of their independent contractors,⁶¹ and most federal and state tort claims acts bar claims that involve “discretionary functions,” which could include both the contracting out of the correctional function⁶² and the placement of an individual inmate in a privatized facility.⁶³ Only tort suits involving allegations of negligent oversight or monitoring of a private prison are likely to succeed under a state or federal tort claims act, as the case may be.⁶⁴

Three major questions under Section 1983 and *Bivens* litigation that arose in the mid-1980's in the wake of the first significant correctional privatizations were (1) could private prison contractors be sued as defendants acting “under color of state law?” (or federal law, in the case of *Bivens* suits); (2) if private prisons were indeed “state actors” amenable to suit under Section 1983 and *Bivens*, would private prison contractor officials be able to share the “qualified immunity” defense that public officials “acting under color of state law” enjoyed? and (3) if private prison contractors were deemed “state actors” amenable to suit under Section 1983, what kind of liability, if any, would still attach to *public* correctional officials who might still have various kinds of continuing responsibilities toward private facilities? These questions assumed great significance as policy makers sought to ascertain the true costs and benefits of privatization, and as the public sought to learn whether private prisons would permit governments to avoid their constitutional responsibilities toward inmates.

2. Are Private Prison Contractors Amenable to Suit under Section 1983?

The Supreme Court appeared to answer the “state action” question in 1988 in the case of *West v. Atkins*.⁶⁵ In *West*, the Court concluded that a private physician who worked in a state prison several days each week could constitute a defendant under Section 1983. The Court dismissed the notion that the private doctor was not covered by Section 1983 simply because he was not a state employee and worked part-time in the prison. What mattered, according to the Court, was the “function within the state system” that the doctor played within the prison: he had agreed to assume the government’s responsibility, delegated specifically to him, to furnish medical care required by the Eighth

59 Ordinary tort actions may be severely circumscribed by state tort claims acts, and usually provide only for the award of compensatory damages. Except in the possible case of medical malpractice cases, such damages are in any event usually exceedingly modest, given the status of prisoners and the fact that most of their needs are furnished by the prison.

60 See, e.g., Utah Code Ann. § 63-30-10(j) (explicitly excepting prisoners’ suits from waiver of sovereign immunity).

61 See Restatement (2d), Torts, § 409. This principle is statutorily codified in the Federal Tort Claims Act at 28 U.S.C. § 2671.

62 See, e.g., *Gotha v. United States*, 115 F.3d 176, 179-80 (3d Cir. 1997)(discussing situations where major government decisions “susceptible to policy analysis” constitute “discretionary functions” immune from suit under the Federal Tort Claims Act, 28 U.S.C. § 2680(a). As such, the ‘discretionary function’ exemption would appear to bar any negligence suit based on a theory of “negligent selection” of a private contractor. Everyday oversight over a private contractor via a prison monitor may conceivably still expose a corrections agency to negligence liability, but this will undoubtedly arise in the context of a larger Section 1983 suit.

63 See, e.g., *Bailor v. Salvation Army*, 51 F.3d 678 (7th Cir. 1995)(pre-release placement of inmate in half-way house deemed discretionary function immune from suit).

64 See discussion on Section 3.B.2, *infra*.

65 487 U.S. 42 (1988).

Amendment to the Constitution. His specific function in the unique prison setting was to discharge the state's medical care responsibilities which he "possessed by virtue of state law and [which were] made possible only because [he was] clothed with the authority of state law."⁶⁶

There should be no reason to doubt the application of *West v. Atkins* to private contractors running entire prison facilities, either on legal or policy grounds. The special, all-encompassing role that private contractors play in the day-to-day management of privatized facilities -- their "function within the state system"⁶⁷ -- together with the understanding that contractors have assumed responsibility for protecting inmates' constitutional rights, make it highly unlikely that a private prison management company could escape Section 1983 liability. This would seem to be the case even if the reasoning in another Supreme Court state action case were applied.⁶⁸ At least one federal circuit court has explicitly endorsed the application of *West v. Atkins* to private correctional management.⁶⁹

It is important to note that, at present, notwithstanding the *West v. Atkins* holding, it is an untested proposition in many areas of the country whether *Bivens* actions may be brought against federal prison contractors as "state actors." Only four judicial circuits have unambiguously recognized private contractors as appropriate *Bivens* action defendants, while most of the circuits have

66 *Id.* at 55.

67 *Id.* This reference to the doctor's function in the state system may or may not signal reliance on a line of Supreme Court cases finding state action where the activity at issue has been a "public function" -- defined by the Court to be "traditionally exclusively reserved to the state." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). Because prisons cannot, strictly speaking, be said to have been "traditionally exclusively reserved" to the state due to the 19th century legacy of private prisons -- something the Supreme Court itself acknowledged in the recent case of *Richardson v. McKnight*, 117 S. Ct. 2100, 2104 (1997) -- there is still some debate as to whether the "public function" test is applicable to Section 1983 cases in the new correctional privatization environment.

68 One of the most interesting questions regarding private prisons and 'state action' is why the Supreme Court, in the recent decision of *Richardson v. McKnight*, 117 S. Ct. 2100 (1997) -- a case that involved a private prison run by Corrections Corporation of America -- instructed the trial court on remand to analyze the state action question under the holding not of *West*, but of *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982). The best explanation is that *Lugar* actually enunciated a test to determine state action, while *West* was less clear about its governing principles. The real question, however, is whether by referring to *Lugar*, the Court was signaling a reaffirmation of the increasingly restrictive approach to state action that it began to develop in the 1980's. But the result in the private prison context is in fact likely to be the same regardless of which decision is relied on. The two-part test in *Lugar* requires first, that a constitutional deprivation "must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible"; and second, that "the party charged with the deprivation must be a person who may fairly be said to be a state actor." The definition of state actor in the second part of the test includes a person jointly acting with state officials, or who "has obtained significant aid from state officials," or "*whose conduct is otherwise chargeable to the State.*" *Id.* at 937 (emphasis supplied). Thus, although the *Lugar* decision itself revolved around a finding of joint activity by public and private parties, the last phrase of the two-pronged test would appear to be expansive enough to attribute liability to almost any kind of private prison company assuming all or virtually all management functions at a facility.

69 See *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) *cert. denied*, 503 U.S. 989 (1992), quoting *Plain v. Flicker*, 645 F. Supp. 898, 907 (D.N.J. 1986) ("[I]f a state contracted with a private corporation to run its prisons it would no doubt subject the private prison employees to § 1983 suits under the public function doctrine"). See also *Street v. Corrections Corp. of America*, 102 F.3d 810, 814 (6th Cir. 1996) (private operation of prison is a public function). At least one district court has reasoned similarly. See *Payne v. Monroe County*, 779 F. Supp. 1330, 1335 (S.D. Fla. 1991) (Wackenhut Corp., operator of county jail, deemed state actor performing public function).

not ruled on the issue. One circuit has refused to allow *Bivens* suits against private parties.⁷⁰ Lower courts confronted with private contractor defendants in *Bivens* actions generally continue to find ways to avoid ruling on the issue.⁷¹ Still, it is hard to see how these remaining judicial circuits will be able to resist the logic of *West* in the Section 1983 context if and when an analogous *Bivens* case appears before them.⁷² Interestingly, the current Bureau of Prisons facility in Taft, California falls within the 9th Circuit, which has in fact recognized private contractors as appropriate *Bivens* defendants.

3. Do Private Prison Officials Have a ‘Qualified Immunity’ Under Section 1983?

Even with increasing general agreement that private prison contractors and employees are “state actors” subject to Section 1983 liability, it remained uncertain until recently whether such employees could raise the defense of “qualified immunity” that is extended to public officials defending against monetary claims in such litigation.⁷³ Such immunity shields from liability officials exercising discretionary functions if, in light of the clearly established law existing at the time, they could reasonably believe that their conduct was lawful. The immunity is therefore helpful in protecting officials from liability in situations where the applicable law is in flux and they must operate with resolve and confidence in volatile environments. Proponents of extending qualified immunity to private prison officials argued that officials acting “under color of state law” in managing a prison should have same defenses available to public employees. This would allegedly create an “even playing field” allowing fair competition between public and private entities.⁷⁴

Last year, in *Richardson v. McKnight*,⁷⁵ the Supreme Court rejected such an approach, ruling that private prison guards cannot raise a qualified immunity defense to a Section 1983 action. The Supreme Court’s reasoning relied on both history and public policy. The Court found that the “mere performance of a governmental function” by a private defendant could not, alone, entitle that defendant to claim qualified immunity.⁷⁶ The purpose of qualified immunity is to prevent public

70 The four circuits that have found *Bivens* actions to be appropriate against private defendants are the D.C., 5th, 6th, and 9th Circuits. See, e.g., *Reuber v. U.S.*, 750 F.2d 1039, 1053-57 (D.C. Cir. 1984); *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982); *Yiamouyiannis v. Chemical Abstracts Service*, 521 F.2d 1392 (6th Cir. 1975); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1337-38 (9th Cir. 1987). The one circuit that has found to the contrary is the First. *Fletcher v. Rhode Island Hosp. Trust National Bank*, 496 F.2d 927, 932 n. 8 (1st Cir.), cert. denied, 419 U.S. 1001 (1974). Other circuits have either not dealt with the issue or have purposely left it untreated. See *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 720 n.5 (cataloguing status of private party amenability to suit by circuit).

71 See, e.g., *Smith v. United States*, 896 F. Supp. 1183 (M.D. Fla. 1995) (court merely assumes private half-way house is proper defendant under *Bivens* action against half-way house and U.S. Bureau of Prisons; *McChan v. CCA*, 1997 WL 104110 (D. Kan. 1997)(same assumption in case involving privately-managed federal detention center); *Gleave v. Graham*, 954 F. Supp. 599, 604 (W.D.N.Y. 1997)(court does not rule on issue, where private half-way house is the principal defendant).

72 Indeed, the Supreme Court has noted how liability standards in *Bivens* cases generally track those in Section 1983 litigation. See *Siebert v. Gilley*, 500 U.S. 226 (1991).

73 The qualified immunity defense applies only to actions against officials for monetary relief.

74 See, e.g., Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suits*, 53 La. L. Rev. 449, 454 (1992).

75 117 S. Ct. 2100 (1997).

76 The Court noted that “[h]istory does not reveal a ‘firmly rooted’ tradition of immunity applicable to private employed prison guards,” *id.* at 2104, and further observed that “[c]orrectional functions have never been exclusively public” in the U.S. by virtue of the history of private jails and prisons in the 18th and 19th centuries. *Id.*

officials, who have civil service protection and less strict oversight, from exhibiting “unwarranted timidity” in the face of liability. The Court noted, however, that private companies and their employees have other incentives, generated by state monitoring and the marketplace, to spur them to perform their duties zealously. Moreover, such contractors can obtain relatively inexpensive liability insurance for their employees that will further minimize any disincentives for good performance.⁷⁷ The Court concluded that its decision to deny qualified immunity should apply to any situation where “a private firm, systematically organized to assume a major lengthy administrative task...with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms.”⁷⁸

Despite the narrow decision in *McKnight* and an agitated dissent by the minority justices, the ruling is likely to apply to virtually all private contractors managing prisons, even where competitive market pressures may be relatively weak.⁷⁹ The bigger question is whether the case’s significance to current private prison operations is more modest than it initially appeared. To begin with, qualified immunity by its terms is generally most helpful to public officials when the legal standards governing their work are unclear and a reasonable official might believe that his conduct was lawful. In the case of prison litigation, however, constitutional law standards that might have seemed confused or unsettled in the 1970s and 1980s have now reached a degree of clarity and relative stability that render the qualified immunity defense far less valuable than in earlier years. Moreover, in monetary terms, the impact of *McKnight* on private prison contractors has been negligible, since the additional insurance necessary to cover individual prison officials’ liability is only marginally higher than that necessary to cover the corporate liability of the firms themselves.⁸⁰ Finally, the *McKnight* decision left open the possibility that a potentially equally meaningful “good faith” defense to liability -- rather than an absolute defense to suit -- still might be asserted by private prison officials who genuinely believed their actions were in accord with prevailing law.⁸¹ In the end, the slight increase in private contractors’ exposure to liability appears not to have had any discernible impact on those firms’ costs.⁸²

77 *See id.* at 2106-07. The Court argued that if private companies or their employees flag in their duties, they may be replaced in the competitive procurement process or through the action of market and reputation forces.

78 *Id.* at 2107. The *McKnight* decision would also appear to put to rest the notion that a private contractor could avail itself, in federal actions against states and their high-ranking officials, of the defense of absolute “sovereign immunity” that would also shield it from Section 1983 liability. Although the Supreme Court did not address this issue explicitly, its reasoning extends to both types of immunity for private prison contractors and their employees.

79 While the minority opinion, written by Justice Scalia, emphasized that the private prison industry is dominated by a few major players and often driven by political lobbying and decision making, it does not necessarily follow that the basic profit motive, and its incentives for private guards to perform effectively, are weak. There are still significant contract and market pressures at work. *See, e.g.,* Thomas & Logan, *The Development, Present Status, and Future Potential of Correctional Privatization in America*, in G. Bowman, et al., eds., *Privatizing Correctional Institutions* 233 (1993) (noting that profitability and share value are usually tied to meeting government contractual expectations and enhancing firm’s public reputation).

80 Not only did private prison contractors not assume that their officials were protected by qualified immunity prior to *McKnight*, but their insurance policies before and after *McKnight* typically indemnify private prison officials for all liability relating to their prison work.

81 117 S. Ct. at 2108.

82 In this regard, it also does not seem persuasive to suppose, as did the *McKnight* minority, that private contractors will “down-play discipline” and otherwise exhibit timidity in their work so as to reduce the cost of § 1983 litigation. Anecdotal evidence suggests that private firms are not deterred from entering or profiting in the market. *See generally* Note, *Qualified Immunity -- Privatized*

4. Private Contractor and Governmental Liability Exposure in Section 1983 Litigation

With private prison contractors deemed “state actors” amenable to suit under Section 1983, and with contractor personnel not immune from suit, it becomes possible to analyze the general contours of how liability would be distributed among contractors and government correctional authorities in a privatized correctional environment, and whether, and to what degree, privatization helps or harms governments and prisoners involved in inmate litigation. The most important factor, from a cost standpoint, is simply the availability to contractors and governments of a contractor’s comprehensive general liability insurance policy. Still, even from the standpoint of exposure to suit, it is clear that the interposition of a private contractor handling the day-to-day management of a correctional facility will tend to reduce significantly the exposure of governments and senior public correctional authorities, particularly in cases involving isolated or individual incidents. It should not, meanwhile, affect adversely the ability of prisoners to obtain relief for legitimate constitutional complaints. To understand these effects, it is useful to examine the respective Section 1983 liabilities of private contractors and government entities (i.e., local governments, states, federal government).

a. Private Correctional Firm Liability

As a private entity functioning as a “state actor,” a private correctional contractor would be amenable to suit under Section 1983 or *Bivens*, and subject to both monetary damages and injunctive relief if it were found to have violated one or more inmates’ constitutional rights. Hence, a private contractor would be subject to the same liability standards established by the Supreme Court for public actors, including those relating to causation and state of mind.⁸³ Since, however, there is no so-called *respondeat superior* liability for *any* employers under Section 1983 -- meaning, no automatic liability of an employer for the actions of its employees⁸⁴ -- a firm and its supervisory employees must be shown to have been directly involved in the alleged violation, have known about the violation or its likelihood of occurring and been “deliberately indifferent toward the risk, or have generated or validated a policy or custom that led to the violation.”⁸⁵

As in the case of public employers, in practice this means that while inmate cases may succeed against private correctional officers, it may be much more difficult to reach supervisory personnel. Such higher-level personnel may be insulated from liability in cases involving isolated

Government Functions, 111 Harvard L. Rev. 390, 398-400 (1997) (private firms appeared undeterred by lack of immunity in aggressively operating prisons). Also, since litigation costs are merely possible future costs, firms will usually prefer to reap savings through immediate staffing and training efficiencies rather than through presumed litigation savings. *See id.* at 400 n. 75.

83 In the case of an Eighth Amendment claim alleging safety problems stemming from other inmates, for example, a plaintiff would need to show that the private correctional officials’ actions or omissions had a causal connection to the injuries alleged, and that the officials displayed “deliberate indifference to a substantial risk of serious harm.” *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

84 *See Monell v. Department of Soc. Serv.*, 436 U.S. 658, 694 (1978). Although *Monell* involved a municipal corporation, all federal circuit courts have agreed that there is no *respondeat superior* liability for private corporations as well. *See Street v. Corrections Corp. of Am.*, *supra* 102 F.3d at, 818.

85 *See, e.g., Street v. Corrections Corp. of Am.*, *supra* (private prison contractor and warden not proper defendants for alleged Eighth Amendment violation by prison guard; no showing of custom or policy); *Nelson v. Pennsylvania*, 1997 WL 793060, at 3 (E.D. Pa. 1997)(allegations against private prison warden and assistant warden dismissed due to lack of participation in or knowledge of and acquiescence in activity alleged to have caused constitutional deprivation).

incidents and lower level personnel (e.g., guards or medical staff),⁸⁶ depending on their particular level of knowledge or lack of forewarning of specific problems or risks. Even in cases where a failure to train correctional officers is at issue, the failure to train must be accompanied by officials' "deliberate indifference" to the risk that deficient training will result in constitutional violations.⁸⁷ Mere negligence -- on the part of line employees or their supervisors -- does not give rise to a Section 1983 claim.⁸⁸

On the basis of *comparative* recovery of damages, it can be said that privatization may bring certain benefits to inmates bringing meritorious Section 1983 suits. First, in the case of state and federal corrections (although not local government corrections), due to the Eleventh Amendment and/or statutes on sovereign immunity, state and federal correctional employees are not amenable to suits for monetary damages except in their personal capacity.⁸⁹ This means that only damages against their individual assets may be obtained, thereby significantly limiting the amount of money that can be obtained in such cases.⁹⁰ By contrast, damages obtained against private correctional employees can be paid out of the employing firm's assets, which could be quite large. Moreover, federal, state and local governments may have statutory limits on damage awards or be exempted from certain types of damages,⁹¹ while private contractors are not similarly restricted.

b. Government Correctional Authority Liability

Contracting for prison management services also means lower overall liability exposure for governments. This lower liability profile results directly from the Section 1983 causation and state of mind standards discussed immediately above: insofar as public corrections authorities will have entrusted day-to-day management of prisons to private contractors, they will be less likely to have advance notice or knowledge of specific harms alleged to have caused injury to individual inmates. While reliance on a private contractor will obviously not insulate government authorities from being named in lawsuits⁹² or being exposed to liability for widespread or obvious problems with prison conditions, it will greatly lessen the liability of government supervisory officials for most inmate claims alleging individual harm. These claims represent the most common type of inmate lawsuit, and assume a significant proportion of a corrections authority's litigation budget.

86 Thus, for example, in an Eighth Amendment inmate freedom from harm case, if supervisory officials were to be held liable, an inmate would have to show not only that front-line guards were "deliberately indifferent" to a strong likelihood that the inmate's safety was in danger, but that the supervisory officials had similar knowledge of a risk and recklessly and consciously disregarded it. *See, e.g., Payne v. Monroe County, supra* at 1334 (claims against private jail management firm dismissed; no showing of deliberate indifference on part of firm).

87 *See City of Canton v. Harris*, 489 U.S. 378 (1989).

88 *See Daniels v. Williams*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986).

89 Also by virtue of sovereign immunity, states themselves are not amenable to suit. *See, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

90 Although the government cannot be tapped directly for damages, it can, by statute and based on discretion, choose to indemnify government employees sued in their personal capacities. States, are, however, liable for attorneys' fees under 42 U.S.C. § 1988 in cases for injunctive relief where state officials were sued in their official capacity and lost.

91 In addition, the Supreme Court has held that punitive damages are not obtainable against municipal governments. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

92 As one commentator has noted, "[T]he government cannot hide behind its private operator. An inmate can sue either party." M. Gold, *The Privatization of Prisons*, 28 *The Urban Lawyer* 359, 380 (1996).

Governments will still be subject to injunctive relief if they permit obviously unconstitutional conditions to arise in private prisons.⁹³ Municipalities and county governments, unprotected by sovereign or qualified immunity, will also face monetary damages, including punitive damages in such situations where a “policy or custom” bearing on the alleged harm is deemed to exist.⁹⁴ But municipalities, together with state and federal officials, will face monetary liability in cases of individual harm only if, based on Section 1983 state of mind requirements, they authorize improper conduct by a private contractor, or have knowledge of that conduct and consciously fail to take steps to correct it. In most cases involving these kinds of allegations, courts will dismiss claims against upper level officials, who are deemed entitled to rely on the judgment and professionalism of private contractors reacting to the day-to-day challenges of prison management.⁹⁵

B. The Role of Indemnification, Insurance and Monitoring in Reducing Liability and Litigation Costs

This section addresses the importance to public correctional authorities of (a) being covered by a broad indemnification agreement covering the contractor’s acts and omissions, and (b) being named as an insured on a private contractor’s comprehensive general liability insurance policy. These important advantages are discussed in greater detail below. This section also reemphasizes how Section 1983 will not impose liability on government officials unless they not only know about a problem but are *deliberately indifferent* toward it. Prudent monitoring of private facilities by the government has the clear benefit of alerting public officials to serious and systemic problems in a facility that, if responsibly dealt with, will not generate damaging litigation -- not to mention public relations problems -- in the first place. Perhaps equally important from a liability and cost standpoint, an effective monitor can prevent public authorities from committing their own acts and omissions that are *not* generally covered by the contractor’s insurance policy.

1. Indemnification and Insurance

It goes without saying that any expectations about privatization’s purported litigation cost advantages would prove completely illusory without government insistence on an effective

93 See, e.g., *Nelson v. Prison Health Serv., Inc.*, 1997 WL 821531 (M.D. Fla.1997) (county could be found liable for deficient medical care at private jail based on repeated receipt of monitoring reports identifying problems).

94 Sometimes, courts have viewed municipal government liability broadly as non-delegable where contracting decisions are viewed as constituting a “policy or custom.” See, e.g., *Ancata v. Prison Health Services*, 769 F.2d 700, 705-06 nn. 9 & 11 (11th Cir. 1985) (county liable together with private prison health provider for inadequate medical care furnished to inmates); *Blumel v. Mylander*, 954 F. Supp. 1547, 1556 (M.D. Fla. 1997) (county liable with private contractor CCA for Fourth Amendment violation where county policy entrusted CCA with policy making authority on subject at issue). Custom has been interpreted broadly to include a “widespread practice, that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.” *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), quoting *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 167-68 (1970). If a custom is shown to be so longstanding and widespread that it is considered to have been “authorized by the policy-making officials because they must have known about it but failed to stop it,” liability may attach under § 1983. See *Payne v. Monroe County*, *supra* at 1334 (section 1983 prison suit against county and private contractor dismissed where no showing that inmate safety problem was known or should have been known).

95 Cf., e.g., *Calvert v. Hun*, 798 F. Supp. 1226, 1232-33 (N.D. W.Va. 1992) (Eighth Amendment claims against state prison officials dismissed where no showing that such officials actively or tacitly approved provision of allegedly incompetent medical care to individual inmate by private health provider).

indemnification and insurance scheme. By demanding full indemnification and compensation of the government for all acts and omissions of the private contractor that may give rise to liability surrounding the operation of a private facility, public corrections authorities can ensure that there is no litigation cost increase attending privatization. Being named as an insured on a private contractor's comprehensive general liability policy can provide governments with the security they need in order to turn over complete operation of a prison and to focus their attention on specific matters of facility oversight and proper contractor performance.

To ensure that they deliver their full benefit, indemnification clauses typically indemnify, defend, and hold harmless the government and all of its employees, agents, and officers from any claims or losses -- including all damages, costs, fines, and/or settlements -- stemming from the contractor's acts or omissions in connection with performance of a privatization contract.⁹⁶ They are also typically written in such a way as to apply to all subcontractors, agents, or any other persons supplying services or supplies in connection with the contract. Beyond these basics, a contract may explicitly provide for indemnification for specific harms, including prison escapes, failure to comply with federal, state, or local legislation (particularly labor laws), and unsanctioned use of information or data collected or used in the course of performance of the contract (e.g., research or personal data implicating privacy, copyright, or trade secret concerns).⁹⁷ It may also address government requirements that the government be a signatory to any settlement or explicitly approve any settlement in excess of insurance limits.

Insurance provisions in a contract constitute a logical extension of the indemnification clauses. A contracting government agency will usually be named as an insured on any and all insurance policies written for the private contractor managing one or more prison facilities.⁹⁸ By being named explicitly as a direct insured party -- rather than as merely a beneficiary -- a government can strengthen its indemnification provisions vis-a-vis the contractor and its rights against the insurer. Among the most important of those rights is the right to advance notice of any nonpayment or cancellation of the policy by the contractor. Without these direct rights -- contained in the insurance policy or in the contract with the private contractor⁹⁹ -- the government's protection may be illusory. The contracting agency may also insist that it be given advance notice of, and opportunity to approve, a new certificate of insurance that replaces an expiring policy.¹⁰⁰

96 It is important that the indemnification extend to performance of the *contract* in all of its dimensions (including by implication all manner of omissions), rather than simply the operation of the facility in question, which might otherwise narrow the coverage of the hold harmless benefit.

97 See generally, e.g., Contract Between Commonwealth of Kentucky and U.S. Corrections Corporation for the Operation of Three Minimum Security Facilities, December 9, 1993 (hereinafter "Kentucky Contract"), at 33.

98 There appears to be unanimous agreement that third-party insurance obtained by the contractor is the safest and most cost-effective means that governments have of being properly insured. See Robbins, *The Legal Dimensions of Private Incarceration*, *supra* at 854, n. 644 (discussing problems with contractors self-insuring).

99 See, e.g., Kentucky Contract at 34; CCA-Va. Contract at § 7.4, p. 38.

100 See, e.g., State of California Department of Corrections Standard Contract, Attachment B (General Terms and Conditions), ¶ 19 at 6, furnished as Attachment 1 to RFP for Expansion and Operation of Medium Security Community Correctional Facility, October 13, 1995.

In developing specific provisions for insurance coverage, governments generally seek to cover all possible liabilities arising from the operation of the privatized facility, including both personal injury claims and Section 1983 litigation. Liability areas include those for personal injury, professional (malpractice) liability (including medical malpractice), contract liability, property damage, worker's compensation liability, theft and fraud, and automobile liability (to protect against damages stemming from transport of inmates). Insurance policies are also generally sought that explicitly provide for the payment of *litigation defense costs*.¹⁰¹ Depending on risk calculations specific to individual facilities, governments will also seek to prescribe insurance amounts that insurance policies should contain.¹⁰² In addition to liability insurance, contracts may also provide that contractors furnish performance bonds as a means of ensuring proper performance of the contracted-for services, although the usefulness of this tool is limited.¹⁰³

Government indemnification and coverage under a contractor's third-party liability policy go hand-in-hand with the practical reality that public officials have turned over day-to-day prison management to private firms that must, as a matter of ordinary accountability and proper market pricing, bear the direct costs of damages they may cause in executing their responsibilities. Attentive governments will closely monitor both the quality of insurance initially obtained by the contractor, as well as changes in coverage and premiums that may have an impact on the overall savings derived from the management contract. While market pressures and profitability concerns should, over time, be expected to result in lower premiums for contractors that perform responsibly, governments can still be expected to monitor contractor performance closely to make sure that there is no offsetting tendency to cut back on staffing, training, and other inputs affecting the bottom line.

It should be noted that government litigation costs at a particular facility may or may not be lower with prison management in the hands of a private contractor. A great deal depends on the nature of the facilities involved, the profile of the inmate population, and the risk management approaches taken by particular public versus private authorities. The latter approaches can themselves vary greatly according to the overall management plan, quality of staff, and claims handling procedures employed by those administering a specific prison facility or system. While it may be contended that private authorities can exercise greater flexibility than their public sector counterparts in given situations, this assertion cannot be readily substantiated.¹⁰⁴ Thus, even though a prudent

101 See, e.g., CAA-Va. Contract at § 7.3, p. 38.

102 For example, Virginia has required a contractor managing a medium security facility to carry comprehensive general liability insurance in an amount no less than \$2 million per occurrence and \$5 million in the aggregate. See CCA-Va. Contract, *supra* at § 7.3, p. 37. Kentucky requires commercial general liability insurance to be carried by a contractor for a minimum security facility in the amount of \$2 million per person and \$3 million per occurrence. See Kentucky Contract, *supra* at 35. Most specialists seem to think that \$5 million per occurrence is a completely adequate amount for a medium security prison with 500-1000 beds. For medical malpractice insurance, the U.S. Bureau of Prisons prescribed an amount of \$1 million per medical speciality per occurrence. See RFP for Minimum Security Prison, Taft, California, Nov. 27, 1996 (hereinafter "Taft RFP"), at 72.

103 Although performance bonds have been viewed by some as useful where the contracting agency wishes to protect itself from events such as contractor bankruptcy, default, strikes, or a takeover by or merger into, a new firm, many believe they are unnecessary since they usually require replacement of a private contractor by a vendor of the insurer's choosing, and because it is usually easier and cheaper for public authorities to resume control.

104 Some privatization proponents have asserted that private firms may prove more responsive to inmates and the general public in remedying problems that result in prison litigation. They contend that a private contractor can more expeditiously to correct a problem or settle a lawsuit when political pressures are absent, fewer approvals are needed, and funding is more readily accessible. Also, a private firm's concern with market reputation and profitability is alleged to create incentives for flexibility and holding costs down. There remains no solid evidence or study to support these contentions, however plausible they may be.

government correctional agency will insist as a matter of course that a contractor indemnify and hold it harmless against all acts and omissions of the contractor arising under a management contract -- and even though such an agency will similarly insist that it be named as an insured on any private comprehensive general liability insurance policy covering particular prison facilities -- there is no way to tell for sure whether its litigation expenditures under privatization will be lower.¹⁰⁵

2. Monitoring to Safeguard Against Liability Resulting from Government Duties

Indemnification and insurance covering the acts and omissions of the private contractor will not necessarily shield public correctional authorities for failing to exercise that degree of oversight deemed appropriate to particular contract circumstances. As the Supreme Court acknowledged in the case of *Logue v. United States*,¹⁰⁶ government correctional authorities may be liable for their own negligence even though management of a correctional facility has been given over to an independent contractor.¹⁰⁷ To safeguard against the continuing possibility of liability for their own conduct, as well as to ensure proper contractor performance and compliance with contract terms, most governments have statutorily¹⁰⁸ or contractually provided for public corrections monitors to oversee private prison operations. Monitors may be individuals who fulfill roles significantly different from those performed by auditors, inspectors, and performance evaluators whose interventions are less frequent and less concerned with day-to-day operations. Without such frequent oversight, it is possible that a government could be found negligent -- according to an evolving standard of reasonableness in the corrections community -- for negligent or deficient monitoring.¹⁰⁹

105 Clear answers to this question are likely to be exceedingly difficult to obtain. To begin with, public entities do not carry third party liability insurance, so direct cost comparisons are impossible. Also, public correctional authorities and contractors alike would find it very hard to isolate with any precision all of their relevant litigation costs (staffing costs, particularly in the public sector, are hard to attribute exclusively to litigation-related functions), and may be reluctant to disclose their damage awards paid out. Ascertaining what portion of the contractor's per diem is attributable to litigation defense would probably be quite speculative. Finally, it would be extremely difficult to control for potentially wide differences in prison populations, facility conditions, and the past history of litigation at one or more facilities. Still, one could surmise that public authorities have a number of factors that could aid them in keeping certain litigation defense costs relatively low. These include the judicious use of salaried government attorneys to handle virtually all prison litigation, possibly less expensive claims handling, and the lack of a profit mark-up. Private contractors, by contrast, might feature relatively more expensive claims handling and legal assistance (e.g., though contract attorneys billing at market rates), as well as that portion of their fee allocated to such work.

106 412 U.S. 521 (1973).

107 *See id.* at 532-33. In *Logue*, the Court acknowledged that a U.S. Marshal could be found negligent for his own acts of negligence in failing to take certain precautions in placing a federal inmate in a county jail under an intergovernmental agreement pursuant to 18 U.S.C. § 4002. While indemnification and insurance covering a private contractor will help with litigation stemming from prison condition problems, it will not obviate government officials liability for negligent selection or oversight of a contractor. As discussed above, Section 1983 litigation has in recent years confirmed this same fact in the context of private prison contractors specifically, *see* § 3.A, *supra*.

108 *See, e.g.*, Fla. Stat. Ann. § 957.04(1)(g) (requiring full-time monitor with unlimited access to private facility); Ky. Rev. Stat. Ann. § 197.510(29) (requiring frequent monitoring); N.M. Stat Ann. § 33-1-17(D)(7) (requiring monitoring of compliance).

109 *See* CSG Report, *supra* note 37, at 533. Lack of monitoring or grossly deficient monitoring could also figure as a major grounds for voiding a contract on grounds of excessive delegation.

In some jurisdictions, and pursuant to certain contracts, monitors are full-time Department of Corrections employees who work at private facilities,¹¹⁰ while in other cases, monitors may only visit intermittently.¹¹¹ In still other cases, a monitor may be an independent contractor who visits a facility only several days per month.¹¹² RFPs or contracts may require a private prison operator to set aside space for a government monitor and to assume all costs associated with the monitor's work other than his or her salary.¹¹³ The monitor's mandate in many cases may be a broad and active one, in which ongoing guidance is provided to the private contractor.¹¹⁴ A wide-ranging, ongoing document review - including paperwork on population, classification, discipline, grievances, serious incidents, and programming¹¹⁵ -- can complement direct observation. In many cases, the level of oversight received by a private contractor may ultimately exceed that received by publicly-operated prisons.¹¹⁶

A review of alternative approaches to monitoring and the many deficiencies that may attend many of these approaches,¹¹⁷ lies beyond the scope of this review. For present purposes, it is important simply to recapitulate the legal implications of using -- or not using -- a monitor. The problems of government negligence liability resulting from deficient monitoring or a failure to monitor at all have already been addressed.¹¹⁸ If a monitor is employed, however, public corrections authorities should make every effort to take the monitor's role -- and the information he or she relays to the public agency -- seriously. Otherwise, public correctional officials may find themselves exposed to "deliberate indifference" allegations in a Section 1983 action for failing to respond appropriately to information provided by the monitor.

110 See, e.g., Florida, where this is statutorily required.

111 See, e.g., North Carolina Department of Corrections RFP for Two 500-Cell Medium Security Institutions, Dec. 19, 1995 (hereinafter N. Carolina RFP), at 19.

112 This arrangement exists in the case of the contract between the District of Columbia and the Northeast Corrections Center in Youngstown, Ohio, operated by Corrections Corp. of America. Although this arrangement was apparently selected in light of concerns that the D.C. Government could not perform the job properly, it is far from an ideal situation, given that the monitor resides out of state and only visits the facility a few days per month. This may or may not be viewed as a modest, though important, contributing factor in the D.C. Government's failure to respond appropriately to repeated problems of inmate violence at the prison.

113 See, e.g., N. Carolina RFP at 19.

114 For example, the contract monitor for the U.S. Bureau of Prisons' Taft, California, minimum security facility is empowered to provide "technical direction" to "all work performed" under the contract, which can include "[d]irections to the contractor which re-direct the contract effort, shift work emphasis between areas or tasks, require pursuit of certain lines of inquiry, fill in details or otherwise serve to accomplish the contractual scope of work." Taft RFP, *supra* note 102, at 56.

115 See Keating, *Public Over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, in D. McDonald, ed., *Private Prisons In the Public Interest* 130, 145 (1990). Many private prison contracts require full access to prison facilities and private contractor books and records, without notice. See, e.g., CCA-Va. Contract at § 4.38, p. 27.

116 See Calabrese, *Low Cost, High Quality, Good Fit: Why Not Privatization*, in G. Bowman, et al., eds, *Privatizing Correctional Institutions*, *supra* at 184-85.

117 Among the most thorny issues are monitors being co-opted by contractors, see, e.g., D. Shichor, *Punishment for Profit* 121-22 (1993); confusion and blurring of the chain of command that occurs when prison administrators must answer to government officials, *id.* at 120; and governments having insufficient funds to undertake effective, regular monitoring. See, e.g., J. Prager, *Contracting Out: Theory and Policy*, 25 N.Y.U. J. Int'l L. & Pol. 73, 1099-1100 n. 71 (1992). Indeed, the high cost of monitoring may offset many of the financial advantages of contracting out.

118 See Section 3.A.1, *supra*.

Note that other problems can develop with independent contractors or monitors: a public correctional agency can be unnecessarily exposed to additional liability if an independent monitor does not agree to indemnify the agency for any and all acts and omissions and if he or she fails to carry adequate professional liability and comprehensive general liability insurance naming the agency as an insured.¹¹⁹ In sum, monitoring acts as a double-edged sword: it can create as well as forestall liability depending on how intelligently it is structured and conducted.

119 The problems of liability and conflict of interest are graphically illustrated by Wisconsin's having several years ago appointed an independent prison monitor to oversee a private facility in Texas that housed Wisconsin inmates. The monitor's salary was shared by Wisconsin and the private contractor, making the monitors allegiances and responsibilities unnecessarily confused.

4. Employment and Labor Relations Issues

Some of the most important legal questions surrounding prison privatization relate to employment and labor relations. Specifically, can prison employees engage in collective bargaining under the National Labor Relations Act? Can they go on strike? Unionized employees in public correctional facilities have traditionally worried about governments contracting out jobs to private contractors who may not be required to recognize or negotiate with their collective bargaining representatives. For their part, private correctional management companies have sometimes resisted taking over a once-publicly run facility if in doing so they may be deemed a ‘successor employer’ bound to the terms of an existing labor contract. These and other questions bearing centrally on labor relations will be examined in this section, along with a discussion of how public and private correctional authorities can practically address prison employees’ right to strike. First, however, the section discusses the impact of privatization on existing civil service arrangements, as well as the significance of private prison companies remaining independent contractors rather than “joint employers” with public correctional authorities.

A. Potential Civil Service Impediments

State courts differ about whether civil service regimes -- constitutional or statutory schemes designed to eliminate political spoils systems and increase governmental efficiency through the creation of a merit-based employment system -- can prevent or facilitate the privatization of government services.¹²⁰ Several state courts have held that civil service laws in fact neither bar nor impede privatization.¹²¹ These courts have concluded that privatization is not contrary to the purpose of their civil service laws: privatization is deemed a cost savings measure -- not a reintroduction of the political spoils system.¹²² However, at least two prominent state court decisions have held that state civil service laws bar privatization.¹²³ Both courts found that the states lacked statutory or regulatory authorization to contract with private service providers and held that privatization is inconsistent with the purpose of the civil service laws (i.e., to provide full civil service protections to everyone performing a traditional state function).¹²⁴

Other state courts have not found civil service laws to bar privatization, but have held that such laws impose significant restrictions on contracting out state-provided services, and impede

120 See Nancy Buonanno Grennan, Note, *A Legal Roadmap to Privatizing Government Services in Washington State*, 72 Wash. L. Rev. 153, 157-59 (1997).

121 See *Moore v. Department of Transp. and Pub. Facilities*, 875 P.2d 765, 771 (Alaska 1994); *In re Local 195, Int’l Fed’n of Prof’l and Technical Employees*, 443 A.2d 187, 193 (N.J. 1982); *Conn. State Employees Assn. v. Board of Trustees of the Univ. of Conn.*, 345 A.2d 36, 40 (Conn. 1974); *Kiger v. Nixon*, 1996 WL 512031, at *7 (Tenn. Ct. 1996); *Mich. State Employees Assn. v. Civil Serv. Comm’n*, 367 N.W.2d 850, 852 (Mich. Ct. App. 1985) (*per curiam*).

122 See *id.*

123 See *Colo. Assn. of Pub. Employees v. Dept. of Highways*, 809 P.2d 988, 995 (Colo. 1991) (*en banc*); *Wash. Fed’n of State Employees v. Spokane Community College*, 585 P.2d 474, 476 (Wash. 1978) (*en banc*).

124 See *id.*

privatization.¹²⁵ For example, courts have held that a state can privatize a traditional government function if a public entity controls the private contractor, or the privatization is not a subterfuge to evade civil service laws or an arbitrary or capricious reorganization.¹²⁶ Ultimately, whether civil service laws impede or bar privatization seems to depend not on specific constitutional or statutory language but rather on a court's policy choice between purported cost savings and civil service protections for everyone performing a traditional government service. In any case private contractors will need, in practical terms, to devise attractive inducements to persuade civil servants to move over to the private sector.¹²⁷

B. The Significance of Private Correctional Firms' Independent Contractor Status

Once initial impediments to contracting out correctional services have been addressed, it remains to analyze a private contractor's responsibilities relative to employment and labor relations obligations. The contractor's status as an independent contractor bears significantly on such questions.

As an independent contractor, a prison management company would retain full authority and responsibility for establishing, maintaining, and/or modifying the wages, hours, and working conditions of its employees, including a presumptive right to select and hire its own complement of employees. A different result would obtain if public correctional authorities retained significant control over basic employee relations. In that case, the corrections firm and public authorities would be considered "joint employers" with important ramifications for employment and labor relations obligations. In brief, as a joint employer, a firm does not have unfettered discretion over a wide range of personnel issues. Many observers of privatization believe that many of the benefits of privatization may be lost if government retains significant control over a private firm's personnel issues.

From the standpoint of employment law, a private corrections firm with independent contractor status would have to comply with all legal standards that apply to private industry, including the Fair Labor Standards Act (FLSA),¹²⁸ the Service Contract Act if applicable (providing for the payment of prevailing wages by government contractors with service contracts with the federal government or the District of Columbia),¹²⁹ and a host of other applicable employment laws, including

125 See *State ex rel. Sigall v. Aetna Cleaning Contractors, Inc.*, 345 N.E.2d 61, 65 (Ohio 1976) (*per curiam*); *University of Nev. v. State Employees Assn., Inc.*, 520 P.2d 602, 606-07 (Nev. 1974); *Ball v. Board of Trustees of State Colleges*, 248 A.2d 650, 654 (Md. 1968); *Crowin v. Farrell*, 100 N.E.2d 135, 139 (N.Y. 1951).

126 See *id.*

127 These could include special retirement buyouts and other incentive packages. In some cases, contractors have offered special annuity plans for senior public officials nearing retirement, while ensuring that other employees can, at a minimum, roll over their retirement benefits to the maximum extent possible.

128 29 U.S.C. §§ 201-219. The FLSA requires employers to pay their employees a minimum hourly wage and overtime compensation at the rate of one and one-half times their regular hourly wage for work in excess of 40 hours per work week.

129 41 U.S.C. §§ 351-358. The Act requires contractors to pay their employees wages and benefits that either meet or exceed the levels that are "prevailing in the locality" as determined by the Secretary of Labor, or that are determined by a collective bargaining agreement. 41 U.S.C. §§ 351(a)(1), (2).

laws on discrimination and possible affirmative action requirements. The contractor would also be responsible for meeting any additional personnel or employment requirements that the contracting agency may have included in an RFP. These could embrace a number of fundamental standards promulgated by the American Correctional Association. In general, however, these ACA Standards for Adult Correctional Facilities (hereinafter “ACA standards”) tend to be generic, requiring the contractor to have policies regarding various personnel issues, but not addressing their content.¹³⁰ It is likely that a privatizing public corrections agency would seek to develop tailored contractual requirements for personnel issues at a particular facility, including specific guidelines to ensure that the contractor does not achieve cost savings through unreasonable personnel practices.

Genuine independent contractor status also has important implications for a private corrections management firm’s labor relations obligations. So long as a firm is not a “joint employer,” it will qualify as an “employer” subject to the National Labor Relations Act (NLRA) and therefore as an entity with whom employees can potentially collectively bargain and hold the right to strike.¹³¹ Indeed, since the landmark decision of the National Labor Relations Board (NLRB) in *Management Training Corp. and Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local 222*,¹³² -- a decision explicitly supportive of flexibility in privatization scenarios -- virtually any government contractor can so qualify as an “employer,” even if a contracting government agency retains some control over wages, benefits and other essential personnel matters.¹³³ The determination is essentially up to the contracting parties. As such, the private contractor’s employees will presumptively not be considered “public employees” subject to special public labor regulatory authorities and potentially barred from striking under federal or state law.¹³⁴ Rather, they will

130 American Correctional Association Standards for Adult Correctional Institutions (3d ed. 1993 & 1998 Supp.) ACA standards require such basic policies as confidential personnel records, annual performance reviews, appropriate ethics rules, and a personnel policy manual covering all major aspects of personnel organization, qualifications, hiring, training, evaluation, promotion, termination, and dispute resolution. See ACA Standards 2-4054-4078. Only wages are addressed in terms of substance: "Compensation and benefit levels for all institution personnel are comparable to similar occupational groups in the state or region." ACA Standard 2-4064.

131 The NLRA has no jurisdiction over public entities. 29 U.S.C. § 182.

132 317 N.L.R.B. 1355 (1995)

133 Until this case, the NLRB had long held, pursuant to the case of *Res-Care, Inc.*, 280 NLRB 670 (1986), that a firm would not be subject to the NLRA if an "exempt entity" -- like a public agency -- had significant control over, and final approval of, wages and benefits. With *Management Training Corp.*, the NLRB decided that the prior test was unduly restrictive of possible privatization arrangements, and it would allow private contractors and their employees to determine for themselves whether collective bargaining could address any number of terms and conditions of employment, including wages. It specifically noted that government approval of wage packages left considerable room for private employer flexibility, including possible scenarios where a private employer might absorb certain costs itself without passing them on to the government. This more flexible, open standard has since been repeatedly upheld. See, e.g., *Teledyne Econ. Dev. v. NLRB*, 108 F.3d 56 (4th Cir. 1997); *Pikeville United Methodist Hospital of Kentucky, Inc. v. United Steel Workers of America*, 109 F.3d 1146 (6th Cir. 1997); *Landscape & Property Management, Inc. and Service Employees Int'l Union*, 324 NLRB No. 44 (1997).

134 Unlike private employees, public employees do not ordinarily have a right to strike. Federal employees are completely barred from striking under 5 U.S.C. § 7311, and are subject to criminal penalties for violation of the statute. See 18 U.S.C. § 1918. Also, federal employees may only join "labor organizations" that are defined to expressly exclude organizations that participate in strikes against a government agency. 5 U.S.C. § 7103. State employees, meanwhile, are usually subject to the same kinds of provisions, although as many as eleven states have now created specific exceptions to the general rule that allow certain classes of public employees to strike. See J. Fisher, *Reinventing a Livelihood: How United States Labor Laws, Labor-Management Cooperation initiatives, and Privatization Influence Public Sector Labor Markets*, 34 Harv. J. Legis. 557 (1997). Still, virtually all states have retained clear

constitute private employees who are subject to the broad exclusive jurisdiction of the NLRA and able to exercise the full panoply of rights under the Act. The major implications of NLRA coverage, including employees' right to strike, are discussed below.

C. Effects of Privatizing an Existing Unionized Facility

If a private prison contractor assumes control of an entirely new facility, it will be subject to the NLRA and will not be permitted to interfere with any concerted activities taken by its employees. Even if a private firm takes over an existing public facility, however, it is unlikely that the employer will have to collectively bargain with an existing union or be bound by an existing collective bargaining agreement.

Under the NLRA, if a private firm is awarded a public contract, substantially maintains the operations of the predecessor public institution and hires a majority of its correctional officer work complement from the unionized workforce, the contractor can be considered a "successor employer" with an obligation to bargain with the current union representative.¹³⁵ This requirement can exist even where the original bargaining obligation may have arisen under a state or other public employees labor regulatory authority, rather than the NLRB.¹³⁶ A firm's duty to bargain arises as soon as a "substantial and representative complement" of its workforce is in place.¹³⁷

Despite this general presumption, no bargaining obligation should generally arise in any private company takeover of a public correctional facility. The reason is that in almost all prison privatization scenarios, the incumbent public employees' union will not be able to represent prison guards in a private employment setting. Under the NLRA, "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership....employees other than guards."¹³⁸ In other words, only special guards unions -- such as the United Plant Guard Workers of America -- can represent prison guards under the NLRA.¹³⁹ In a prison privatization context this means that a union with a more diverse membership that previously

prohibitions against strikes by employees whose functions are essential to the public welfare, a category that would include prison employees. *Id.* at 572-73. Only Ohio appears to permit "non-safety" public employees to strike. *See* Ohio Rev. Code Ann. § 4117.01-4117.23.

135 *See NLRB v. Burns International Security Services, Inc.*, 472 U.S. 272 (1972). *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987).

136 *See Base Services, Inc.*, 296 NLRB 172, 174-75 (1989) (NLRB not precluded from finding successorship merely because predecessor employer not covered by the NLRA); *Harbert International Services*, 299 NLRB 472, 476 (1990). Still, there is some question about this requirement if, as in the case of most public labor agreements, there is no successorship clause.

137 *See Fall River Dyeing & Finishing Corp.*, *supra* note 135, at 51-53. The duty to bargain would arise upon the private contractor taking over operations if it was "perfectly clear," even before the contractor, as successor, hired its full complement of employees, that it was going to employ a majority of the predecessor's employees. *See Kingswood Services*, 302 NLRB 247 (1991).

138 NLRA § 9(b)(3), 29 U.S.C. § 159(b)(3).

139 Corrections officers have been deemed "guards" for purposes of the NLRA. *See Crossroads Community Correctional Center*, 308 NLRB 558 (1992). The reason for this provision is to prevent conflicts of interest from developing in situations involving, among other things, employee theft or deceit, where guards could find themselves as witnesses testifying against fellow union members.

represented public correctional officers -- i.e. a union representing many kinds of employees, such as the American Federation of State, County, and Municipal Employees (AFSCME) -- *cannot* be certified as a bargaining representative under the NLRA when a private contractor assumes operational control of a correctional facility. An obligation to bargain collectively with the workforce would only materialize upon an appropriate *new* guards union being selected by the employees and certified under the NLRA.

Even in the extremely rare case that guards at a public facility are already represented by a special guards union, a private contractor will not necessarily be bound by the substantive provisions of the existing labor contract. This is true even if a prison management firm states that it may make employment opportunities available to all existing correctional officers at a facility. So long as the firm expressly reserves the right to establish initial terms and conditions of employment as well as initial job assignments, it will not be required to adopt the terms of the current labor agreement.¹⁴⁰ Indeed, only if the company were to indicate explicitly and affirmatively that it would hire most of the correctional officer workforce at a facility -- or alternatively, would explicitly consent to be bound by the existing guards' collective bargaining agreement -- would an extant labor contract be imposed on the firm.¹⁴¹ The private contractor will have to determine what kinds of statements and actions it will take toward the hiring of existing correctional officers, and carefully articulate whether it will be establishing new terms and conditions of employment.¹⁴² Under these circumstances, it will be quite rare that a new prison contractor taking over existing facilities will have an obligation either to bargain collectively, or abide by the terms of the existing collective bargaining agreement.¹⁴³

D. The Right to Strike

Any employees covered by the NLRA possess the right to strike. Though the right is not absolute -- there exists no constitutional right to strike for public or private employees¹⁴⁴ -- the extension of NLRA coverage to a wide variety of possible private contractors in the wake of the *Management Training* decision means that the right to strike becomes a presumptive right of prison guards at privatized correctional facilities. In fact, the NLRB has upheld the right of private prison

140 See, e.g., *United States Can Co.*, 304 NLRB 1127 (1992).

141 See *NLRB v. Burns Int'l Security Services*, *supra* note 135. Although a successor employer may be found to "constructively adopt" a predecessor contract through particular actions or conduct, merely retaining a particular provision of the predecessor contract that was required by law does not constitute "adoption." See, e.g., *EG & G Florida, Inc.*, 279 NLRB 444, 453 (1986) (paying prevailing wages as required by statute and provided for in predecessor contract does not constitute "adoption" of such contract).

142 Whether these legal doctrines applicable to successorship situations represents good public policy or not is open to debate by labor and corrections specialists, but its practical implications appear quite clear. Nevertheless many observers may be displeased by the degree to which successor employers can keep existing unionized employees in a state of turmoil and limbo as new operations and policies are put into place prior to a substantial and representative complement of employees being deployed. Moreover, more generally, as with the debate about out-sourcing correctional management in the first place, see section IV.A, *supra*, many may view the avoidance of a civil service regime as a sure way to eliminate the training, professionalism, and *esprit de corps* that may characterize certain public corrections departments.

143 It will however, need to permit public union access to the facility if there are public, unionized employees operating a prison industry on-site.

144 See *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971).

guards to strike on at least one occasion in the case of *U.S. Corrections Corp. and United Plant Guard Workers of America*.¹⁴⁵ There, the Board found that guards were entitled to go on strike at a minimum security institution without perimeter fences or guard towers, and simply with unarmed guards on duty.

An important question remaining in the wake of the *U.S. Corrections Corp.* case is whether the NLRB would decline to exercise jurisdiction -- and by extension, permit the right to strike -- at a more secure facility. This question remains unanswered, but significantly, the Board has assumed jurisdiction and permitted strikes at other types of facilities that involved public safety concerns. For example, in *NLRB v. E.C. Atkins & Co.*, the Board exercised jurisdiction over private guards at a defense plant who served as civilian auxiliaries to the plant's military police. In *Career Systems Development Corp.* and *Correctional Medical Systems*, the Board similarly acknowledged guards' right to strike in situations involving a juvenile correctional facility and security services provided to the United States Coast Guard and U.S. Navy, respectively.¹⁴⁶ While the Board or a court might conceivably determine in a given case involving a medium or maximum security facility that matters of public security warranted a decision to decline jurisdiction, this seems unlikely to evolve as a general principle. If correctional authorities seek to limit the right to strike by guards, they will do better to turn to two practical mechanisms discussed below -- no strike clauses in labor contracts, and mandatory notification and strike delays accompanied by binding arbitration.

1. No-Strike Clauses

Even if private prison employees enjoy the right to strike, a private prison contractor can seek to have the employees agree, individually, or collectively (in a labor contract) to the incorporation of a no-strike pledge. Unions often agree to the inclusion of such clauses in labor contracts in return for a management agreement to seek peaceful settlement of contract disputes through an agreed-upon grievance procedure extending to third-party arbitration if necessary.¹⁴⁷ As one court has noted, "a no-strike obligation, express or implied, has been seen as the *quid pro quo* for a grievance arbitration agreement."¹⁴⁸ Consequently, an employer can seek to enjoin any strike in violation of a no-strike pledge.¹⁴⁹

2. Strike Notification/Mandatory Delays

Either due to the expiration of a labor contract or the refusal of a union to agree to a no-strike clause, private correctional employers may also seek to negotiate other special provisions to blunt the

145 304 NLRB 934 (1991)

146 See *Champlain Security Services*, 243 NLRB 755 (1979); *Career Systems Development Corp.*, 301 NLRB 59 (1991).

147 The BOP's Taft RFP provides that any collective bargaining agreement entered into during the period of the contract "should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout or other interruption of normal operations." Taft RFP at 14.

148 *AFSCME v. Executive Dept.*, 52 Ore. App. 457, 479, 628 P.2d 1228, 1242 (1980), citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957); *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

149 See *Boys Markets, Inc.*, *supra*.

impact of a potential strike on prison operations.¹⁵⁰ First, in the case of contract expiration, the parties may agree to use their best efforts to reach an early and peaceful settlement to any labor dispute that might arise in the interim. Whether or not a contract had expired, the parties might also agree to a notice provision that would potentially allow the private contractor to make arrangements for an impending dispute, including arrangements for notify in a public corrections authorities of the dispute and enabling the latter to prepare to assume possible operation of the facility in the event of an actual strike.¹⁵¹ Some prison contractors have reportedly also stated that they can enter into special emergency preparedness agreements with government authorities to permit the National Guard to intervene in a timely manner. While this scenario is hardly a congenial one -- relocating replacement guards, supervisors, medical staff, etc. from public corrections facilities to unfamiliar (and sometimes remote) institutions on relatively short notice¹⁵² -- it represents the best that corrections officials can expect in the absence of a no-strike agreement.

150 See Robbins, *The Legal Dimensions of Private Incarceration*, *supra*, at 310-11.

151 See *id.* Robbins suggests a 60-day notice period in cases where a labor agreement is set to terminate, and immediate notification upon an employer learning of a potential dispute.

152 This could prove even more difficult if privatization expands and there are fewer available public correctional employees to assume key positions on short notice.

5. Inmate Labor Questions

The question of inmate labor, though it constitutes a fairly straightforward area of the law, reverberates with the controversial legacy of an earlier era in American history where the shameful treatment of private prison labor ultimately provided a major impetus for the modern public corrections movement. Today, the federal government and most states have in place a regulatory scheme that simultaneously guards against inmate exploitation while ensuring that prison-generated products and services do not gain an unfair competitive foothold in the marketplace. Against this backdrop, it does not appear that privatized corrections would raise any significant legal issues.

A. Constitutional Dimensions

The Thirteenth Amendment to the U.S. Constitution excepts convicted prisoners from its bar against “involuntary servitude.”¹⁵³ Courts continue to recognize this “convict labor exception,” upholding laws mandating prison labor, and finding no constitutionally protected right not to work, or right to reimbursement.¹⁵⁴ Because prison labor has been found under the 13th Amendment to be an acceptable component of punishment, only pretrial detainees are protected from involuntary labor.¹⁵⁵ Meanwhile, the courts have not viewed the Eighth Amendment’s prohibition against “cruel and unusual punishment” as providing an obstacle to prison labor per se, or a basis for redress of inmate claims of unfair working conditions.¹⁵⁶

While it may be possible to imagine policy grounds on which to mount a Thirteenth Amendment objection to inmate labor at privatized facilities based on potential financial incentives for abuse,¹⁵⁷ it is not clear whether these arguments would find a receptive audience in the courts. Even in the event that private prisons were given the freedom to profit from inmate labor -- something not envisioned at present (see below) -- it is unclear whether the Thirteenth Amendment would directly speak to the problem at issue.¹⁵⁸

153 U.S. CONST., Amend. XIII.

154 See, e.g., *Berry v. Bunnell*, 39 F.3d 1056 (9th Cir. 1994).

155 See, e.g., *Channer v. Hall*, 112 F.3d 214 (5th Cir. 1997).

156 See, e.g., *Ray v. Mabry*, 556 F.2d 881 (8th Cir. 1977); *Woodall v. Partilla* 581 F. Supp. 1066 (N.D. Ill. 1984).

157 See I. Robbins, *The Legal Dimensions of Private Incarceration*, *supra*, at 125.

158 The theory in favor of a Thirteenth Amendment objection would likely be that for-profit facilities would have financial incentives to exploit inmate workers, and particularly to conceive of ways to keep inmate workers incarcerated. Ultimately, the profit orientation would be seen to overwhelm the penological justification for incarceration of which prison labor is a subordinate part. Still, it is unlikely that for-profit prison labor would ever be permitted to become a dominant part of the correctional environment and it is unclear how useful the Thirteenth Amendment would be as a bar to this phenomenon. It should be remembered that it was labor movement and business community pressure to eliminate cheap prison labor (i.e., the cold logic of economics), not the Thirteenth Amendment and human rights concerns, that led to the elimination of private corrections facilities during the early part of this century.

B. Federal prisons and inmate labor

For decades, Congress has delegated the management of federal prison labor to a governmental corporation known as Federal Prison Industries (“FPI”) or “Unicor.” Unicor’s mandate is to provide employment for all physically fit inmates, so far as practicable. Currently, Unicor employs roughly 20% of all federal inmates in some hundred or so individual operations (two or more may be located at a particular correctional facility). It can, however, only operate under a “state use” principle, whereby products and services are sold solely to federal departments and agencies and not to the public in competition with private enterprise.¹⁵⁹ Moreover, because they are not working voluntarily, *prisoners are not deemed to be “employees” under the Fair Labor Standards Act, and are not entitled to receive minimum wage.*¹⁶⁰

Privatization of federal facilities with Unicor operations should not face major difficulties, assuming jurisdictional lines are properly drawn. In the context of the federal regulatory framework, federal prisons are prohibited from contracting out prison labor to “any person or corporation.”¹⁶¹ This provision is interpreted to bar both the leasing of prison labor or the relinquishing of control of Unicor industries to any private entity. A private federal prison would therefore require either a ‘carve-out’ of Unicor facilities -- which would need to continue to be operated by the federal government -- or a legislative change to the applicable statutory impediment, 18 U.S.C. § 436. While the need for continuous, coordinated interaction between federal and private management systems might otherwise seem to create administrative difficulties that could undercut the purported overall cost benefits of privatization, in fact such administrative integration has not proven a deterrent.¹⁶²

C. State Prisons and Inmate Labor

Each state has different laws governing inmate labor. Some distinguish between county and state prisoners and specify in detail the kinds of work that they may perform.¹⁶³ Others are more vague. To prevent inmate exploitation, as well as to mollify private business and labor interests concerned about uncompetitive impacts, many states prohibit the use of prisoners in the private sector.¹⁶⁴ In virtually all cases, these statutes were intended to reach situations where prisoners are

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Moreover, even in the context of sales to the federal government, Unicor must operate its shops in such a way that no private industry shall be forced to bear an undue burden of competition from the prison-made products and services.

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See, e.g., Vanskike v. Peters, 974 F. 2d 806, 810 (7th Cir. 1992), *cert. denied*, 507 U.S. 928 (1993); *Nicastro v. Clinton*, 882 F. Supp. 1128 (D.D.C. 1995), *aff’d* 84 F.3d 1446 (D.C. Cir. 1996).

161 18 U.S.C. § 436.

162 A “carve out” of this nature is precisely the arrangement adopted at the Bureau of Prisons Taft facility. See Taft RFP at 4-5.

163 *See, e.g., Fla. Stat. § 951.01* (1987) and Fla. Admin. Code § 33-8 (1987) (convicted county prisoners can be employed at a facility, on public works projects, or on projects that benefit a county or municipality); Fla. Stat. §§ 946.002, 946.40 (1987) and Fla. Admin. Code. § 33-3.017 (1987) (state Department of Corrections (“DOC”) prisoners may be used to perform prison labor, as well as contracted out to other government agencies, political subdivisions, and nonprofit corporations for use in public works projects, with compensation to be determined by DOC rules).

164 *See, e.g., Fla. Stat. § 951.10* (1997).

used to produce commercial goods for sale (including instances where prison labor is leased out to private for-profit businesses), not where they are tasked with prison maintenance or service work.

Whatever the particular construction of state rules, the federal government has significantly preempted local legislation in this area by generally restricting the flow of prison products and services in commerce. Thus, the Summers-Ashurst Act¹⁶⁵ makes it a federal offense to transport prisoner-made goods in interstate commerce -- thereby restricting the use of prison labor to the state or non-profit sector. More recently, though, the Prison Industry Enhancement (PIE) Act of 1994 explicitly permits prison-made goods from 50 non-federal pilot programs to be sold in interstate commerce if the prisoners used at such facilities participate voluntarily, receive prevailing or minimum wages, and are covered by workers' compensation.¹⁶⁶ It is unclear to what degree increasing prison privatization and potential use of inmate labor will have on federal and state regulation. Certainly state correctional authorities and private prison contractors can apply for PIE Program certification, which, if granted, will require inmates to be adequately remunerated in a PIE Program, based on specific guidelines.

Meanwhile, even if state laws prohibiting the contracting out of prison labor to 'private interests' are deemed not to address the situation where a private corporation takes over the operation of an entire correctional facility, concerns will persist about potential exploitation of inmates in *ordinary prison maintenance jobs*. Will inmate labor increasingly be used by private for-profit contractors to handle more aspects of prison operation -- substituting for tasks traditionally performed by government employees in public correctional settings?

The latter scenario could raise significant questions about private companies' commitment to prison welfare rather than their own bottom line. These companies' profit margins are known to be quite modest. All of them, particularly those whose stock trades in public markets, confront quarterly pressures to show improving profits. The temptation to save on certain prison maintenance costs through targeted use of inmate labor could make it hard to distinguish between normal prison labor undeserving of special protection, and work specifically helping prison contractors meet their profit targets. Lines between these should not be too difficult to draw,¹⁶⁷ but public policy should ensure that inmate work responsibilities are non-exploitative and are properly accounted for, and reflected in, lower per diem rates charged to the government by private contractors.

165 18 U.S.C. § 1761.

166 18 U.S.C. § 1761(c). For a detailed examination of the PIE Program, see Note, *Factories with Fences: An Analysis of the Prison Industry Enhancement Certification Program in Historical Perspective*, 33 Am. Crim. L. Review 411 (1996). Note that ordinarily, states exclude state inmates from minimum wage and workers' compensation coverage. See, e.g., Fla. Stat. § 946.002(5) (1996). *Kofoed v. Industrial Commission of Utah*, 872 P. 2d 484 (Utah 1994) (no workers' compensation coverage).

167 Contractors may be required to "build up from the bottom" their costs for each maintenance position and justify the use of prison labor therefore. One easy way to draw lines is use the same inmate staffing plans for private prisons that are used in public facilities. This creates a level playing field and allows for relatively easy cost comparisons. This is the contractual approach taken by the Commonwealth of Virginia, see, e.g., CCA-Va. Contract at § 4.27, p. 24 ("contractor will be allowed to use Inmate labor for facility operations and maintenance to the same extent Inmate labor is utilized in department facilities. However, *Contractor shall not receive a direct financial benefit from the labor of Inmates*") (emphasis supplied). Still, if this method is not used, line-drawing may be complicated by differing notions of what constitutes 'normal' or traditional areas of inmate maintenance responsibilities within a 'traditional' prison, as well as varied opinions about what qualifies as an acceptable threshold of non-exploitative 'basic' work functions for inmates.

6. Other Important Legal Issues

A number of other legal issues have important implications for correctional privatization. These include public access to private prison records, private contractor access to criminal history records, the impact of bankruptcy laws on a possible private contractor insolvency, private contractor use of force, and contractors' environmental responsibilities and liabilities. These topics receive brief treatment in turn.

A. Access to Private Prison Records

As government correctional authorities move to privatize one or more prison facilities, concerns have emerged that the public may lack access to private prison records under state or federal freedom of information acts. The shift to private prisons is viewed as potentially cutting off a major source of information necessary for proper public accountability. While public prison officials have traditionally sought to limit the types of records obtainable through freedom of information act requests, a more fundamental impediment to records access due to privatization would both frustrate the purpose of such acts and undermine public confidence in prison systems that undertake privatization initiatives. While a review of the impact of privatization on state public records legislation lies beyond the scope of this report due to the number and variety of such statutes, this section seeks to examine this general issue by focusing, by way of example, on the federal context, i.e., the degree of accessibility to federal private prison facility records afforded by the federal Freedom of Information Act (FOIA).¹⁶⁸

Based on accumulated case law interpretation, a number of fundamental records access questions have reached a certain level of clarity over the past decade. First, not surprisingly, records relating to privatized facilities that the U.S. Bureau of Prisons itself generates and holds in its possession would be subject to FOIA disclosure. Private prison operators, as mere federal contractors, however, would not be directly subject to FOIA, since they would not find themselves subject to the kind of day-to-day supervision by the BOP necessary to characterize them as part of a federal "agency."¹⁶⁹ As to private prison records generated specifically *for* the BOP by a prison contractor, they would be presumptively accessible under FOIA only if they were actually *obtained and held* by the BOP at the time of the FOIA request.¹⁷⁰

Even if private prison records are accessible by virtue of their retention by BOP, a key FOIA exemption might limit disclosure of certain types of information. Exemption Four of the FOIA protects from disclosure privileged or confidential "financial or commercial information."¹⁷¹

168 5 U.S.C. § 552.

169 *See Forsham v. Harris*, 445 U.S. 169, 180 n. 11 (1980) (research funded by the Dept. of Health, Education and Welfare and supervised by the Food and Drug Administration did not constitute "substantial federal supervision" triggering FOIA requirements); *Public Citizen Health Research Group v. Dept. of Health, Education & Welfare*, 668 F.2d 537, 554 (D.C. Cir. 1981) (agency contracts mandating numerous requirements for privatized medical peer review group does not render private entity an "agency" for FOIA purposes).

170 *See Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989).

171 5 U.S.C. § 552(b)(4).

Confidential commercial or financial information has in turn been interpreted to constitute data “of a kind that would customarily not be released to the public by the person from whom it was obtained.”¹⁷² Even if such information is voluntarily provided to the BOP by private contractors, it can be withheld by the BOP for no reason other than its confidential nature.¹⁷³ Meanwhile, if transmission of information of this nature is compelled by statute or contract, the BOP could still prevent disclosure if either the agency would find it hard to obtain the information in the future or disclosure might cause “substantial harm to the competitive position” of the private contractor in question.¹⁷⁴

How these FOIA doctrines -- and potential state law analogues patterned generally on them -- would affect the general flow of private prison information to the public remains somewhat uncertain. Certainly, if there is to be maximum public scrutiny of private prison operations, the BOP and other public correctional authorities would want to compel contractually the production of, and retain, the widest variety of private prison records consistent with physical and information management constraints. This would result in at least certain key types of information being regularly collected and retained.¹⁷⁵ At the same time, considerable portions of the overall information obtained might end up being withheld if it were interpreted by the agency to constitute confidential financial or commercial information. A flexible interpretation of the latter might extend to a variety of supposedly “commercially relevant” information covering staffing and procurement -- i.e., well beyond such customarily withheld data such as sensitive cost information contained in proposals submitted in response to RFPs.

Because public oversight might suffer under the foregoing defects even if public officials mandated the collection of voluminous private prison records, one commentator has suggested the adoption of federal legislation to expand disclosure.¹⁷⁶ A more practical and congenial option, employed by the BOP, is to subject a private contractor *contractually* to FOIA requirements.¹⁷⁷ While this kind of solution addresses the critical problem of public agency retention of the records in question, the fact is that privatization itself may continue to shield from disclosure many kinds of privately-generated, “confidential” information that might otherwise be available for public scrutiny if produced by a public corrections department.

172 *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993), quoting *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974).

173 The reasoning is that the flow of information of this kind that is voluntarily provided to an agency might dry up if it were released to the public, or information might end up being less candid and accurate. See *Critical Mass Energy Project*, 975 F.2d at 879-80.

174 *Id.* at 878. This justification is frequently cited by public officials in shielding from disclosure financial and other commercial information submitted by private contractors in response to an RFP.

175 Even a fairly selective information collection mandate would have to steer a difficult course between information overload on the one hand and significant blind spots in agency and public oversight on the other. See N. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J. L. Reform 249, 293-96 (1995) (noting the enormous burdens that a comprehensive records delivery program would place on the public agency).

176 See *id.* at 196-301. Casarez would have federal legislation mandate that all prison records created and maintained by private companies be subject to FOIA. The processing of FOIA requests could continue through the channels already in place at the public agency, but the costs of processing the additional requests could be allocated under the privatization contract with the private prison operator.

177 See Taft RFP at 17-18.

B. Private Contractor Access to Criminal History Records

To perform its prison management duties properly, private correctional contractors need access to criminal history records for two purposes: (1) to classify inmates properly and take other steps for the proper safety and care of prisoners; and (2) to screen potential private correctional employees. By implication, both of these needs affect the privacy rights and expectations of inmates and private citizens seeking employment in the field of law enforcement and corrections. As it turns out, there exist two related, but distinct legal regimes at the federal level that safeguard these privacy rights. The federal mechanisms established to permit transfer of selected federal criminal history records information (“CHRI”) to private firms such as private prison contractors represent a compromise between full disclosure and heavily redacted or edited data that would hamper the contractors’ ability to perform their contractual obligations. At the state level, the policies are governed by state law, which reflects varied approaches too numerous to summarize within the scope of this report. At least some of the mechanisms at the state level, however, roughly parallel those employed by federal authorities.

The regime governing the sharing of federal CHRI for law enforcement and corrections purposes is governed by regulations found at 28 C.F.R. Part 20. These address functions related to the “administration of criminal justice.” Under 28 C.F.R. § 20.31, the Department of Justice empowers the Federal Bureau of Investigation to operate a National Crime Information Center (“NCIC”), which is able to link local, state, and Federal criminal justice agencies for the purpose of exchanging NCIC-related criminal history information. Pursuant to 28 C.F.R. § 534, and 20 C.F.R. § 20.21(c)(5), the NCIC is able to share full criminal records information with these law enforcement bodies. Those agencies, however, may only summarize or characterize that information if they transmit it to private entities like prison management companies for law enforcement or correctional purposes (such as inmate classification).¹⁷⁸ While access to such information has not appeared to be a problem for private contractors in terms of the quality or promptness of the information provided, private contractors may ultimately benefit from planned revisions to the federal regulations that acknowledge the growth of privatization and that will make more CHRI available to government contractors directly.¹⁷⁹

A separate federal regulatory regime governs the use of CHRI for uses unrelated to “the administration of criminal justice,” which includes employment screening. Since the 1971 decision in *Menard v. Mitchell*¹⁸⁰ and the 1972 passage of legislation in P.L. 92-544,¹⁸¹ CHRI can only be used for employment screening and licensing purposes pursuant to state and local statutes or regulations that are certified by the FBI’s Criminal Justice Information Division, Access Integrity Unit, and that are

178 28 C.F.R. §§ 20.21(b)(3), (c)(3). Transfer of information to private entities such as private prison contractors can only occur “pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice pursuant to that agreement. The agreement shall specifically authorize access to data, limit the use of data to purposes for which given, insure the security and confidentiality of the data consistent with these regulations, provide sanctions for violation thereof.” 28 C.F.R. § 20.21(b)(3).

179 Legislation is reportedly being developed to accomplish these objectives.

180 328 F. Supp. 718 (D.D.C. 1971) (disclosure of criminal suspect’s arrest record for employment purposes enjoined).

181 P.L. 92-544 is not codified.

administered by designated state and local agencies. Generally, disclosure parameters are narrowly drawn for the specific purposes involved. Here too, private prison contractors appear to have had few problems in obtaining all relevant CHRI necessary for hiring correctional officers. On the other hand, reports have surfaced of problems with the speed with which such information is transmitted, prompting some private contractors to “end run” the regulations by asking public correctional authorities to make CHRI requests on their behalf.

State regulation of CHRI is too diverse to summarize easily. Suffice it to say that while many of the fundamental principles utilized in the federal scheme are recapitulated at the state levels. To take just one example, Florida has a general statute providing that upon the furnishing of identifying information, “persons in the private sector” may obtain criminal history information -- but not direct records information -- “upon tender of appropriate fees.”¹⁸² For employment screening purposes, Florida law requires all private correctional officers to submit to fingerprint and background checks, and all counties and private entities running incarceration facilities are entitled to CHRI provided that they are not the direct recipient of criminal records.¹⁸³ Although most states will ensure the availability of CHRI,¹⁸⁴ one alternative to having private contractors seek the information -- with its possible attendant bureaucratic delays -- is to have government corrections authorities retain some or all screening duties. Under the BOP Taft RFP, for example, the BOP conducts key criminal background and records checks. This would operate to maintain consistent screening procedures.¹⁸⁵

C. Bankruptcy

Of the many topics mentioned in connection with correctional privatization, few seem to generate as much concern and controversy as bankruptcy. Yet, as discussed below, these concerns appear greatly exaggerated. Since privatization became a reality in the mid-1980s, many observers have worried that the security-oriented, politically sensitive nature of the corrections business would make it especially difficult for a government to grapple with a private contractor bankruptcy and ensure a smooth transition to a successor arrangement. They especially worried about the potential for a serious interruption in the provision of correctional services pending the engagement of a new or reorganized provider, as well as the loss of contractual control that government authorities might suffer in the formal bankruptcy process if it were invoked. These concerns have persisted to some extent, even though governments can, as discussed below, protect themselves with certain contract termination clauses and even though private contractor bankruptcies have been very rare.¹⁸⁶

182 Fla. Stat. § 943.053(3).

183 Fla. Stat. § 951.063.

184 *See generally* U.S. Dep’t of Justice, *Compendium of State Privacy and Security Legislation: 1997 Overview* (1998).

185 *See* Taft RFP at 11-12. Of course, the government would have to bear the liability for any mistakes omissions in the screening process. Also, the government would have to determine whether to offset any costs under the contract as a result of undertaking this work.

186 Bankruptcies have been virtually non-existent except in the case of companies that have concentrated on building prisons on a speculative basis.

In fact, the bankruptcy of a private prison contractor should not in most instances pose any insuperable problems for the responsible public entity, especially if the prison is owned by the government. Of course, a good public correctional authority that has carefully selected a private service provider based on a thorough investigation of its capabilities and financial status (and that has properly monitored its contract with that provider) should not have to face a provider bankruptcy in the first place, at least not without sufficient advance warning to permit contract termination and other contractual arrangements to be made. Annual financial investigations provide a baseline for monitoring, while interim signals, such as complaints by certain vendors about missed payments, provide additional guidance that may militate in favor of prompt contract termination and selection of another contractor (or resumption of public control). Public corrections authorities may also insist in their contract with a private contractor that the latter maintain a certain net worth at all times¹⁸⁷ and have purchased business interruption insurance that names the relevant public entity as an insured.

As described in greater detail below, even if serious financial problems with a private contractor were to develop quickly, public authorities that own their facilities and that have contracted properly should be able to terminate their agreement with a troubled provider quickly before filing of a bankruptcy petition. It should then be able to settle on a successor arrangement -- either a resumption of public operation or selection of a new contractor -- and have enough funds on hand (from monies that would otherwise have been used to pay the defaulting provider) to be able to pay for the new arrangement and offset any losses incurred in the process. Even in the case of a contractor-owned facility, a sale of the facility to the government at a low price, but sufficient to pay off creditors, should be feasible due to the alignment of interests of all relevant parties.

How is the foregoing possible? First, public correctional authorities must draft a contract that allows for rapid termination in the event of incipient or current financial problems. A general "termination for convenience" clause can serve this purpose. Assuming proper operation of this kind of termination clause, most contracts provide for a ninety-day phase-out or transition period, and may specify special procedures and requirements for the transition.¹⁸⁸ Quickly disengaging from a contract allows the public authority adequate time to resume management of a facility or find another private operator. Today, the private corrections industry is sufficiently active and aggressive, even if concentrated, that reasonably good alternative providers can be accessed relatively quickly.¹⁸⁹ Perhaps the most vital input to prison management -- trained human resources in the form of incumbent correctional officers -- live in the surrounding community and will be ready and willing to continue working for a successor provider.¹⁹⁰

187 See, e.g., Contract between Corrections Corp of America and Metropolitan Gov't of Nashville and Davidson County, May 30, 1997 (hereinafter "CCA-Nashville Contract") at § 7.6.

188 See, e.g., M. Gold, *The Privatization of Prisons* 379 (citing Puerto Rico prison contracts); see also CCA-Nashville Contract at § 8.9.

189 This might of course, be problematic at any given time in an expanding private prison market with tight labor conditions. Many observers would further contend not only that the market as a whole is quite concentrated, but that the higher quality-end of the market is exceedingly concentrated, resulting in less than ideal competitive conditions. Others, however, would point to the youth of the industry as a reason why competition has been so healthy thus far and signs of true entrenchment have yet to appear.

190 Public authorities can also take special measures, such as payment of overtime to officers or the hiring of additional law enforcement personnel, to help keep operations intact during a transition period.

The reason that a pre-petition notice of termination based on insolvency or “convenience” will be so effective is that it removes from the bankruptcy process what would normally be deemed an “executory contract”¹⁹¹ otherwise subject to the process’s automatic stay and to control by the bankruptcy trustee.¹⁹² Accordingly, a contract providing for automatic termination with or without notice to the private contractor, and *prior to the contractor filing for bankruptcy*, deprives the contractor of protection under the Bankruptcy Code, since the contract terms are enforceable and preempt the Code.¹⁹³ By having a contract clause mandating notice of the filing of a petition in bankruptcy by the private contractor several days or weeks in advance, public correctional officials can ensure that they can invoke the termination for convenience provisions of the contract beforehand. Such a clause becomes critical if a contract monitor is unable to detect incipient financial problems on the part of the private contractor.

Note that, as alluded to above, a 90-day or so transition period also provides a government facing an impending private contractor bankruptcy with a significant financial resource with which to engineer a successful transition and cover any expected or unexpected damages. Because private contractors typically invoice their services at least a month after they are rendered, and then demand payment up to 60 days or so later, public authorities can withhold payment and use the sums that would otherwise be due for the purpose of covering current operations, securing a new contractor, or offsetting damages caused by the bankrupt contractor. The amounts involved are usually very significant and place public corrections authorities in an advantageous position relative to other potential creditors. Meanwhile, a public authority may also benefit from a contractor’s business interruption insurance, if the latter had purchased such insurance and named the public entity as an insured. However, the withholding of amounts payable to the contractor may well prove to be the more significant financial cushion.¹⁹⁴

191 Generally, a contract is deemed “executory” if performance remains due on both sides throughout the life of the contract. Prison management contracts would fit this definition. See C. Holley, *Privatization of Corrections: Is the State Out On a Limb When the Company Goes Bankrupt?* 41 Vand. L. Rev. 317, 330 (1988).

192 A termination based “solely” on grounds of the debtor’s insolvency, so long as it is invoked prior to the filing of a bankruptcy petition, has been repeatedly upheld as legitimate, and outside the reach of the bankruptcy process. See, e.g., *In re LJP, Inc.*, 22 Bankr. 556 (Bankr. S.D. Fla. 1982). Moreover, a termination at will clause may also avoid the effect of Section 365(e)(1) of the Bankruptcy Code, which generally invalidates bankruptcy termination clauses by providing that an executory contract may not be modified or terminated after the commencement of an action in bankruptcy based on the insolvency or financial condition of the debtor. See Ruben, *Legislative and Judicial Confusion Concerning Executory Contracts in Bankruptcy*, 89 Dick. L. Rev. 1029, 1059 (1985). Even if a termination clause were invoked after a petition for bankruptcy was filed by a private contractor, a Bankruptcy Court might sanction termination of a prison management contract for reasons involving “other factors” besides the insolvency itself -- reasons that could rest on a variety of public policy grounds. *Cf., id.* at 1043.

193 One commentator has suggested use of all purpose termination at will clause that allows for a pre-petition notice of termination by a government entity:

[The state] may terminate this agreement upon thirty days written notice to [the private contractor]. [The state] must inform [the private contractor] of its intention to file a petition in bankruptcy at least five days prior to filing such a petition. Debtor’s filing without confirming to this requirement shall be deemed a material, pre-petition incurable breach.

Ruben, *supra* note 192, at 1058-59.

194 Business interruption insurance may not have been purchased with very large policy limits, either as a business decision of the private contractor or due to the public authorities’ unwillingness to have a certain level of premium charges passed through to them as a segment of the overall per diem cost of operating the prison facility.

Although the case of bankruptcy of a contractor-owned facility is much more serious, even here the system should work to the ultimate advantage of public authorities. To begin with, public correctional authorities should be able to terminate the private prison contract and keep it outside of the bankruptcy process, as described above. Insofar as that process ultimately results in a reorganization or liquidation of the private contractor, a resolution acceptable to the government is eminently possible. It should be kept in mind that the interests of public correctional officials and creditors in this situation are not likely to be in conflict. The former seek control of the facility or seek to have it taken over by another qualified private contractor; the latter simply want to be paid debts owed to them. It is highly likely that the debtor in possession (assuming a Chapter 11 reorganization) or the trustee in bankruptcy (in the case of a Chapter 7 liquidation), would agree with the government and the creditors -- on financial as well as public policy grounds -- that the facility should be sold to a new management company or to government authorities at a price advantageous to the public and sufficient to pay off all or most outstanding debts to creditors.

Finally, if for any reason (despite the foregoing) a government did not properly contract to have a termination at will clause -- or failed to invoke it and became subject to the bankruptcy process -- the government would still potentially retain some important rights. To begin with, a government may still have been alert enough to have inserted a non-assignment clause in its contract. This will prevent a trustee in bankruptcy from assigning a prison management contract to other vendors who may or may not be qualified to assume that responsibility, notwithstanding the pressures from other creditors to do so.¹⁹⁵ Moreover, a government is not stayed by the bankruptcy process from actions to enforce its police or regulatory power.¹⁹⁶ Consequently, any action brought by public correctional authorities regarding the custody and control of prisoners would fall squarely within the police power and should not be stayed by the bankruptcy of the private contractor. This would include legal or other actions to enjoin continued operation of a prison facility or otherwise to safeguard the safety and care of inmates.¹⁹⁷ Only if a private prison contract were actually assigned or rejected by a trustee -- something a trustee would be loath to do on public policy grounds -- would government corrections authorities be truly legally disadvantaged.¹⁹⁸

D. Use of Force

Legal questions about the use of force often revolve around subtle matters of proper statutory authorization. The major issue for private prisons is whether the use of force generally, or specific variants thereof -- including the use of deadly force -- are properly mandated by the relevant law of the jurisdiction. Without proper enabling legislation or contractual provisions authorizing the use of force

195 See, e.g., *In re Pioneer Ford Sales, Inc.*, 729 F.2d 27, 29 (1st Cir. 1984).

196 See 11 U.S.C. §§ 362(b)(4), (5).

197 Note, however, that a stay would suspend all prison inmate litigation or special claims by the government against the firm. See 11 U.S.C. § 362(a).

198 In the case of a trustee rejecting the contract -- where, for example, the contractor faces extraordinary liabilities for civil actions under the contract -- the government would become an unsecured creditor with a claim for damages for breach of the contract as if the breach occurred prior to the filing of the petition. See 11 U.S.C. § 365(g). In this event, the government might not be able to recoup all of its expenses incurred in resuming operation of the private prison facility.

by designated private prison officials, it is possible that such personnel and the private contractor could face criminal and civil liability.

The applicable legal standards for the use of force vary tremendously from place to place. Some states' laws may adequately treat the use of force generally, but insufficiently address the use of deadly force in a variety of situations. Other states, for example, recognize a common law right of any citizen to use deadly force in certain circumstances, including the apprehension of one previously arrested for a felony.¹⁹⁹ For states that have adopted the Model Penal Code, which permits correctional officers to use deadly force under certain conditions, correctional firms may be so authorized if their employees are statutorily brought within the definition of "correctional officers."²⁰⁰ A still different approach is taken by some states like Louisiana, which, in its correctional privatization statute, specifically authorizes private firms to use force and further prescribes standards and procedures for licensing private correctional employees to use weapons.²⁰¹

Even if a contractual solution is adopted on a case-by-case basis -- delegating certain use of force and weapons use powers to private correctional management firms²⁰² -- care must be taken to explore all of the nuances involved in various scenarios, including escapes and actions taken outside of a correctional facility. ACA Standards for Adult Correctional Institutions address many dimensions of the use of force in generic ways,²⁰³ but specific policies and procedures are necessary to comply with state statutes and case law that have evolved under the Eighth Amendment. So-called rent-a-cop statutes delegating certain use of force powers to private security companies may not be sufficient to cover many of the circumstances encountered by private contractor guards. Also, correctional officials must be sensitive to interjurisdictional issues about the use of force, particularly in the case of escapes where use of certain types of force may not be authorized beyond a facility's perimeter. All of this requires government correctional officials and their legal staffs to think through very carefully all of the possible scenarios requiring different kinds of force, and to ensure that there is proper authorization for their use.

199 This is ostensibly the case, for example, in Michigan. *See, e.g., People v. Whitty*, 96 Mich. App. 403, 292 N.W. 2d 214 (1980).

200 *See* Model Penal Code §§ 3.04-3.07, *cited in* Wooley, *Prisons for Profit: Policy Considerations for Government Officials*, 90 Dickinson L. Rev. 307, 323 (1985).

201 *See* La. Rev. Stat. Ann. § 39:1800.4(D)(5), (6). Note, for example, that the state of Ohio similarly requires a private correctional officer working at a correctional facility housing out-of-state prisoners in Ohio to carry and use firearms only if the officer is certified as having satisfactorily completed an approved training program designed to qualify persons for positions as special policemen, security guards or persons otherwise privately employed in a police capacity. Ohio Rev. Code Ann. § 9.07(E).

202 For example, Virginia's DOC specifies the use of non-deadly and deadly force by private contractors in its contracts with private prison management firms. *See, e.g., CCA-Va. Contract, supra* at § 4.22, pp. 20-21.

203 *See, e.g.,* ACA Standard 2-4206, for example, which simply requires a written policy and procedures to restrict the use of force as a last resort in cases of justifiable self-defense, protection of others, protection of property, and prevention of escapes. Elaboration is left to prison officials.

E. Environmental Law Concerns

Prison privatization appears to raise no significant environmental issues except whether and how governments and private contractors allocate responsibilities for environmental review of prison construction and the risks associated with hazardous waste cleanup. Some guidance exists as to various allocation arrangements.

At the federal level, Section 102(2)(c) of the National Environmental Policy Act (NEPA)²⁰⁴ requires federal agencies to prepare detailed statements of environmental impact for major federal actions that could significantly affect the quality of the human environment.²⁰⁵ Federal actions include projects undertaken directly by an agency, agency support of private projects through contracts, grants, subsidies, loans, or other forms of funding assistance, agency issuance to a private project proponent of a lease, permit, license, certificate, or other 'entitlement for use,'²⁰⁶ or agency sale of government land to a private project proponent.²⁰⁷ Although a project proponent could be public or private, the federal agency most involved with a project is solely responsible for the preparation of an environmental impact statement (EIS).²⁰⁸ In the private prison context, if a construction project involving the Bureau of Prisons and a private prison contractor triggers the EIS requirement of NEPA, then the BOP would be responsible for EIS preparation.

Responsibility for environmental review is less certain at the state and local levels. Most states have state environmental policy acts (SEPAs) modeled after NEPA; however, some SEPAs contain important differences.²⁰⁹ Unlike NEPA, some SEPAs require private project proponents to prepare an EIS if the EIS requirement of the SEPA is triggered.²¹⁰ Additionally, some SEPAs require different EIS preparations depending on whether a project is considered public or private in nature. For example, the Washington State Environmental Policy Act (SEPA)²¹¹ requires state agencies to consider alternative project sites only if the project is public; if the project is private, then state agencies need not consider alternative sites.²¹² Under NEPA, federal agencies must always consider alternatives to a proposed project.²¹³ Under the SEPAs that distinguish between public and private

204 See 42 U.S.C. §§ 6901-6992k.

205 See 42 U.S.C. § 4332(2)(c).

206 See McGregor, *Environmental Law and Enforcement* 10 (1994).

207 See, e.g., *Lockhart v. Kenops*, 927 F.2d 1028, 1035, (8th Cir. 1991) ("When the government sells or exchanges federal land, it must consider the environmental impact of the proposed use of the federal land by the private purchaser . . .").

208 See *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994) ("Agencies may not delegate the responsibility of preparing an EIS to private parties . . .").

209 See McGregor, *supra* note 206, at 14.

210 See *id.*

211 See Wash. Rev. Code. §§ 43.21C.010-43.21C.914.

212 See Wash. Rev. Code § 43.21C.030.

213 See 42 U.S.C. § 4332(2)(c)(iii).

projects, courts would almost certainly consider private prisons to be public projects because they perform a governmental function.²¹⁴

Due to the transfer of land and property rights that may occur between governments and private prison contractors in a particular construction, sale or lease arrangement, hazardous waste liability presents some concerns. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund),²¹⁵ liability for environmental cleanup costs is strict, joint, several, retroactive and prospective: any former, current, or future party who generated, transported, treated, stored, or disposed of hazardous waste is liable for all of the associated cleanup costs without regard to fault.²¹⁶ CERCLA does not bar indemnification agreements; however, a liable party can transfer only its responsibility for cleanup costs -- not its underlying liability to the Government.²¹⁷ Experience has shown that contracting parties need to state indemnification agreements expressly to minimize the risk of non-indemnification.²¹⁸ This applies to private prison contracts no less than other business agreements. Meanwhile, state environmental laws vary, but almost every state has statutes compelling cleanup of hazardous materials.²¹⁹ In this arena as well, both government agencies and private prison contractors could be liable for cleanup costs and might rely upon indemnification agreements to shift those costs to the other party.

214 *Cf. Weyerhaeuser v. Pierce County*, 873 P.2d 498, 504-07 (1994) (*en banc*) (holding that a private contractor's construction and operation of a landfill is a public project because the handling and disposal of waste is a governmental function).

215 *See* 42 U.S.C. §§ 9601-9675.

216 *See* 42 U.S.C. § 9607.

217 *See* 42 U.S.C. § 9607(e); *Purolator Prod. Corp. v. Allied-Signal, Inc.*, 772 F. Supp. 124, 128-30 (W.D.N.Y. 1991).

218 *See* Rhonda K. Hill, *Contractual Indemnifications for Environmental Liabilities*, 21 *Colo. Law.* 943, 943-44 (1992).

219 *See* McGregor, *supra* note 206, at 40.

7. Regulating Interjurisdictional Private Prison Contracting

Prison privatization, as commonly conceived, involves a government corrections agency contracting out correctional management and/or construction work to a private contractor that operates within the agency's political jurisdiction and is subject to statutory and regulatory authorities promulgated by that jurisdiction. Thus, for example, the U.S. Bureau of Prisons selects a contractor to build and operate a new minimum security prison on federal land; a state department of corrections enters into an agreement with a private corrections company to take over the management of an existing maximum security facility in one of the state's metropolitan areas; a county government, pursuant to state law, authorizes its sheriff to contract out the operation of a county jail. In each case, there exists a close legal and contractual correspondence between the public agency doing the privatizing and the private entity responsible for providing the correctional services.

Correctional privatization can, however, involve other arrangements between public and private correctional specialists that span multiple jurisdictions. These arrangements, which involve the leasing of bed space by public authorities facing prison overcrowding, can implicate the transfer of prisoners to private contractors in distant localities as well as the political and legal interplay of several different jurisdictions that have a stake in such a transfer. Definite legal confusion and ambiguities can result. Two basic factual patterns characterize this phenomenon of interjurisdictional contracting out. The first encompasses indirect arrangements where public corrections authorities send inmates to other jurisdictions via intergovernmental agency agreements (IGA's) -- and the other jurisdictions in turn rely on private contractors to run the particular facilities where the inmates are housed. One example of this arrangement is the State of Montana, which for two years sent prisoners to Dickens County, Texas through an IGA before terminating the agreement for contract violations.²²⁰ Dickens County had in turn contracted with a private contractor, BRG Operations, a division of the Bobby Ross Group, to run the prison where the Montana prisoners were sent.

The second arrangement involves the leasing of bed space directly from a private contractor, but in a foreign jurisdiction. Many of these prisons are operated on a speculative basis, without having been chartered by their home jurisdictions or having been opened on the basis of a contract providing for a certain minimum level of occupancy. The motivating force behind the opening of several such private facilities may have been to reap the supposed economic development benefits of correctional privatization. A prominent example of this phenomenon is the District of Columbia Department of Corrections' contract with Corrections Corporation of America to house medium security prisoners in a new facility -- the Northeast Ohio Correctional Center (NOCC) -- that was built on a speculative basis in Youngstown, Ohio.²²¹

220 The IGA is denominated an "Inmate Housing Agreement" ("Dickens County IHA") between the Montana Department of Corrections and Dickens County, and runs for three years, with an option for annual renewal for a period not to exceed seven years. *See* Dickens County IHA at 2.

221 As discussed in more detail below, the City of Youngstown entered into a "Development Agreement" with CCA whereby the city transferred land to CCA and provided for a three-year tax exemption in return for construction and operation of a private prison within Youngstown city limits that was expected to provide construction and management jobs for the surrounding area.

Both types of arrangements have generated considerable controversy. Relatives complain about family members housed in distant localities. Concerned citizens express their displeasure with the lack of accountability that attends the transfer of prisoners hundreds or thousands of miles away to places where no one from their home jurisdiction may be present to monitor the governing contract or represent or acknowledge their interests and grievances. Perhaps most fundamentally, correctional specialists criticize the fact that the receiving facility may not have legal authorities sufficient to allow it to cope with a variety of critical situations, including inmate escapes and prison emergencies. The law may simply lag behind new correctional realities. This is in fact what happened in the widely-publicized case of two Oregon prisoners who a few years ago escaped from a private prison in Texas, and yet were unable to be charged with a crime since Texas law at the time did not recognize escape from a private prison as a felony.²²² Lack of legal oversight mechanisms also played a prominent role in the decision of the Ohio legislature to pass a law earlier this year subjecting the NOCC and any future private prisons in Ohio housing out-of-state inmates to a variety of additional statutory requirements.

Across the country, it is these inter-jurisdictional private prison arrangements that have seemed to generate the worst performance problems, spawned the most critical articles on private prisons and reflected most poorly on the correctional privatization movement as a whole. While many of these troubles can be traced to poor or hasty arrangements or the difficulties of ensuring proper contract monitoring from afar, a surprisingly large number of problems stem from inadequate legal or contractual frameworks, unsuited to the role of regulating private either contractor conduct outside a particular jurisdiction or the incarceration of out-of-state inmates within that jurisdiction. This section examines briefly a few of the major legal problems that affect interjurisdictional contracting out of prison services, as well as the kinds of legislative and contractual provisions that public corrections authorities have adopted to minimize these problems.

A. Interjurisdictional Contracting Out and Legal Problems

Few public corrections authorities view the transfer of prisoners to other jurisdictions as anything but an unfortunate necessity caused by overcrowding and inadequate or inappropriate facilities at a particular time. Certain transfers to public prisons have occurred for many years pursuant to different statutory mechanisms, including the Interstate Corrections Compact.²²³ Still,

222 See, e.g., Associated Press, *Private Prisons Shackle Texas with Confusion; State Laws Haven't Caught Up with New Phenomenon*, Chicago Tribune, Nov. 7, 1996 at 34. Further reflecting the huge legal loopholes often opened up as a result of cross-jurisdictional prison arrangements, even the State of Oregon was unable to prosecute the inmates for escape, since Oregon law did not cover escapes outside of the state. See *Prison Brake; Texas Needs More Scrutiny of Private Prisons*, Houston Chronicle, Sept. 3, 1996 at 18A.

223 Various states have adopted the Interstate Corrections Compact, which allows the transfer of convicts to penal institutions in other states that are parties to the compact. See, e.g., 730 Ill. Comp. Stat. 5/3-4-4; 61 Pa. Cons. Stat. § 1601. In addition, there are state statutes authorizing transfers of state prisoners to federal penitentiaries, see, e.g., Mass. Gen. Laws., ch. 127, § 97A; Conn. Gen. Stat. § 18-91. Such transfers do not, by themselves, trigger due process requirements, see, e.g., *Olim v. Wakinekona*, 461 U.S. 238 (1983), or implicate the equal protection strictures of the Constitution. See, e.g., *Tucker v. Angelone*, 954 F. Supp. 134 (E.D. Va.), aff'd, 116 F.3d 473 (4th Cir. 1997) (Virginia inmate who lost certain benefits upon transfer to Tennessee facility no denied equal protection of the laws).

many jurisdictions have been surprisingly willing to go one step further and enter into arrangements whereby their inmates are housed in *private* facilities outside the jurisdiction. In the case of agreements with other jurisdictions, public contracting through an IGA or similar contract mechanism may allow correctional authorities in the sending jurisdiction to avoid procurement requirements mandating competitive bidding for private contracts. There may also be the perception that public authorities in the foreign jurisdiction have developed some kind of legal framework for private prison operation on which the sending jurisdiction can rely. Finally, the sending jurisdiction may believe that the interposition of the receiving jurisdiction between it and the private contractor can act as a buffer relative to various kinds of inmate litigation.

Actual experience with these arrangements may or may not bear out the foregoing suppositions. Certainly contracting can be more rapidly effected through a sole-source agreement with another public entity that may only seek to address the most important legal and inmate care topics. It is understood that certain details can be left to a separate agreement (which may or may not be explicitly referenced in the intergovernmental agreement) between the receiving jurisdiction and the management company actually providing the incarceration services. But that other agreement, and the surrounding legal framework established by the receiving jurisdiction, may prove deficient in a number of significant ways, such as the provision of liability insurance and the handling of escapes. Since even the most egregious, systemic misconduct in the out-of-jurisdiction facility may be beyond the ken of the sending correctional authorities due to the difficulties of long-distance monitoring and responding promptly to problems identified by the contractor, the public authorities may find themselves facing more liability exposure than expected.²²⁴ Finally, the sending jurisdiction may continue to have potential liability for its own negligence in sending inmates to such a facility in the first place or in overseeing the long-distance arrangement.

The experience of Montana correctional officials in the case of the Dickens County, Texas private prison at least partially illustrates these problems. Montana ran out of prison space in 1995, and was forced to look for out-of-state solutions when county jails could no longer accommodate the overflow of inmates. Because out-of-state public facilities were unavailable at that particular time, Montana explored private facilities and eventually settled on the Dickens County facility. In June, 1996, Montana entered into a three-year Inmate Housing Agreement with Dickens County to house up to 400 Montana inmates. It was explicitly understood that actual operation of the prison facility would be in the hands of BRG Operations, part of the Bobby Ross Group, which had a separate Management and Maintenance Agreement with Dickens County. The Inmate Housing Agreement was deemed to be "assigned" or "delegated" to BRG Operations through the Management and Maintenance Agreement.²²⁵ Ultimately, about 260 Montana prisoners were incarcerated in Dickens County.

224 Even if the sending jurisdiction were in the process of taking steps to remedy problems in the foreign jurisdiction, "deliberate indifference" could still be demonstrated in a Section 1983 action if tangible signs of remediation were delayed or lacking in the facility at issue.

225 Inmate Housing Agreement at 17-18.

Montana terminated the contract well short of its 3-year completion after it found problems with a wide variety of prison conditions, including inadequate food, medical care, and security and housing arrangements inconsistent with a long-term, medium-security facility.²²⁶ Montana's designated prison monitor ended up spending much more time and money than expected addressing these problems. From the standpoint of liability exposure, it was clear to Montana officials that the situation in Dickens County could generate a number of legal claims but the state would not be in the best position to extract prompt compliance from the private prison operator, due both to problems of distance and lack of a direct contractual relationship.

A number of legal and contractual problems common to foreign jurisdiction contracting are illustrated by the Dickens County example. The biggest problem is a lack of communications and reporting requirements. According to Montana officials, the lack of these in the contract meant that it would often take many days before correctional authorities were alerted to the fact that serious disturbances had occurred. This problem loomed very large given the absence of an on-site monitor. Another problem was the failure of the contract to prescribe any level of liability insurance to be provided by the county or the private contractor acting in its stead, something that is standard in in-state private contracts. Also, insofar as the Dickens County contract appeared to allow for Texas county personnel or private contractor personnel to pick up inmates in Montana for transfer to Texas,²²⁷ it is not clear that Montana law permitted either type of officials to use force while transporting inmates within the state or attempting to apprehend them following an escape.

Even more fundamental and serious legal questions may attend *direct contracting* by a corrections authority with a private contractor in a foreign jurisdiction, particularly if the contractor is operating a prison on a largely speculative basis. Many of the problems are the same as those noted above, such as proper authority for use of force and apprehension of escaped inmates. But direct contracting with a contractor in a foreign jurisdiction highlights even more numerous legal problems that may bedevil the receiving jurisdiction if local public corrections oversight is inadequate. These legal problems include potential deficiencies in prison operation and governance, facility standard-setting, state corrections authority oversight, and coordination with local law enforcement.

Many of these problems have emerged into public view recently with the much-publicized troubles surrounding the NOCC, run by CCA in Youngstown, Ohio. The NOCC was essentially built on a speculative basis through a "Development Agreement" between CCA and the City of Youngstown in March, 1996. When CCA later began operations in May, 1997 on the strength of a five-year, \$182 million contract with the District of Columbia to house medium security prisoners, the City of Youngstown was essentially a bystander; no local government or law enforcement agency was a party to the contract. This only heightened the legal problems and problems of accountability that

226 Telephone Interview of Tom Rolfs, consultant to Abt Associates, with Janice Wunderwald, Contracts Manager, Montana Dept. of Corrections, March 27 and 30, 1998; April 15, 1998. It was reported that there were also drug problems at the facility, and a small riot involving the Montana prisoners and inmates from Hawaii.

227 The overall delegation of prison management under the contract left unclear whether private contractor personnel might be tasked with pick-up of the Montana prisoners.

are inherent in this type of three-way arrangement (unlike the case of the Dickens County contract where at least the public entity had some responsibilities for the activities of the private contractor).

These problems received increasing attention in the NOCC's first year of operation. The District began sending prisoners to NOCC as part of its gradual shutdown of the Lorton prison complex, a facility plagued for years by lax discipline and mismanagement. Over the next nine months, the prison witnessed a significant inmate disturbance that prompted prison guards to use gas on inmates, allegations of deficient medical care, and a number of violent assaults on prisoners by other inmates, including two fatal stabbings. A lawsuit was brought in the fall of 1997 alleging use of excessive force, failure to protect inmates, and substandard medical care. The suit also questioned the authority of CCA to operate the prison under Ohio law. After the second fatal inmate stabbing, the judge in the case ordered a preliminary injunction requiring CCA to reexamine the classification of all inmates who had been involved in violence at the institution; and halting the further delivery of prisoners from the District to NOCC pending a satisfactory classification system being put in place.²²⁸

The lawsuit and Youngstown community fears of further prison disturbances raised a host of questions about the legal basis for CCA's operation of the prison, and about the legal framework necessary for any state or locality to regulate properly the incarceration of out-of-state prisoners. Like many states, Ohio had a private prison statute that only envisioned the incarceration of state prisoners by its own corrections authorities. The lawsuit also drew particular attention to the problem of localities in home rule states taking it upon themselves to enter into private prison contracts -- usually for reasons wholly centered on economic development -- with little or no oversight by the state department of corrections.

Based on community pressure, state legislators highlighted a number of legal gaps and deficiencies overlooked in the Youngstown community's haste to reap the benefits of its new prison facility. These included inadequate standards for: acceptance by private prisons of foreign inmates; coordination of law enforcement activities in the case of riot, rebellion or escape, and reimbursement of state and local governments for the costs therefor; qualifications in hiring of private prison guards; state inspection of private prisons for compliance with applicable standards of care; and release of foreign inmates in their home jurisdictions. These kinds of legal inadequacies have spurred a number of states to consider or enact special legislation giving state corrections authorities and local law enforcement authorities greater regulatory authority over private prisons that may choose to accept foreign inmates. Two examples of such legislation, which recently passed in Ohio and Texas, respectively, are discussed below.

228 Washington Post, February 23, 1998 at B1.

B. Some Regulatory Solutions

Two states -- Ohio and Texas -- have recently passed legislation that attempts to remedy some of the more egregious legal deficiencies that private prisons have exposed over the past several years as some of them incarcerated out-of-state inmates. Both enactments seek to give state correctional authorities greater overall authority to prescribe minimal operational standards for such facilities and to eliminate gaps and inconsistencies that emerged between the treatment of public and private prisons, and between private facilities that do and do not accept foreign prisoners.

The Ohio legislation passed in March 1998²²⁹ represents a version of a bill introduced in late September, 1997 in the wake of the filing of the Youngstown lawsuit.²³⁰ The bill enacted into law generally limits the operation of correctional facilities housing out-of-state prisoners²³¹ and provides comprehensive criteria for the establishment and operation in Ohio of such prisons. The most salient provision of the bill created a new statute, Ohio Stat. §9.07, that specifically requires the direct involvement of a local public entity and the indirect involvement of the state's Department of Rehabilitation and Corrections (DRC) in any private prison arrangement with a foreign jurisdiction.²³² Moreover, the local public entity is permitted to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in Ohio only if the locality and the foreign jurisdiction jointly submit to the DRC a statement that certifies the facility's intended use, projected prisoner population, custody level, and if the DRC reviews and comments on the plans for the design or renovation of the facility concerning its intended use.²³³ A contract for the housing of out-of-state prisoners must also contain a provision requiring the sending jurisdiction to assume all responsibilities for housing and transportation of its prisoners should the facility close or cease operations for any reason.²³⁴

The new legislation then mandates a considerable number of provisions for inclusion in any private prison contract entered into by a local public entity with a private contractor for the operation of a correctional facility. These requirements, which have also been made applicable to CCA at its NOCC facility,²³⁵ obligate the private contractor to do the following:

229 Ohio House Bill 293, effective March 17, 1998.

230 The original bill, Senate Bill 174, was introduced by Senator Robert Hagan of Youngstown, who emphasized the need for private prisons housing out-of-state inmates to meet certain minimal state-prescribed standards and to permit adequate access to, and coordination with, private prisons by local law enforcement authorities in the case of illegal activities or prison disturbances.

231 Among other things, the legislation keeps the state out of the business of accepting out-of-state prisoners in private facilities and instead limits such arrangements to Ohio localities, subject to the considerable oversight requirements of the new statute. *See* Ohio Rev. Code Ann. § 9.06; Ohio State Legislative Service Commission, Final Analysis of Am. Sub. H.B. 293 at 3.

232 The new statute also seeks to create greater accountability by requiring a local entity and private contractor contemplating a prison contract to hold a public hearing in the locality and by specifically requiring the local public entity to authorize the location and operation of the facility. Ohio Rev. Code Ann. § 9.07(C)(3).

233 Ohio Rev. Code Ann. § 9.07(C)(1).

234 *See id.* at § 9.07(C)(2).

235 The legislation requires the parties operating under a "preexisting contract" to reach agreement on inclusion of these provisions no later than 180 days after the act's effective date -- in the case of CCA and the City of Youngstown, by mid-September, 1998. Ohio Rev. Code Ann. § 9.07(I). Reportedly, however, CCA was supportive of the legislation, although it did engage in considerable lobbying over several specific provisions.

- seek and obtain ACA accreditation within 2 years after accepting its first out-of-state prisoner;
- report to local law enforcement agencies all criminal offenses or delinquent acts committed in or in connection with the facility, and report to the DRC all escapes or disturbances at the facility, as well as “unusual incidents,” according to reporting rules applicable to state correctional facilities;
- enter into a written agreement with the DRC setting forth a plan and procedure to coordinate law enforcement activities with state and local police; and permit law enforcement officers to enter into the facility to investigate any criminal offense or delinquent act allegedly committed there;
- reimburse the state or any political subdivision for any costs incurred by state or local law enforcement in responding to an escape or disturbance at the facility;
- maintain a staffing plan adequate to ensure inmate supervision and security maintenance, as well as other operational needs, including programming and transportation;
- indemnify, hold harmless, and reimburse any legal defense costs of the state or the local public entity and their employees, officers, and agents in connection with claims arising from operation of the prison facility;
- develop a security classification system appropriate to the institution;
- reject any out-of-state inmate for whom it has not received an institutional record and medical records; or whose institutional record shows a pattern of violence involving use of a deadly weapon;
- cooperate with the state’s Correctional Institution Inspection Committee, whose jurisdiction is extended to private facilities housing out-of-state inmates;
- not employ any person until a criminal records check is performed, and not employ any person whose records check indicates previous malfeasance;
- return out-of-state inmates who have completed their term to the sending jurisdiction and agree with that jurisdiction to return to that jurisdiction any inmate who commits a crime while housed in Ohio; and
- certify its correctional officers to carry firearms consistent with Ohio law requirements.²³⁶

236 Ohio Rev. Code Ann. §§ 9.06, 9.07. Other important obligations placed by the new law on private prison contractors for the protection of local public entities and the general public include the following: (1) compliance with all federal, Ohio, and local laws, rules or regulations, including specifically laws on sanitation, food service, safety, and health; (2) sending of all copies of all

The legislation also makes it clear that any act or omission considered a criminal offense or delinquent act or criminal offense if committed at a state correctional institution will be deemed as such if it is committed at a private correctional facility; and that an escape from a “detention facility is specifically deemed to include escape from a private prison.

The Ohio legislation governing private contractors housing out-of-state inmates is one of the most ambitious attempts by public authorities to gain greater control over a phenomenon that appeared recently to overwhelm state and local authorities with legal and operational confusion. The Ohio act consciously sought to patch up all manner of gaps and inconsistencies in a statutory framework not originally intended to cover interjurisdictional contracting for private correctional services. Quite likely, a number of other jurisdictions will pass similar types of acts in the next few years.

Ohio’s legislation itself followed by a few months Texas’ effort to accomplish some of the same purposes. Texas, which has the greatest concentration of private prisons in the country, had been plagued for several years by problems of accountability and a legal framework riddled with gaps and loopholes concerning the operation of private correctional facilities. The Texas legislation, effective September 1, 1997, similarly provides for interjurisdictional contracting only if a local public entity is directly involved and submits to the Texas Commission on Jail Standards information on custody level capacity and availability as well as a law enforcement coordination plan. The Commission, in turn, is supposed to inspect the facility and certify to the local public entity that the facility is appropriate for the intended use.²³⁷

Some of the Texas provisions represent noteworthy variations on, or additions to the type of scheme adopted by Ohio. The Texas act requires any private prison contract involving out-of-state inmates to be sent to the Commission on Jail Standards, and empowers the Commission to adopt rules regulating the number of federal and out-of-state prisoners housed in private facilities in the state. The act also requires all employees at the private facility to maintain certification as required by the Texas Commission on Law Enforcement Officer Standards and Education.²³⁸ From a financial standpoint, the act allows the Commission to require a sending jurisdiction, rather than merely the private contractor, to reimburse the state for any cost incurred by a state agency in responding to a riot, escape, or other emergency situation,²³⁹ and also permits the Commission to charge a private contractor a reasonable fee to cover the costs of regulating a privately-run facility.²⁴⁰ Perhaps most

inspection reports to the DRC’s Director and to the local public entity; (3) provision of appropriate perimeter and internal security necessary to protect the staff and prisoners at the facility, as well as the general public; (4) agreement with the local public entity for a conversion plan that will be followed if for any reason the facility is closed or ceases operations; and (5) agreement to include in its contract with a local public entity provision for fines to be imposed if the private contractor fails to perform its contractual duties. *See id.*

237 Texas Senate Bill 367, May 7, 1997, § 9 (a)-(e). The Texas act., like the Ohio act, also requires certain minimal facility standards to be met, and certain information to be supplied to the facility by the sending jurisdiction before foreign inmates can be accepted there. *See id.* at § 9(d).

238 *See id.* at § 9(f).

239 *See id.* at § 9(i).

240 *See id.* at § 9(g).

significant, the act requires the Commission to review the qualifications of any private contractor prior to that vendor entering into a contract with a local public entity.²⁴¹

The unmistakable trend of states and localities extracting greater accountability from private contractors who seek to house out-of-jurisdiction inmates can be said to mark the beginning of a third major phase of the prison privatization experience. The first phase was characterized by heated political debates and tentative state experiments. The second phase featured a number of significant state and federal initiatives to rely on private contractors at selected facilities, and witnessed the rapid growth of the private prison industry. The third phase represents a thoughtful and nuanced stock-taking of correctional privatization (both intra- and interstate), with an emphasis on using legal and other tools to ensure local political control of the contracting process and adequate oversight of prison operations. As experience grows, so does the sophistication of those responsible for contract negotiations. Increasingly, a number of experienced lawyers, both public servants and independent consultants, are providing expert advice to correctional authorities on all manner of contracting issues. Some are providing model contracts and legislation that are gaining wide notoriety.²⁴² Based on this advice and the publicity accorded many privatization failures -- including the interjurisdictional incarceration examples discussed above -- it appears less and less likely that states and localities will enter into private prison contracts without a significant array of legal protections at their disposal.

241 *See id.* at § 9(h).

242 To take just one prominent example, Richard Crane, a former public corrections lawyer and former general counsel for CCA who now does independent consulting on contracting for correctional services, has published a widely circulated model law for regulating private corrections. In it, he prescribes many of the regulatory tools adopted by the Ohio and Texas legislatures, as discussed above. In addition, he has some important other recommendations, including requirements for competitive bidding for private prison contracts, basic requirements for private contractor qualifications, delegating contract monitoring functions to local authorities when the sending jurisdiction is distant and may be unable to provide sufficiently frequent monitoring by its own personnel, and state review and approval of all private correctional facility construction, so as to curtail the building of speculative facilities. *See* R. Crane, *Wanted: A Model Law for Regulating Privatization*, *Correctional Law Reporter* 83 (April/May 1998).

8. Legal Dimensions of Contracting

A significant number of legal issues with a direct bearing on contracting approaches and provisions have already received some discussion in this review. Some of them, relating to reduction of liability exposure -- including matters of indemnification, insurance, and monitoring -- have already been discussed in Section 3, above. This section addresses somewhat more general legal concerns associated with contracting, such as careful drafting, the use of objective standards, contract duration, termination, other enforcement mechanisms, and dispute resolution. While contracting parties can easily reduce most policy choices to simple legal provisions, a few of these policy matters have a determinative impact on the efficacy of private prison contracts as a whole. This section will discuss just a few of these critical contracting matters.

A. Regulatory Purposes and Contract Specificity

Some of the most important contracting questions relate to the broad purposes to be served by a particular prison privatization contract and the degree of specificity believed to be necessary to effect those purposes. Contracts may vary substantially in their approach and detail depending on the correctional ideas animating public officials and the kind of regulatory framework and capacity that exists in the public sector. Is there a dense web of regulatory requirements applicable to private prisons, along with capable governmental monitoring, inspection and/or licensing bodies? If not, then a contract may have to import from the outside and treat in detail a number of provisions and mechanisms that would otherwise be expected to govern, at least in part, a private prison arrangement²⁴³ Are standards for private prisons similar to those guiding public prison operation? And is a level playing field desired to promote fairness, increase competition, and allow for meaningful cost comparisons?²⁴⁴ If not -- because in part, a host of innovations are required -- a contract will need to cover more uncharted territory for the parties than might otherwise be the case. Finally, how new are the parties to contracting? Depending on their experience and track record, public and private authorities alike may be more comfortable with more -- or less -- detail in a contract and definition of terms.

Some of the most critical contents of private prison contracts may be imposed at two distinct levels. First, legislation can require mandatory contract provisions, and provide for a competitive bidding process that prevents industry concentration and entrenchment as much as possible. Second, public corrections officials can use RFPs to dictate both what subjects a proposal must address and which provisions will form the basis of an eventual contract. Of great practical importance are RFPs that mandate inclusion of certain provisions in a contract, and that insist on contractors providing evidence of how they would address certain requirements. This allows for considerable adaptation on

243 For example, statutes or regulations may specify requirements for topics such as the procedures or grounds for termination of a contract. *See, e.g.*, N.M. Stat. Ann. § 33-3-27(F) (specifying bases for termination of a contract); N.M. Stat. Ann. § 33-3-4 (requiring inspections of private prisons by governing bodies of counties and municipalities).

244 For example, public authorities need to be especially careful not to permit private contractors to make money from inmate phone service, commissary sales and the like. Income from these should be reflected in lower per diem rates or should be paid into the general fund.

the part of both contracting parties. It also permits both sides an opportunity to question the judgments of each other early on in the contracting process. Contractors can politely suggest possible changes to the statement of work where demands are viewed as unrealistic. Government officials, meanwhile, can ask for practical illustrations and plans that reveal strengths and weaknesses well before they are applied to actual prison operations. Better contracts, speedier contract negotiations,²⁴⁵ and a more candid contractual relationship may result.

Based on the degree to which public officials view privatization as specifically benefitting the public, officials may insert into a contract more or less specific language concerning expected cost savings. Cost savings requirements may be phrased in terms of a provider delivering correctional services at significantly less cost or significantly better services at the same or less cost than that which public corrections authorities would need to pay if it did the job itself.²⁴⁶

The possibility of intentionally or inadvertently bestowing third-party contract beneficiary status on inmates -- allowing them to sue for contractual deficiencies alongside possible tort and Section 1983 actions -- should also receive careful attention from public corrections officials. Prisoners do not automatically possess such rights. A contract must intend to grant them legally enforceable rights to sue under the contract, which can occur through conscious adoption of contractual language or by a court implicitly reading such an intention into the contract and its surrounding circumstances.²⁴⁷ If government corrections officials wish to confer such rights on inmates as a means of bolstering the policing (and inevitably raising the cost) of the contract, they can make an explicit statement to that effect in the contract.²⁴⁸ If they do not wish to encourage additional litigation,²⁴⁹ even for a laudable monitoring purpose, they can deprive prisoners of third-

245 However, inclusive -- even if not necessarily overly detailed -- RFP's may or may not establish proper expectations and more efficient negotiations, depending on the specific circumstances.. If RFPs ask for *illustrative* approaches to a variety of subjects, they can indeed result in informative negotiations. If, on the other hand, specific approaches are mandated up front, public corrections officials may artificially circumscribe the negotiations and deprive themselves of otherwise valuable information that could be presented.

246 The State of Tennessee has enacted a statutory requirement to this effect. See Tenn. Code Ann. § 41-24-105(c)-(f).

247 See Restatement of Contracts (2d) §§ 302(1)(b), 308. There is some precedent for courts reading an implicit intent to bestow third-party beneficiary status on prison inmates. In *Owens v. Haas*, 601 F. 2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979), wherein a federal prisoner was beaten and injured while housed in a county jail, a court found such an intent by reference to a statutory policy by the U.S. Bureau of Prisons to safeguard federal prisoners while in the care of county governments pursuant to an intergovernmental agreement under 18 U.S.C. § 4002 (providing for "suitable quarters for the safekeeping, care, and subsistence" of federal prisoners). See also *Cherry v. Crow*, 845 F. Supp. 1520 (M.D. Fla. 1994) (intent to benefit inmate found in contract between county and prison health service provider). But see, e.g., *Oliver v. Vose*, 1991 WL 97453 (D. Mass. 1991) (no third-party beneficiary rights conferred on federal prisoner in custody of Massachusetts Department of Corrections; contract language merely embodies constitutional right to be free of "cruel and inhumane treatment," rather than specific guarantee of a particular level of care).

248 Some commentators have specifically viewed such third-party suits as a valuable, though by no means dominant, component of an overall contract enforcement scheme. See, e.g., Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 Yale L. J. 353, 367 (1986).

249 While such litigation will not usually involve expensive relief -- actual contract damages will be small, and most actions will be seeking to enjoin the private contractor to deliver certain services as promised -- it will create additional transaction costs for the contractor and government agency, since such suits may be independent of tort and Section 1983 actions, and may require a lesser showing of harm.

party beneficiary rights by curtailing certain language in the contract²⁵⁰ or by explicitly renouncing any intent to allow third party suits.²⁵¹ The important thing is for public authorities to choose their words as carefully as possible to avoid inadvertent ratification or endorsement of these rights.

B. The Importance of Objective Standards

Substantive standards of inmate care and treatment under applicable constitutional provisions and state law will apply to private prisons just as they do to public correctional institutions, thanks to the “state action” doctrine. Still, public correctional authorities have reason to be concerned that private prison managers, operating outside of direct public scrutiny and the political process, and animated by a powerful cost-consciousness, will attempt to reduce staffing and resources in such a way as to spark increased litigation over alleged constitutional harms. This concern remains strong despite the protection afforded by the contractor’s private liability insurance and the contractor’s market-driven pressures to provide adequate service. Potential harms resulting from defective due process mechanisms have already been discussed in the broader context of delegation concerns. Other harms, resulting from the excessive use of force, poor inmate safety, or inadequate medical care, may cause unnecessary Eighth Amendment violations to occur. As discussed below, contracting governments can attempt to reduce the frequency of these problems by adopting contractual standards that provide a superior foundation for inmate care and treatment.

Like monitoring, having correctional standards in place may act as a powerful means to judge contractor performance and prevent conditions from developing that could prompt litigation. Some states, like Florida, have an elaborate statutory framework that prescribes some operational standards.²⁵² Most relevant standards, however, will derive from contract terms specifically made a condition of contracting by an RFP. While a detailed discussion of standards lies beyond the scope of this legal review, it is important for present purposes to acknowledge the importance of standards generally, and particularly the importance of standards that constitute measurable, objective management norms.²⁵³ These can form the basis of meaningful performance evaluations as well as a means -- if backed up by fines or other enforcement mechanisms -- of ensuring compliance with fundamental constitutional obligations.

Most available norms address only the minimum operational requirements. Even the ACA Standards for Adult Correctional Institutions, many of whose requirements are mandated by some contracting agencies to be included in private prison contracts, usually provide only general criteria

250 *See, e.g.*, CCA-Va. Contract at § 9.7, p. 53. In this case, officials will also have to be alert to the use of preambular language appearing specifically to benefit inmates and provide them with a certain standard of care -- arguably a laudable purpose otherwise consistent with one of the major premises of successful privatization.

251 *See, e.g.*, Oklahoma Dept. of Corrections Contract with Capital Correctional Resources, Inc., Dec. 3, 1996 at 18.

252 *See, generally* Fla. Stat., Chapter 944. Some other states address individual standards, albeit vaguely, by statute. *See, e.g.*, N.M. Stat. Ann. § 33-3-6 (“independent contractors shall supply prisoners with food of a good and wholesome quality and sufficient in quantity for the proper maintenance of life”).

253 For example, food requirements can be phrased in terms of caloric intake and types of food rather than generalities like “three balanced meals per day.”

for the treatment of inmates. The standards are general in nature, are intended for institutions of all types and varieties, and tend to leave prison administrators considerable discretion in developing specific policies and procedures. Moreover, only 41 of the code's nearly 500 provisions are deemed "mandatory." However, public correctional authorities frequently specify in a contract that a contractor shall achieve ACA accreditation within 18 months or 2 years of contract signature, and that it comply with 100% of the mandatory ACA standards.²⁵⁴ Specific application in a particular facility and contract requires that the standards be refined and adapted to local needs. At the same time government may choose not to spell out requirements in detail in the belief that innovation and alternative approaches would be stifled.

1. Special Attention to Staffing and Training

Adequate, quality staffing and training constitute two of the most critical contract provisions public corrections authorities may address in private prison agreements. Both represent likely areas in which private contractors will seek to reduce expenditures, either through the payment of lower wages and benefits, the hiring of less experienced personnel, the deployment of innovative staffing patterns, or the introduction of special technology (e.g., specialized surveillance equipment).

To prevent unnecessary and unwanted risk-taking in this area, public authorities have often addressed staffing matters in detail. Some observers have suggested including provisions on minimum required personnel per shift, the number of days per week to be worked by each person, and the positions that, for reasons of security, must be filled at all times.²⁵⁵ Others believe such provisions are sometimes difficult to prescribe up front in an RFP (particularly in the case of new prison construction) and may remove opportunities for creative staffing proposals.²⁵⁶ Accordingly, public officials have crafted RFPs that define "key personnel"²⁵⁷ but then specifically require illustrative staffing patterns to be included in private contractors' proposals, so as to help ensure that contractors can deliver the kind of adequate staffing sought by the contracting agency.²⁵⁸

Training requirements may loom as large as staffing level requirements in ensuring that private contractors meet their inmate care responsibilities. Some governments have, like the state of

254 See, e.g., CCA-Va. Contract at p. 11.

255 See Gold, *supra* at 393. Gold cites Puerto Rico private correctional contracts that he has negotiated in which these and other matters are addressed through a formula to yield the total number of persons required to fully staff each position in a facility. Such contracts also define which positions are required to be filled, which can remain vacant for some periods, and which are to be filled on an independent contract basis.

256 Richard Crane, a veteran negotiator of private prison contracts, believes that governments are wise to give weight to contractors' competing staffing plans during the proposal evaluation process. Telephone interview with Mr. Crane, June 2, 1998.

257 The BOP's Taft RFP, for example, sets forth 14 positions deemed "essential personnel" with specific qualifications and background experience specified. Taft RFP at 15-16.

258 Contracting officials can also incorporate into RFP's and contracts requirements that private contractors meet applicable ACA standards on staffing. These address the need for ongoing review of staffing requirements, the development of an appropriate formula of time and persons necessary to yield a proper staffing pattern, and policies and procedures governing all types of staffing needs. See ACA Standards for Adult Correctional Institutions 4-4072, 4-4073, 4-4074, and 4-4075. See also, e.g., the states of Tennessee and New Mexico, which specifically provide that prison employees do not need to have the same training as state correctional officers. See Tenn. Code. Ann. 41-24-111(3); N.M. Stat. Ann. 33-3-28(B).

Florida, mandated that private operators meet the same training requirements that public authorities must satisfy. While many contractors and some correctional authorities have wrongly believed that such a requirement is too inflexible,²⁵⁸ having the same training standards in fact, ensures that proper safety requirements are met and creates a level playing field between public and private facilities, building public trust in the latter and allowing for helpful cost comparisons.²⁵⁸ While ACA standards address a host of training issues,²⁵⁹ public authorities can add specialized training requirements for particular purposes or types of employees. And while some corrections authorities may require that the private contractor pay for all necessary training, others like the U.S. Bureau of Prisons, may view certain types of training as so unique, and uniformity of service so important, that they will supply certain types of training themselves at no cost to the contractor.²⁶⁰

C. Effective Contract Performance and Enforcement

Effective contract performance and enforcement encompasses far more than the liability reduction mechanisms discussed earlier in Section 3 above. A well-designed and well-written private prison contract obviously looks to superior contractor performance on a variety of fronts, including cost-effectiveness and delivery of services. It also seeks to avoid liability problems and litigation altogether by encouraging flexible preventive systems to operate effectively.

1. Contract Term and Renewal

A good contract seeks to prevent contractor entrenchment and complacency with respect to the agreement as a whole. Rebidding contracts at regular intervals and having shorter-term contracts forces an incumbent firm to emphasize good performance and undertake innovative practices that can keep its costs low and position it advantageously for a re-bid or contract renewal. A shorter contract term will also, particularly at the onset of privatization, relieve the parties of having to foresee and write into an initial contract all types of eventualities. If, however, public authorities set a contract term that is too short, contract incentives will be lessened and contractors will not have sufficient opportunity to demonstrate innovations or returns on certain human or capital investments. Contracting agencies' "availability of funds" restrictions may also prohibit contracting that extends beyond a certain budget period. Most observers seem to believe that three or four years represents an ideal

258 By the same token, however, if public standards themselves are viewed as lax, others concerned about inmates' rights may believe that such training parity is inadequate. *See, e.g.,* Robbins, *The Legal Dimensions of the Prison Privatization*, *supra* at 276-77. Robbins suggests that contractors meet the higher of applicable ACA Adult Correctional Institution standards or locally applicable state, local, or agency-specific training requirements.

259 *See* ACA Standards 2-4079 through 2-4101.

260 *See* Taft RFP at 16-17 (highlighting as many as 19 different types of training to be provided to a contractor on a one-time basis upon request).

contracting period.²⁶¹ Consistent with an overall preference for relatively shorter contracting terms, renewal periods should also be limited in number and duration, although they may provide for renegotiation of the contract price.²⁶²

2. Bolstering Good Performance

A variety of contractual mechanisms can support good performance on the part of contractors. These include promulgation of clear objectives, and where possible, measurable standards, active monitoring of the contract by government corrections authorities, inmates, and the public,²⁶³ and progressive compliance with certain target indicators or compilations of standards. Requiring a contractor to comply over time with a collection of ACA standards or obtain ACA accreditation²⁶⁴ represents another approach to encouraging good performance that acknowledges the time necessary for some contractors to demonstrate adequate or superior service delivery in particular institutions. In addition to reliance on generic standards such as these, public corrections officials may fashion performance benchmarks of their own, focusing on indicators like numbers of complaints against staff, numbers of disruptive or violent incidents among inmates or against the staff, number and nature of disciplinary actions against inmates and staff, rates at which inmates complete certain programs successfully, etc. These could conceivably serve as the basis for certain kinds of reward or incentive payments, although the record of employing such bonus payments is relatively poor, and their use tends to muddy comparisons with the private sector, which receives no such bonuses. Also, to prevent complacency, most correctional specialists believe that in a market context, renewal of a contract should serve as a perfectly adequate incentive or award.²⁶⁵

3. Contract Enforcement through Termination

Contract termination remains the ultimate lever to ensure contract compliance. Most contracts recognize the following as possible grounds for termination: nonperformance, noncompliance with monitoring or auditing findings, failure to meet minimum standards and conditions of incarceration specified in the contract, replacement of key personnel with unsuitable successors, serious conflicts of interest,²⁶⁶ the filing of a petition in bankruptcy, reorganization or

261 See, e.g., Robbins, *Legal Dimensions of Private Incarceration supra* at 186 (three years balances competing interests in efficiency and practicality); D. Shichor, *Punishment For Profit* 113 (governments often prefer short contracts up to three years in light of possible changes in political administration). Tennessee and New Mexico statutorily limit the duration of contracts to three years.

262 Shorter renewal periods will act against unnecessary entrenchment while allowing a successful contracting relationship to continue without unnecessary disruption or additional costs. Adequate notice, however, should precede a contracting agency's determination to either exercise a renewal option or re-bid a contract. See generally CSG Report *supra* at 98-100 (noting that in no case should automatic renewals exceed five years).

263 Many observers believe significant public access to, and monitoring of, private prisons can support monitoring efforts by public officials and inmates. See, e.g., Gentry, *The Panopticon Revisited, supra* at 364-67; Keating, *Monitoring Private Prison Performance, supra* at 151-53.

264 See text at fn. 254, *supra*. The BOP's Taft RFP calls for a 24 month period to obtain accreditation.

265 Many believe that causation and measurement problems make reward payments of this nature problematic.

266 Some contracts may include detailed conflict of interest provisions. These provision loom more important today, given controversies that have erupted in recent years about unseemly relationships developing between private contractor officials and public authorities, including both legislators and correctional officials.

liquidation, or unavailability of funds. Virtually all government authorities will also insist on termination without cause, or “for convenience,”²⁶⁷ as well as specific steps and emergency plans to be deployed in the event the government reassumes control of a facility or turns operation over to another party. As is obvious, however, termination represents an exceedingly blunt instrument for remedying contractual problems that fall short of default or grossly deficient performance. “Even the opening up to rebidding of an existing contract can prove traumatic if the contract involves heavy capital commitments, considerable staff, and a significant number of prisoners.”²⁶⁸

4. Contract Enforcement Through Fines and Penalties

Fines or performance penalties provide contracting agencies with a more flexible tool to spur contractor compliance with a prison contract. Fines can be set in such a way that they tap market-oriented motivations and provide contractors with a continuous incentive to innovate and improve conditions over time. Although some commentators enthusiastically endorse penalties for significant acts or omissions such as deaths in custody, escapes or instances of recidivism, or incidence of illnesses or injuries,²⁶⁹ others may question whether these are proper measures for penalties, and whether more objective criteria related to day-to-day performance might be utilized.

Given the pervasiveness, acceptability, and relative neutrality of the ACA Adult Correctional Institution Standards, some have built a performance penalty regime around them. For example, one contract negotiator has recounted the use of monetary payments to the government tied to criteria such as failure to meet a mandatory or essential ACA standard or failure to fill a particular position.²⁷⁰ While correctional specialists can disagree about reliance on specific ACA or staffing criteria to generate penalties, incorporating some measures like these into a private prison contract can at least provide an early ‘tripwire’ for informed discussion by contractor and public corrections personnel about performance concerns. This represents an enormous advance over adversarial termination

267 Both Arizona and Tennessee have formally enacted termination for convenience statutes. Ariz. Rev. Stat. Ann. § 41. 1609.01(C); Tenn. Code Ann. 41- 24-104(a)(4). Each of these statutes provides for 90 days notice to the contractor.

268 Keating, *Monitoring Private Prison Performance supra*, at 142.

269 See, e.g., Gentry, *The Panopticon Revisited, supra* at 362. Gentry also believes that fines can be set in such a way “as to counter the perverse incentive for the firm to create demand for its own product [which it could do] by fomenting violence among current inmates in order to scuttle parole chances, arbitrarily reducing good time, or “dehabilitating prisoners so that they are more prone to recidivism. Such actions will, either directly or indirectly, increase the firm’s fine costs.” Many would question whether fines are necessary to create the proper incentives for contractors in these particular areas, or would question whether contractors have sufficient control over certain environmental factors to make such penalties as effective and targeted as are generally presumed.

270 See, e.g., Gold, *The Privatization of Prisons, supra* at 395-97. In the Puerto Rico contracts that he showcases in this article, the author states that “monetary payments to the government can be thought of either as performance penalties, liquidated damages, or payment adjustments for the operator’s failure to provide services or staff or to meet standards being paid for by the government.” *Id.* at 395. In one contract, Gold alludes to monetary penalties of \$750 per day per failure for failure to meet a mandatory ACA standard. He also states that a failure to obtain ACA accreditation may “incur several such penalties per day since all of the thirty-eight [now 41] Mandatory ACA Standards must be met for accreditation.” Finally, Gold cites as a typical penalty for an unfilled position -- e.g., failure to staff a fixed post -- “the amount of the salary not paid, time a multiplier for fringe benefits, plus a penalty of 10 percent.” *Id.* at 397. The penalty rises to 20 percent for vacancies in excess of 30 days for a nonprofessional and 45 days for a professional employee.

discussions by lawyers, which usually occur long after performance problems have manifested themselves or shown themselves susceptible to effective solutions.

5. Dispute Resolution

Given the popularity of alternative dispute resolution (ADR), it is to be expected that the parties to a correctional privatization contract might contemplate incorporation of certain ADR mechanisms into such an agreement. While mediation effects no major change in the rights of either party -- so long as there is some time limit on its use and the parties retain their rights to utilize the judicial process should mediation fail -- arbitration is another story. Under arbitration, parties typically agree to submit a dispute to neutral third parties (typically industry experts) who will enter a decision that, based on the specific contractual terms, will be either binding or non-binding on the parties. While arbitration is generally seen as less costly and formal than recourse to judicial mechanisms, its use by public correctional authorities should be weighed carefully.

One drawback is that arbitration provides for a less formal discovery process, so that a public correctional agency could find it difficult to obtain promptly all of the materials and evidence it needs to prove its case. In many cases there is no substitute for prompt and effective injunctive relief -- something that only a court can render. There is also no substitute for contract termination in many circumstances. Finally, there are also many situations where public policy dictates use of an open, public forum to resolve a dispute, with a detailed, complete elaboration of issues on the record that cannot be obtained through arbitration. In general, public correctional authorities are likely to want to retain as much flexibility as possible to avoid ADR and the extended discussions and delays it can engender. Only on matters involving payment disputes (where industry standards might be important), or relatively inconsequential disagreements (e.g., involving non-mandatory ACA standards) will a public correctional agency be likely to consider submitting disputes to arbitration.

Appendix 4

State and Federal Prisoners in Government and Privately Operated Facilities, December 31, 1997

Table 4.A
State and Federal Prisoners in Government and Privately Operated Facilities, December 31, 1997

	Privately Operated			Government Operated			Total
	In-State Facilities	Out-of-State Facilities	Total Private	In-State Facilities	Out-of-State Facilities	Total Government	
Alaska	—	—	—	—	—	—	—
Alabama	0	0	0	21,870	420	22,290	22,290
Arkansas	0	0	0	10,200	255	10,455	10,455
Arizona	1,335	0	1,335	23,866	0	23,866	25,201
California	2,948	0	2,948	153,937	314	154,451	157,399
Colorado	1,362	1,008	2,390	8,842	0	8,842	11,232
Connecticut	588	0	588	15,558	66	15,624	16,212
Delaware	0	0	0	4,801	0	4,801	4,801
Florida DOC	798	0	798	60,713	162	60,875	61,673
Florida CPC	3,079	0	3,079	0	0	0	3,079
Georgia	0	0	0	38,109	0	38,109	38,109
Hawaii	0	600	600	2,762	0	2,762	3,362
Iowa	0	0	0	6,932	49	6,981	6,981
Idaho	0	613	613	3,333	0	3,333	3,946
Illinois	0	0	0	40,788	0	40,788	40,788
Indiana	0	69	69	16,520	0	16,520	16,589
Kansas	0	0	0	7,914	96	8,010	8,010
Kentucky	1,490	0	1,490	9,330	0	9,330	10,820
Louisiana	3,581	0	3,581	14,889	0	14,889	18,470
Maine	—	—	—	—	—	—	—
Massachusetts	0	0	0	11,738	403	12,141	12,141
Maryland	0	0	0	21,840	0	21,840	21,840
Michigan	0	0	0	45,348	20	45,368	45,368
Minnesota	50	0	50	5,151	125	5,276	5,326
Missouri	58	0	58	23,643	0	23,643	23,701
Mississippi	2,522	0	2,522	12,910	0	12,910	15,432
Montana	357	380	737	1,802	0	1,802	2,539
North Carolina	0	0	0	31,545	0	31,545	31,545
North Dakota	0	50	50	770	0	770	820
Nebraska	0	0	0	3,327	0	3,327	3,327
New Hampshire	0	0	0	2,140	75	2,215	2,215
New Jersey	0	0	0	27,776	0	27,776	27,776
New Mexico	704	354	1,058	3,486	132	3,618	4,676

Table 4.A
State and Federal Prisoners in Government and Privately Operated Facilities, December 31, 1997

	Privately Operated			Government Operated			Total
	In-State Facilities	Out-of-State Facilities	Total Private	In-State Facilities	Out-of-State Facilities	Total Government	
Nevada	496	0	496	8,340	188	8,528	9,024
New York	0	0	0	70,026	0	70,026	70,026
Ohio	0	0	0	47,808	0	47,808	47,808
Oklahoma	3,655	933	4,588	15,846	0	15,846	20,434
Oregon	0	71	71	7,723	0	7,723	7,794
Pennsylvania	0	0	0	34,964	0	34,964	34,964
Rhode Island	0	0	0	2,647	66	2,713	2,713
South Carolina	0	0	0	21,314	24	21,338	21,338
South Dakota	70	0	70	2,151	18	2,169	2,239
Tennessee	2,958	0	2,958	12,153	0	12,153	15,111
Texas	7,223	0	7,223	136,680	13	136,693	143,916
Utah	378	6	384	4,395	85	4,480	4,864
Virginia	0	0	0	28,870	0	28,870	28,870
Vermont	0	0	0	1,291	6	1,297	1,297
Washington	0	0	0	12,002	0	12,002	12,002
Wisconsin	0	0	0	14,080	819	14,899	14,899
West Virginia	0	0	0	3,172	0	3,172	3,172
Wyoming	0	99	99	1,283	0	1,283	1,382
District of Columbia	202	1,725	1,927	6,083	580	6,663	8,590
Federal BOP	9,951	0	9,951	87,089	1,581	88,590	98,531
Puerto Rico	2,567	0	2,567	12,137	46	12,183	14,750
Virgin Islands	0	70	70	453	97	550	620
Totals	46,392 (3.8%)	5,978 (.5%)	52,370 (4.3%)	1,162,357 (95.2%)	5,840 (.5%)	1,168,197 (95.7%)	1,220,567 (100%)

Notes:
1. "Private facilities" include all those privately operated, regardless of facility's ownership.
2. "In-state" facilities are located in the geographic boundaries of the relevant governmental unit; "out-of-state" facilities are not.
3. Texas data excludes prisoners in privately operated facilities that function as jails, even though they are under contract with the state of Texas.
4. Prisoners in out-of-state government facilities for the Federal Bureau of Prisons includes prisoners in a correctional facility operated by any other governmental agency at state or local levels.
5. For this table, some responding agencies included prisoners housed in community-based facilities (such as halfway houses, home confinement, etc.) in the reported figures, especially those describing private facilities. These facilities and prisoners are not included elsewhere in this report. However, we were unable to disaggregate them from the figures reported here.

Source: Computed from data supplied to ABI Associates Inc. in its survey of state and federal correctional administrators.