Issues and Evidence from the United States

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Something akin to schizophrenia often materializes in the responses of otherwise stable people when they become involved in discussions about privatization. It is improbable that the responses flow from a failure to appreciate the general definition of the concept. It is now widely understood that privatization arrangements cast government and not a private firm as the entity that establishes public priorities. It also is understood that privatization involves nothing more or less than efforts to achieve public goals via a reliance on private rather than public means. Notwithstanding a considerable body of evidence regarding various types of privatization that demonstrates that they can yield meaningful cost benefits, however, new privatization proposals routinely confront significant opposition.

One is thus sometimes left with the impression that policy makers are committed, on the one hand, to improving the quality of essential public services and decreasing the costs of providing those services while, on the other hand, to casting public agencies as the exclusive service providers. It is as though policy makers

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either consciously ignore or are oblivious to the very real potential for conflict between these two commitments. Still, simple logic makes it obvious that achieving the core goal of simultaneously enhancing service quality and controlling service delivery costs may recommend reliance on *either* public *or* private service providers. Put differently, it should be reasonable to assume that policy makers understand that there is nothing in sound economic theory or sound research evidence that supports the conclusion that public agencies are inherently either more or less efficient and effective service providers than private corporations.

Opposition to privatization is particularly, though not uniquely, strident when the possibility of privatizing secure adult correctional facilities is under consideration. To be sure, nobody would advance the contention that the historical record established by public agencies sets an exemplary performance standard. Still, the hypothesis that private corporations can operate jails and prisons in at least as competent a manner as do public agencies elicits much scepticism and sometimes overt hostility. Indeed, I learned long ago that to offer the pragmatic opinion that, first, a core obligation of elected officials and other government policy-makers ought to be the delivery of the best possible public services at the lowest possible cost and that, second, the public or private identity of alternative providers of services ought to be irrelevant is to invite extreme personal and professional criticism. For example, I have not yet fully recovered from being angrily and loudly described as "the academic whore of the capitalist privateers" by a privatization opponent when I advanced precisely this opinion during a meeting at which I had been invited to speak by the League of Women Voters in Virginia last year.

The critics, of course, do not constitute a homogeneous group; generally speaking, they fall into one of at least two categories. One category contains those who are public employees and many, though not all, of the organizations that represent them.[1] At least in the sizable portion of corrections that involves the management and operation of secure adult facilities (i.e., jails and prisons), these critics have enjoyed what amounts to a noncompetitive monopoly that they are committed to preserve. Too often, whether the preservation serves either the public interest or the interest of prisoners is transparently irrelevant to these critics; so, too, is any type of evidence that is contrary to their

narrow self-interest. Fortunately, only the most naive or politically fearful observer would fail to see through the smoke screen created by those who are committed to protecting the monopoly from which they—and sometimes they alone—benefit.

The second category contains people and organizations that offer equally sharp criticism but who do so for far loftier reasons. Their core contention is that it is ethically inappropriate to delegate the power to punish to a private entity whose exercise of such a power might be motivated in no small way by a desire to achieve a financial benefit.[2]

Most such critics understand, of course, that no existing or proposed correctional privatization initiative would permit any private firm to make decisions regarding who is to be confined, or about the duration and conditions of confinement. However, they still cling to the conviction that even the confinement of prisoners by a private firm on behalf of a jurisdiction that independently controls the fact, the conditions, and the duration of confinement is morally repugnant. Indeed, evidence of sound and professional correctional services having been provided by private firms has been insufficient to sway these critics. Their opposition is based on philosophical convictions that no body of evidence would modify. Although I do not concur with all of the conclusions of this set of privatization critics, I view them as people of principle who are to be respected. I also share their view that the darker side of profit motives must not be allowed to shape correctional policy.

This essay will be irrelevant to those who fairly can be assigned to either of these categories of critics. Whether caused by assessments of narrow self-interest or of principle, for them the debate ended before it began. Neither, I should hasten to emphasize, will it be of much relevance for their counterparts on the opposite end of the continuum who are equally persuaded that pairing words like efficient and effective with a word like government automatically creates an oxymoron. For them support for substantially all forms of privatization is both automatic and uncritical.

Between these polar extremes is, I believe, the majority of people whose interest is in having government provide virtually all essential public services in whatever manner can be shown to be the most cost effective.[3] Their judgment necessarily will be shaped more by evidence than by narrow self-interest or philosophical

predisposition. They, reasonably in my view, will dismiss any claim that privatization is somehow intrinsically either inferior or superior to traditional methods of delivering correctional services. Their concerns are largely pragmatic ones. Thus, it is hoped that they will benefit from this effort to provide an overview of the key issues that define the parameters of the debate about correctional privatization and this discussion of what the weight of the available research evidence tells us about those issues.

Because the lion's share of both the evidence and my experience is linked to the American experience, the bulk of the analysis will be based on what has transpired in the United States. Where possible, however, relevant information regarding correctional privatization elsewhere will be taken into account.

Identifying the core issues

There are countless specific issues that those who implement privatization plans are obliged to address. The following list is not exhaustive, but it does provide important illustrations of those issues.

- What type of procurement method best matches the goals of a privatization plan (e.g., a request for bids, a request for proposals, a request for qualifications, etc.)?
- Should public agencies be authorized to submit proposals and, if so, how can one meet the obligation to guarantee that competition between public and private entities will be fair?
- What are the reasonable minimum requirements that all vendors should be obliged to satisfy as a precondition to their being considered for a contract award?
- What weights should one assign to the various elements of proposals vendors submit for evaluation (e.g., construction cost, facility design, operating cost, and program elements of proposals)?
- Should design and construction elements of a project be handled separately as opposed to selecting an integrated design-finance-construct-management approach?
- What should be the source of project financing (e.g., a one-time legislative appropriation, general obligation bonds, a tax-exempt alternative to general obligation bonds, etc.)?

- Should titles to privatized facilities be held by the contracting governmental agencies or private management firms?
- What should be the base term of a management contract?
- Should it be possible to renew or extend a management contract without a requirement for competition between alternative service providers and, if so, what should be the term of the renewal or extension?
- What regulatory standards should one apply to privately managed facilities?
- Should compliance with third-party standards (e.g., the American Correctional Association, the National Commission on Correctional Health Care, etc.) be required?
- What types of performance bonds or performance penalties should one require from or impose on private management firms?
- How should one handle the desire to oblige independent contractors to indemnify and hold harmless the contracting agencies and their officials, employees, and agents?
- Once a contract has been awarded and services are being delivered, by what means should one assure full compliance with contract terms and conditions by an independent contractor (e.g. self audits, periodic inspections by contracting agency personnel, periodic inspections by independent persons or groups, full-time contract compliance monitors, etc.)?

Important as these and other specific issues are to the success of privatization initiatives, they are not the core issues that have shaped the debate about correctional privatization. They are essentially technical questions that must be addressed satisfactorily only by governmental entities that have elected to award facility management contracts. Instead, the parameters of the often-heated privatization debate have been set by a smaller number of questions that, unless answered positively, would preclude privatization altogether, would recommend against it, or would limit its scope on quite matter-of-fact policy grounds. Those questions certainly include the following:

As a matter of law, is it possible for government to contract with a private entity for the management and operation of a jail or prison? At least when the debate began in the early 1980s in the United States, privatization opponents often argued that any full-scale management contracts would be declared to be unlawful on constitutional grounds. Privatization proponents argued that there were no constitutional problems that were not subject to resolution.

Will any jurisdictions be prepared to take the potentially consequential risks that would necessarily be associated with awarding initial facility management contracts without which there could be no concrete tests of the potential benefits of correctional privatization? Privatization opponents reasoned that few or no jurisdictions would explore private alternatives or, if isolated experiments were pursued, that the evidence would come from such atypical facilities as to have no persuasive value. Privatization proponents could do little more than cross their fingers and hope that the pressures confronting at least some jurisdictions would encourage meaningful tests of their theory.

Is there tangible evidence that contracting with a private entity for the management and operation of a jail or a prison can yield cost savings? Privatization opponents continue to argue that private firms cannot possibly provide the full array of essential services at a cost below government agency costs and remain profitable. From the very beginning of the debate privatization proponents contended that the private sector could provide all essential services at a cost significantly below government agency costs and still achieve acceptable levels of profitability.

Is there tangible evidence that contracting with a private entity for the management and operation of a jail or a prison can yield correctional services the quality of which is at least equal to those government agencies provide? Privatization opponents argue that the private sector lacks both the expertise and the motivation necessary to the providing of high caliber correctional services. Privatization proponents claim that private firms can deliver a full range of correctional services at a quality level which is at least equal to what government agencies provide.

If there is evidence that contracting with a private entity for the management of jails and prisons can yield cost savings, does equally tangible evidence reveal that the savings can be achieved without a corresponding decrease in the quality of correctional services? Privatization opponents claim that any cost savings resulting from contract awards to private firms will necessarily be achieved by reductions in the quality of employees, the quality of correctional services, or both. Privatization proponents are persuaded that the private sector can provide services the quality of which is at least equivalent to those of public agencies and still provide meaningful cost savings.

If there is evidence that contracting with a private entity for the management of jails and prisons can yield cost savings without a corresponding decrease in the quality of correctional services, does the evidence suggest that such benefits are limited to specialized types of correctional settings? Privatization opponents are of the opinion that any involvement of the private sector will of practical if not legal necessity be limited to special categories of facilities and/or of the prisoner population (i.e., small facilities, minimum security prisoners, female prisoners, parole violators, etc.). Privatization proponents increasingly often advance the contrary conclusion that the potential benefits of contracting out are not limited by any factors whatsoever.

Little more than a decade ago none of these questions either did or could have answers that were based on hard evidence for the simple reason that there were no privatized jails or prisons. To be sure, at that time supportive evidence flowed from quite a broad array of non-correctional service delivery areas within which the appeal of privatization was growing, from the successful management of facilities housing juvenile offenders, from experience gained via the privatization of individual services required in jails and prisons (e.g., food and medical services), and from the full-scale private management of non-secure adult facilities (e.g., community corrections facilities, halfway houses, work release centers, etc.). The key question, however, remained whether any of that experience with privatization could be generalized effectively if and when the full-scale privatization of jails and prisons became a reality. Unless and until that reality

materialized, both opponents and proponents of full-scale privatization of secure adult correctional facilities could claim virtually whatever they wished to claim with no fear whatsoever that anyone could prove them to be wrong.

Opponents and proponents of privatization are still free to claim whatever they wish to claim. Today, however, those on both sides of the debate are obliged to understand that the risk of being slammed into the hard wall of a rapidly accumulating body of research evidence if they over-state their cases is substantial. In what follows I will make an effort to review a sizable proportion of that evidence.

Overview of the fundamental legal concerns

There probably is no best way to begin to address what lessons the available evidence teaches regarding the key questions. I will try to move forward by simultaneously addressing elements of several of the questions within the context of an historical overview that emphasizes the modern history of correctional privatization and then focusing in some detail on the cost and quality issues, which continue to dominate the debate.

The troubled past of privatization

The analysis being organized in this manner, perhaps the first point that should be made is that opponents of privatization often contend there is nothing new or novel in the involvement of private persons or corporations in our correctional systems. As long as their point is being made at quite an abstract level, the critics are correct. More specifically, many periods of penological history have found government permitting and sometimes encouraging private jailers to exploit and abuse prisoners (see, e.g., Sellin 1976; Cohen 1976; Eriksson 1976; McKelvey 1977; Keve 1986; Lichtenstein 1993; Shichor 1995). For example, the masters of the English Bridewells, the first of which was opened in London in 1556, were in some regards entrepreneurs who were authorized to exploit the prisoners committed to those early correctional facilities (Sellin 1976: 74). Much the same appears to have been true of roughly comparable facilities that were opened in Amsterdam at the end of the sixteenth century (Sellin 1976: 78). Further, as recently as the 1920s in the United States, both Alabama and Florida were involved in convict lease arrangements with private firms that yielded significant finan-

cial benefits to both the firms and the coffers of the jurisdictions (McConville 1987). Clearly, however, comparable benefits did not reach the prisoners whose labor potential was so thoroughly and often brutally exploited by these alliances between government and the private sector.

No ethically responsible person could possibly justify any policy that would give rise to a form of correctional privatization that would either authorize or tolerate a return to these dark days of our penological past. Still, the rhetoric of many privatization opponents often implies or asserts that there is little to prevent the abuses of the past from rematerializing in the present.

At least in the United States, any such implication or assertion is clearly invalidated by the fundamental changes that have transformed relevant portions of the correctional landscape. Of special relevance to this transformation is how both the courts and legislative bodies in the United States have dramatically modified the legal position in which both prisoners and private corrections management firms now find themselves. The significance of this is so considerable that it warrants at least some discussion here.[4]

Legal barriers to the problems of the past: some American examples

It is appropriate to begin this portion of the analysis by noting that multiple and quite fundamental changes materialized before any government agency evaluated the possible value of correctional privatization in any of its contemporary forms. Although the details of the changes would require a complex and lengthy analysis, suffice it to say that the position in which prisoners found themselves as recently as a century ago were bleak at best. As announced in the 1891 decision of the Virginia Supreme Court in *Ruffin* v. *Commonwealth*—to choose the most obvious example:

> [A prisoner] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accord him. *He is, for the time being, the slave of the State*. (21 Grat. 790 [Va. 1891], *emphasis added*)

Judicial activism as a source of change This unequivocal position and the only modestly softer hands-off doctrine that displaced it during roughly the first half of the twentieth century did not sur-

vive the judicial activism of the 1960s (see Krantz and Branham 1991). In particular, a set of decisions announced by the United States Supreme Court in such landmark cases as *Monroe* v. *Pape*, 365 U.S. 167 (1961), and *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), transformed a pre-existing provision of federal civil-rights law whose origins are in the Civil Rights Act of 1871 (42 U.S.C. §1983) from a largely dormant statute into the dominant force it is today.

Most easily understood as the civil enforcement mechanism for the Due Process Clause of the Fourteenth Amendment, §1983 provides a cause of action for any person, including any prisoner, who confronts a deprivation of a constitutional right as a consequence of "state action."[5] Under the more recent holding of the Supreme Court in *West* v. *Atkins*, 487 U.S. 42 (1988), private persons providing constitutionally mandated services under contract for local and state correctional agencies are subject to suit under §1983. Further, prisoner plaintiffs who satisfy the "prevailing party test" forged by the Supreme Court in such cases as *Maher* v. *Gagne*, 448 U.S. 122 (1980), *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), *Hewitt* v. *Helms*, 482 U.S. 755 (1987), and *Rhodes* v. *Stewart*, 488 U.S. 1 (1988), can recover reasonable attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976, which amended 42 U.S.C. §1988. Further still, it is settled law that the array of equitable and legal remedies now available to prisoners housed in private correctional facilities in the United States is broader than is the set of remedies made available to their counterparts in public facilities (Thomas 1991).

It is true, of course, that the changes in the legal position of prisoners described above are based on judicial interpretations of statutes that Congress enacted to guarantee rights secured by the Constitution of the United States, but it must also be emphasized that the present situation in America is shaped by legislative as well as judicial influences. Numerous examples of this could be provided, but a few comments about how the Florida legislature responded to the prospect of local- and state-level privatization will adequately illustrate the points I wish to make.

Statutes as a source of change in Florida In part for reasons related to interpretations of the requirements imposed by Florida's constitution, it is probably true that no full-scale correctional privatization initiative in Florida would have been immune to

constitutional challenge had the legislature not enacted legislation (a) that reflected a clear public policy choice and (b) that protected both the public interest and the interests of prisoners by establishing clear standards regarding the limits within which any powers it delegated to a private entity must be exercised (Thomas, Lanza-Kaduce, Hanson and Duffy 1988). The policy choice and the standards are set forth in at least three separate portions of the Florida statutes: §951.062, which authorizes boards of county commissioners to contract with private firms for the operation of county jails and detention facilities, §944.105, which authorizes the Florida Department of Corrections to contract with private firms for the operation of any size or type of state prison, and the Correctional Privatization Commission Act, which is codified by Chapter 957.[6]

The most important and striking features of what the Florida legislature put in place—and what, albeit to various degrees, one finds in many other American jurisdictions—fall into two general categories.[7] Both categories are well-illustrated by the Correctional Privatization Commission Act. First, management firms are expressly prohibited from making a broad range of decisions that have implications for who will be confined, where prisoners will be confined, work requirements prisoners will confront, and when prisoners will be eligible for release (§957.06, Florida Statutes). Second, the requirements imposed on private management firms are significantly more demanding than are the requirements the law imposes on the Florida Department of Corrections. Obvious examples of this include the requirements that

- the costs for operating private facilities must be at least 7 percent below the costs associated with the public operation of comparable state facilities (§957.07)
- private firms lack the right to assert the sovereign immunity from tort suits even though such a limitation on legal liability is enjoyed by the department (§957.05(1))
- private firms must obtain insurance sufficient to indemnify and hold harmless the state of Florida from all sources of legal liability, including civil rights liability (§957.04(3)(b)), even though the department has no comparable obligation
- the employees of private firms must meet the training and certification requirements imposed on similar employees of

the department or those of the American Correctional Association with whichever set of standards are the more demanding being applicable (§957.05(2))

- private firms must meet a statutory duty to provide work and education programs designed to reduce recidivism (§957.04(1)(f)) even though the Department has no such legal duty

- private facilities must be monitored for compliance with legal and contractual duties via the efforts of a full-time, on-site contract-compliance monitor who is a Commission employee (§957.04(1)(g)), even though no equivalent person is assigned to any department facility

- private firms must seek, obtain, and maintain accreditation by the American Correctional Association even, though facilities operated by the Florida Department of Corrections confront no accreditation requirement (§957.04(3)(c)).

Conclusions regarding the legal issues

At least to the degree that the American experience is similar to the experience of other nations that have privatized correctional facilities (i.e., Australia and the United Kingdom), then the legal context within which private corrections management firms are obliged to operate today bears no resemblance to what one would have found even a few decades ago. No longer cast in the powerless role of slaves of the state, American prisoners can and do aggressively litigate their claims of having been treated unreasonably. This is true without regard to whether they are housed in publicly or privately managed correctional facilities. Further, statutory limitations on the power that can lawfully be exercised by a private corrections management firm are considerable. Further still, the regulatory context within which private management firms are obliged to operate—as illustrated by requirements in Florida and other jurisdictions for on-site government contract-compliance monitors and compliance with non-governmental accreditation bodies—routinely subjects them to higher levels of scrutiny that their public agency counterparts. Finally, the opinion often advanced by privatization critics that contracting out schemes would quickly be found to be unlawful finds no support whatsoever in American

legal experience. No court has invalidated a contract award on constitutional grounds at any point during the modern history of correctional privatization.

The modern history of correctional privatization

Well before the first secure adult facility was privatized, some degree of reliance on privatization in American corrections—even if one ignores the troubled past of what amounts to the pre-modern era—was in place via contracts for the private management of juvenile facilities and of non-secure adult facilities (e.g., work-release facilities) as well as contracts for the delivery of specialized services (e.g., food and medical services) (Camp and Camp 1984; Mullen, Chabotar, and Carrow 1985). Although few if any predicted that the scope of privatization initiatives would broaden, the fact that American prisoner populations began to leap ever higher by the mid-1970s and thereby tax the limits of what state and local correctional systems were capable of handling played a pivotal role in pushing correctional systems all across the nation to seek out alternatives to a business as usual approach.

The initial contract awards by local, state, and federal agencies

The leading edge of the correctional privatization movement began to form during the early 1980s with modest contract awards by the Immigration and Naturalization Service and the United States Marshals Service to such pioneering firms as Behavioral Systems Southwest and Eclectic Communications, Inc.[8] Practically speaking, however, the privatization alternative did not attract serious attention until several key developments materialized a few years later.

The first county-level awards of management contract came in 1984, when Hamilton County (Chattanooga), Tennessee, awarded a contract to the Corrections Corporation of America. The first state-level contract award came in 1985, when Kentucky contracted with the United States Corrections Corporation. The first significant federal award came in 1984, when the Immigration and Naturalization Service contracted with the Corrections Corporation of America for management of the Houston Processing Center.[9]

The importance of these contract awards to the subsequent development of correctional privatization would be difficult to

overestimate and the fact that all remain still in force today with the same management firms is, at least, an oblique indicator of good performance.[10] Each provided a real-world opportunity to test the hypothesis that contracting could yield meaningful benefits to government. Each also provided an valuable model that subsequent units of government could examine and improve upon in such critical areas as procurement strategies, the formulation of sound contracts, and the creation of effective means of contract monitoring.

Notwithstanding the value of the multidimensional testing ground established by the early contract awards, a host of obstacles still stood in the paths of those who deemed correctional privatization to be a significant innovation. Corrections is a field that tends to be so conservative that the diffusion of innovations is seldom swift. As recently as the early 1980s, no jurisdiction in the United States enjoyed express statutory authority to contract for the operation of either jails or prisons. At least during those years, members of legislative bodies were not inclined to venture into such novel and potentially risky areas of law and policy. Few if any public agencies were enthusiastic about awarding facility management contracts, and more than a few opposed the concept quite vigorously.[11] Public employee unions were angered by the possibility that one of the rapidly decreasing areas within which their members enjoyed a non-competitive monopoly would disappear. Other groups with a vested interest (e.g., the American Civil Liberties Union, the American Jail Association, and the National Sheriffs Association) voiced harsh opposition to full-scale facility management by the private sector. The time lag between the adoption of suitable enabling legislation, the initiation of procurement processes, contract awards, and facility openings often was considerable.

Suffice it to say that these and related obstacles precluded any possibility that the progress of privatization proponents would be dramatic. Indeed, the early developments were relatively few and far between.

The transition to maturity for the private corrections industry

Although informed commentators might differ in their judgments regarding when the tide began to turn in favour of privatization, the key influence was quite probably the 1988 decision of the Texas Department of Criminal Justice to award contracts for two 500-bed facilities to the Corrections Corporation of

America and contracts for two 500-bed facilities to the Wackenhut Corrections Corporation.[12] All four contracts were made pursuant to a Texas statute that mandated at least a 10 percent cost savings. All four contracts imposed upon the two management firms performance standards that were more demanding than the standards that had to be satisfied by the public agency. Even though a different Texas correctional agency and correctional agencies in other jurisdictions had awarded facility management contracts prior to these awards in Texas to the Corrections Corporation of America and the Wackenhut Corrections Corporation (e.g., awards at the local level in Florida, Pennsylvania, New Mexico, and Tennessee; awards by the state in California, Kentucky, and Texas; and federal awards for facilities in California, Colorado, and Texas), the sheer magnitude of this single announcement produced shock waves both throughout and far beyond the boundaries of the United States.

That subsequent developments greatly accelerated the pace at which the embryonic private corrections industry moved toward maturity is altogether obvious. A decade ago, for example, the capacity of all secure adult private correctional facilities in operation or under construction was only 2,620 prisoners. Although the capacity had risen substantially to 15,300 prisoners by the close of 1990, the future of the privatization movement remained ambiguous. Since then, however, the rate of growth as measured by the number of beds under contract has leaped forward at an average annual pace of 34.51 percent. Statistics for the end of 1995 revealed 104 contract awards with an aggregate capacity of 63,595.[13]

Significantly, there are no indications that the momentum the private corrections industry achieved during the first half of the present decade is lessening. Early July of 1996 finds 17 private corrections management firms that have received or are presently negotiating contracts for 119 secure adult facilities that are or will be located in Australia (6), Canada (1),[14] the United Kingdom (6), and the United States (106). The estimated capacity of all of these facilities is 76,432 prisoners, which reflects a 20.19 percent increase over the total at the end of 1995. Further, if procurement that is expected to reach closure during the balance of 1996 yields what it is anticipated to yield, a reasonable projection for the end of 1996 would be for approximately 130 facility contract awards that would provide housing for more than 85,000 prisoners.

The refutation of early predictions of the critics

These historical statistics alone directly invalidate one of the early claims of privatization critics. In the mid-1980s, it was their contention that few, if any, jurisdictions would implement full-scale privatization plans. They obviously were wrong. Additionally, however, related statistics invalidate many of their other early predictions. Significant illustrations of this include the following.

The critics predicted that privatization experiments, if there were any, would be limited to small facilities designed to house special offender populations (e.g., detainees in the custody of the Immigration and Naturalization Service). The critics were wrong. Privately management facilities now house a diverse prisoner population. The largest facility now in operation is a 1,704-bed state prison in Texas that is operated by the Management and Training Corporation. The distinction for having the largest facility under private management will soon be transferred to the Corrections Corporation of America when it opens a 2,000-bed Texas prison, and then to the Wackenhut Corrections Corporation, which was recently selected to manage a 2,200-bed state prison in New Mexico.

The critics predicted that few if any jurisdictions would elect to house their prisoners in privately managed facilities. The critics were wrong. In addition to Australia and the United Kingdom, the following jurisdictions in the United States now house prisoners in privately managed facilities: Alaska, Arizona, California, Colorado, Florida, Hawaii, Kentucky, Louisiana, Mississippi, New Mexico, Missouri, Oklahoma, Pennsylvania, Puerto Rico, Tennessee, Texas, Utah, and Virginia. Further, all three federal agencies in the United States that have prisoner-custody responsibilities (i.e., the Federal Bureau of Prisons, the Immigration and Naturalization Service, and the United States Marshals Service) house prisoners in private facilities. Finally, various other American jurisdictions are committed to housing prisoners in private facilities when the capacity becomes available (e.g., Arkansas, Ohio, and Oregon).

The critics predicted that privatization experiments, if there were any, would be limited to facilities housing prisoners with low security classifications. The critics were wrong. The Corrections Corporation of America opened the first privately managed maximum

security facility in Leavenworth, Kansas in June of 1992. Numerous other privately managed facilities house significant numbers of maximum-security prisoners: for example, both the Corrections Corporation of America and the Wackenhut Corrections Corporation manage 1,474-bed state prisons in Louisiana that have maximum-security housing units.

The critics predicted that privatization experiments, if there were any, would fail if for no other reason than that prisoners housed in them would refuse to respect the authority of their private keepers. The critics were wrong. Although maintaining control in detention centers, jails, and prisons is a perpetual problem for both public and private managers, the evidence (e.g., inmate-on-inmate assaults, inmate-on-staff assaults, minor disturbances, riots, and escapes) simply does not support the hypothesis that private correctional employees will be incapable of maintaining effective control in their facilities.[15]

In short, the predictions of athe critics of privatization that public agencies would not contract for the management of significant numbers of secure adult correctional facilities, that contract awards would not include facilities of diverse size and function, and that contract awards would be invalidated on legal or constitutional grounds were quite uniformly refuted during our first full decade of experience with correctional privatization. This is clearly significant in and of itself. It is also significant that research on different types of facilities in dissimilar jurisdictions both within and outside of the United States consistently fails to substantiate the prediction of the critics that the maintenance of control within private facilities would be made impossible because prisoners would refuse to accept the authority of private management firms and their employees.

Taken alone, however, this evidence fails to undermine the core predictions of the critics that, were they to be substantiated by meaningful research evidence, should persuade reasonable people that correctional privatization is an experiment that failed. More specifically, those not firmly wedded by virtue of self-interest or ideology to a position either for or against privatization will be those who accept the position that I advanced at the beginning of this analysis that a core obligation of elected officials ought to be the delivery of the best possible public services

at the lowest possible cost, with the public or private identity of alternative service providers being irrelevant.

Assessing the cost benefits of correctional privatization

No amount of evidence regarding the number or type of contract awards and no amount of evidence regarding the ability of private management firms to maintain control over those committed to their custody provides a reasonable basis to conclude that correctional privatization has allowed policy makers to meet the obligation of delivering the best possible public services at the lowest possible cost. Instead, such a conclusion requires persuasive evidence that contracting decisions can yield cost savings (i.e., improved efficiency) and quality improvements (i.e., enhanced effectiveness). No reasonable public-policy objective would be achieved by correctional privatization initiatives unless, at a minimum, there was an equivalence between the cost and quality of the correctional services provided by both public and private providers. No progress in this public policy arena would be made unless, at a minimum, private management firms provide either comparable services at a cost below that associated with public agency operations or better services without the increased cost being prohibitively higher than public agency costs.[16] Thus, it is vital that this analysis include a consideration of the cost benefit literature that is beginning to accumulate.

Some preliminary considerations

It is appropriate to begin this portion of the analysis with several caveats and qualifications. First, the waters in this area have been muddied by the ideological rhetoric that has come from both the opponents and the proponents of correctional privatization. Still, absent hard evidence, no thoughtful person would accept either the extreme anti-privatization hypothesis that the profit motive of private management firms will necessarily result in their providing cost savings only by decreasing the quality of the services they provide or the extreme pro-privatization hypothesis that public agencies are so bureaucratized and lacking in incentives to foster cost benefits that they are inherently inefficient and ineffective.

Second, providing meaningful comparisons between public and private facilities on the dimensions of cost and quality is ex-

ceedingly difficult. For example, estimates of the operating costs of public agencies almost always underestimate actual costs,[17] and so reports of cost savings are generally believed to reflect less than the true cost savings.[18]

Third, statutes and contracts routinely impose requirements on independent contractors that cause financial burdens that public agencies are not obliged to shoulder. Thus, it is difficult, if not impossible, to create the desired "apple-to-apple" comparisons policy-makers are seeking.[19]

Fourth, privatization initiatives are never "pure" in the sense that all benefits or negative consequences flowing from them are attributable exclusively to the public agencies that awarded the contracts or to the private management firms that operate the facilities. Statutes can shape the outcomes of such initiatives in quite a substantial way. Public-agency procurement documents and contracts generally play even more consequential roles, and so, too, does the manner in which public agencies monitor contract compliance. Thus, if the evidence either shows or fails to show cost benefits, it is seldom if ever possible to conclude that the advantages or negative consequences should be allocated only to one of the two parties to privatization contracts. Credit and blame are more properly assigned to both.

Finally, partly but not exclusively because similar statutes and contracts often impose different performance requirements on independent contractors, it is difficult or impossible to identify public facilities with which to compare private facilities when one attempts to make comparisons regarding quality as well as costs of services.[20]

The net effect of these and other influences is to make it imprudent to base policy conclusions on evidence flowing from research on a single facility, a single jurisdiction, or a single management firm. Instead, it would be far wiser to form those conclusions only after one detects meaningful patterns in research results and thus develops confidence in the probable validity of the generalizations one makes. Although what follows does focus on individual pieces of research, the goal will be to search for the patterns that multiple studies create. Because some of the relevant research focuses on both cost and quality issues, separating the two is somewhat artificial. Nevertheless, the issues are so often dealt with as though they were independent of one another that it is productive to deal with them separately.

Does contracting out yield meaningful cost savings?

The weakest challenge to correctional privatization comes from those who contend that contracting is unlikely to yield significant cost benefits. The are at least three initial reasons why the challenge lacks credibility. First, the very fact that a contract exists strongly suggests the contracting governmental entity was confident that cost savings would be achieved. During a decade of personal experience with contracting, I have yet to encounter a single unit of government that was willing to contract without first having been assured of cost savings. Indeed, it is not uncommon to see tangible evidence of cost savings being cast as a statutory precondition for contract awards.[21] Second, whether one considers private corrections management firms or some other type of private entity, it is generally acknowledged that private sector fringe benefits—most particularly retirement benefits—are less generous than those made available to public employees.[22] Thus, the private sector typically enters the competitive arena with a cost advantage. Third, the private sector is not obliged to comply with a broad array of costly bureaucratic requirements that government agencies confront in such areas as the selection, promotion, and termination of employees and the procurement of goods and services. Again, therefore, the private sector enjoys an advantage over public agencies. In short, one would be surprised only by a contracting initiative that failed to yield at least some cost savings; the real question is how great the cost savings of contracting are likely to be rather than whether there will be any cost savings.

Unfortunately, sound evidence regarding the magnitude of cost savings only recently began to accumulate in a significant way. As late as 1987, for example, a report prepared by The Council of State Governments and The Urban Institute observed that "we have not found available reliable cost information at any of the levels of government studied here" (Hackett, Hatry, Levinson, Allen, Chi, and Feigenbaum 1987: 124). Since then, however, a good deal of evidence has been published about the experience of all levels of government in the United States as well as about recent experience in both Australia and the United Kingdom.[23] Reflecting both the sophistication of the cost comparison methodologies relied upon and various other factors,[24] the results of the cost savings analyses vary quite broadly from study to study. Six illustrations will be sufficient for our purposes here.

Early evidence from local-level contracting in Tennessee The first study was conducted by Charles H. Logan and Bill W. McGriff (1989). Logan and McGriff compared the actual contract cost paid to the Corrections Corporation of America for operating the 350-bed, Hamilton County Penal Farm located near Chattanooga, Tennessee between 1985 and 1988 with estimates of what Hamilton County would have paid had it continued to operate the facility itself. The estimates were based on actual 1983/84 expenditures plus annual employee salary increases equal to those actually received by Hamilton County employees and non-salary increases equal to inflation as measured by the Consumer Price Index.

The total estimated costs for continued public management of the facility for the three-year period was $9,909,717 and the total actually paid to the Corrections Corporation of America during the three-year period was $9,404,801. Thus, Logan and McGriff concluded that the total cost savings realized by contracting was $504,917, or an average annual operating cost savings of 5.37 percent. Significantly, this cost savings was possible despite the fact that public operating costs estimated for the three-year period averaged only $26.08 per prisoner per day, a per-diem cost that was itself well below the reported average per-diem cost of roughly comparable facilities elsewhere in Tennessee. Further, the authors emphasized that the conservative methodology they relied upon almost certainly resulted in their underestimating the true cost savings to Hamilton County.[25]

Evidence at the state prison level in Texas The second study deserving special attention was published by the Texas Sunset Advisory Commission in 1991 and was designed to determine whether contracts awarded to the Corrections Corporation of America and to the Wackenhut Corrections Corporation by the Texas Department of Criminal Justice in 1988 had achieved the 10 percent cost savings required by applicable Texas law.[26] The contracts required each firm to design, construct, and manage two 500-bed minimum security prisons. The cost methodology called for the Sunset Advisory Commission to determine what the cost to Texas would have been in 1990 had the four prisons been operated by the Texas Department of Criminal Justice and to compare that estimate with the actual payments made to the Corrections Corporation of America and to the Wackenhut Corrections Corporation.

The results reveal an average estimated cost for public operation of the facilities of US$42.92 and an actual payment to the Corrections Corporation of America and to the Wackenhut Corrections Corporation of US$36.76. The resulting savings of US$6.16 per prisoner per day or US$4,496,800 per year for all four facilities yielded an estimated cost savings of 14.35 percent.[27]

Longitudinal evidence from Queensland, Australia Third, Allan Brown, an economics professor at Griffith University in Brisbane, Australia, has provided an interesting and well-documented examination of whether the American experience is generalizable beyond the United States (Brown 1994). The relevant portion of his research focuses on a two-year cost comparison of a public and a private correctional facility in Queensland.

The Borallon facility is operated by the Corrections Corporation of Australia; the Lotus Glen facility is operated by the government correctional agency. Both facilities were recently constructed, are similar in their design, and are similar in the size and security classification of their prisoners. Importantly, Brown's cost data included various overhead costs that often escape attention when only facility expenditure data are available.

Brown noted that "Borallon [the private facility] provides the highest programme content of any correctional centre in Queensland and employs a much greater number of staff on programmes than does Lotus Glenn [the public facility]" (1994). Still, he found that the gross annual cost per prisoner for 1991/92 at AUS$39,240 versus AUS$54,560 for Lotus Glenn. Further, the gross annual cost per prisoner for 1992-93 at Borallon was AUS$44,200 versus AUS$49,880 at Lotus Glenn.[28]

Recent state-level evidence from Florida The fourth illustration comes from Florida. During its special legislative session in 1993, the Florida Legislature enacted what is now Chapter 957 of the Florida Statutes. The new law provided for the creation of the Florida Correctional Privatization Commission and imposed an obligation on the Commission to release a request for proposals providing for the private design, financing, construction, and management of two 750-bed medium security prisons.[29] To assure the desired cost savings, the new statute required the Florida Auditor General to determine the total cost Florida would incur for the design, construction, and operation of comparable

state facilities. Significantly, the auditor general was expressly obliged to incorporate a full array of costs in the establishment of the required benchmark figure. Thus, the auditor general's report examined construction and operating costs at multiple comparable facilities being operated by the Florida Department of Corrections, indirect costs associated with central management of the Florida Department of Corrections, and additional indirect costs associated with services provided to the Florida Department of Corrections by various other state agencies (State of Florida, Office of the Auditor General 1993). Further, the statute required that cost proposals submitted by private management firms yield cost savings of no less than 7 percent as a precondition to any contract award.

Eight management firms submitted a total of 12 proposals. All 12 contained legally binding commitments of cost savings that met or exceeded the 7 percent requirement. Two firms were selected at the end of the competitive process: the Corrections Corporation of America and the Wackenhut Corrections Corporation. The Corrections Corporation of America and the Wackenhut Corrections Corporation costs, including debt service obligations associated with facility construction, were, respectively, US$46.96 and US$47.05. The comparable cost for the Florida Department of Corrections set by the Correctional Privatization Commission and was based on the report prepared by the Office of the Auditor General was US$52.40. On average, then, these contracting decisions by the State of Florida will yield an average cost savings of US$5.39 per prisoner per day. Assuming a conservative occupancy rate of 90 percent during the first year of operation of these facilities, the anticipated first-year cost savings will thus be US$2,655,923. The executive director of the Correctional Privatization Commission has estimated that these contracts will save Florida taxpayers modestly more than US$9,000,000 during the first three years of facility operations.

Additional state-level experience in Louisiana and Tennessee Louisiana and Tennessee provide particularly interesting settings within which to measure cost savings even though they also share a common disadvantage. Their evidential value flows from several factors. First, a large state prison has been managed in Tennessee by the Corrections Corporation of America since 1992 and

two similarly large state prisons have been managed in Louisiana since 1990, one by the Corrections Corporation of America and one by the Wackenhut Corrections Corporation. Second, directly comparable facilities are operated by public agencies in both states. Third, the relationship between the private management firms and the public agencies has been cooperative rather than adversarial. Fourth, public-agency operating costs in both jurisdictions are substantially lower than average national costs or even comparable public-agency costs in many of the states in the geographical region within which they fall.

The significant disadvantage is that the design and construction of the facilities in Louisiana and Tennessee was handled by the public agencies rather than the management firms with which they later contracted. Because 65 percent to 75 percent of total operating costs are linked to employee costs and because the number of employees required to operate correctional facilities in a professional manner is very highly correlated with facility designs, much of the opportunity the private management firms would otherwise have had to provide cost savings does not exist in these jurisdictions.

In any event, the experience of these jurisdictions has been examined by several studies (see, e.g., Albright and Harchas 1990; Tennessee Select Oversight Committee on Corrections 1995; State of Washington Legislative Budget Committee 1996). The most recent and perhaps most authoritative of the them, which considers both the Louisiana and the Tennessee experience, was prepared by the staff of the Legislative Budget Committee of the State of Washington (1996: 9–25, A3-1–A3-4). Although the results of the analysis differ from those of the other studies reviewed here, the findings for both jurisdictions are similar.

Specifically, the per-diem costs for the 1995/96 fiscal year based on estimated average daily prisoner populations in the Louisiana facilities showed a virtual equivalence between the public agency (US$23.66), the Corrections Corporation of America (US$24.00), and the Wackenhut Corrections Corporation facilities (US$23.45). The estimated per-diem costs for two public facilities and the Corrections Corporation of America facility in Tennessee for the 1993/94 fiscal year reflect substantially the same narrow difference: the average per-diem cost for the two public facilities was US$34.29; the per-diem cost for the Corrections Corporation of America was US$33.63.

Cost-savings reports from the United Kingdom Following the enactment of the Criminal Justice Act of 1991, the British embarked upon one of the most ambitious, carefully planned, and multi-dimensional privatization initiatives any jurisdiction has crafted to date.[30] Thus far contracts have been awarded for six facilities of which four presently house prisoners.[31] The first began receiving prisoners in April, 1992; the most recently opened first received prisoners in July, 1995.[32] Clearly, therefore, the British have had enough experience with privatization that their assessments of cost savings should be meaningful.

Tim Wilson, Head, Contracts and Competition Group, Her Majesty's Prison Service, summarized a consulting report prepared by Coopers and Lybrand and published in June of 1996:

> The . . . research . . . was a cost analysis for 1994/95 . . . The results, based on a more vigorous analysis than had been achieved before, confirmed that there are significant savings on operating costs, but in the order of 13 percent to 22 percent relative to the average costs of a group of comparable prisons. (Wilson, this volume: 77)

So what patterns do the cost analyses reveal?

A reasonable assessment of the available cost analyses lends at least qualified support to the claims of privatization proponents that meaningful cost 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 realistically hope that economies in the rough range of 10 percent to 15 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 projects incorporating design, finance, construction, and management.[33] On the other hand, it would be quite misleading to describe cost savings of this magnitude as trivial.

A bit of simple if speculative arithmetic based on an easily defended hypothetical situation should be sufficient to push this fact into appropriately sharp relief. What if, for instance, one were a policy-maker in an American jurisdiction whose annual operating costs per prisoner were at the average of US$20,000 that we often encounter in official reports and media accounts

and one wanted to contract out for the design, financing, construction, and management of a medium-sized prison that would provide a prisoner housing capacity of 1,000 beds? Does the cost-savings research suggest that the cost benefits would be sufficient to make the effort worthwhile?

What is worthwhile is subject to broad variation but, if we apply the 10 percent to 15 percent standard to this hypothetical situation, the resulting range of probable cost savings would be between US$5.48 to US$8.22 per prisoner per day, US$2,000,200 to US$3,000,300 per year, and, assuming a three-year term for the typical contract, US$6,000,600 to US$9,000,900 during the base term of the contract award. Regardless of what a group of policy makers might conclude were they to be confronted with this type of evidence, it is safe to assume that ordinary taxpayers would think this a worthwhile saving.

There are at least two additional patterns I suspect one can and should see in this research literature. The first and most obvious of these is that opportunities for significant cost savings from privatization are most strongly influenced by factors over which private corrections management firms have no control whatsoever. For example, the opportunities for cost savings in a jurisdiction committed to nothing more than having its prisoners make little rocks out of big rocks under the supervision of a not particularly well-trained guard carrying a shotgun are few. Similarly, the opportunities for cost savings in a jurisdiction whose public agency is particularly efficient and whose facilities are modern are likely to be few.

Second, and very important, are the bits and pieces of evidence in the research literature that strongly suggest that the long-term and most significant cost savings associated with privatization may come more from the improved performance of public agencies in those jurisdictions that have privatized than from the efforts of private corrections management firms. This is as I believe it should be. Public employees working in the field of corrections are generally quite unlike the uncaring, inefficient, and sometimes brutal people who are depicted in countless usually not very informative or even very good movies. I suspect, however, that decades of working within the context of a non-competitive public monopoly have done little to encourage them to maximize the efficiency with which they allocate their resources and done much to foster habits that encourage,

require, or at least tolerate inefficiency. The injection via privatization of a bit of competition between alternative providers of similar services might well produce the needed encouragement.

In any event, so much experience and so much evidence about correctional privatization supports the hypothesis that privatization is capable of yielding meaningful cost savings that all but the most ideologically blinded privatization critics have tried to shift the debate to other issues and thereby to raise the hurdles privatization proponents are challenged to clear.[34] Today they more commonly advance the argument "you get what you pay for" and allege that discounted prices will necessarily yield substandard services. If this claim were proven to be valid, then contracting clearly would fall into the category of decisions that are penny wise but pound foolish. Thus, the available evidence regarding the quality of services provided by private corrections management firms deserves serious consideration.

Does contracting-out result in decreased service quality?

Significant evidence now exists regarding the quality of contract services. It comes to us in at least four forms and, although no one type of evidence is comprehensive enough to be persuasive, once again it is important to look for patterns in attempting to formulate a set of reasoned conclusions.

Contract renewals as a crude performance indicator The first indicator is as broad—and perhaps as crude—as it is pragmatic. It evaluates quality by measuring the willingness of contracting units of government to renew existing contracts. The hypothesis is that contracts would be terminated for cause or not renewed if contracting units of government were dissatisfied with either the cost savings they realized or the calibre of the services they received from independent contractors.

Evaluated in this manner, it appears that the satisfaction of government is considerable. My review of contracts awarded for the management of secure adult facilities since the privatization movement began to gather momentum in the mid-1980s reveals the closing of only one facility—in Zavala County, Texas—for reasons related to the contracting agency's perception of inadequate contract-performance and one contract—in Sweetwater, Texas—being shifted from one private management firm to another for roughly comparable reasons. Not insignificantly, neither of the

management firms involved in these situations are presently involved in the management of adult correctional facilities.[35] A third possible item to include in such a list would be a facility in Elizabeth, New Jersey from which all prisoners were removed following a disturbance in 1995 and that, when it reopens toward the end of 1996, will be managed by a different private firm. Additionally, the review reveals only one contract in California that was not renewed because of cost considerations, but in that one situation the cost issue was linked to the terms of a property lease with a third party that were beyond the control of both the private firm and the involved contracting agency.

Notwithstanding the fact that this evidence is of some probative value, taken by itself it is far from persuasive. The reasons are multiple. First, even the genuine satisfaction of a contracting government agency cannot be viewed as proof of high quality performance. Satisfaction is not necessarily linked to careful assessments of contract performance. Second, all of us have had or worked with employees who met our minimum expectations and thus maintained their jobs even though nobody would have placed them high on any performance scale. Government agency responses to independent contractors can be shaped by similar considerations. Finally, I have seen evidence of a few private facilities within which performance was the object of very harsh criticism in audit reports but then seen little or no evidence of the contracting governmental agencies having the good judgment or perhaps simply the political courage to respond forcefully. Despite these and other caveats, however, the pattern established by the strong record of contract renewals is meaningful.

Prisoner litigation as a performance indicator The second indicator, the litigation record of the private corrections-management firms, is similarly broad and equally pragmatic. A recent and reasonably careful review I completed of all privately managed jails and prisons in the United States fails to reveal a single facility that is operating under a consent decree or court order as a consequence of suits brought against it by prisoner plaintiffs.[36] When one recognizes that roughly three-quarters of American jurisdictions now have major facilities or their entire systems operating under consent decrees or court orders and that similar intervention by the courts is hardly uncommon in local correc-

tional systems (American Correctional Association 1996: xx), the fact that private facilities remain unblemished by successful prisoner suits is not trivial.

It would be wrong to read too much into the fact that the litigation experience of the private sector is more positive than is the experience of many public agencies. As with the discussion of contract renewals, the reasons for caution are several. First, the experience of the private sector in managing relatively large facilities housing long-term prisoners with high custody classifications, the types of facilities from which prisoner suits are most common, is still relatively brief. Second, very few private facilities are housing a number of prisoners that exceeds their design capacities, and much of the prisoner litigation in the United States raises constitutional questions closely related to facility overcrowding. Third, it often takes a considerable period of time for prisoner suits to reach a stage at which courts issue written opinions that are readily accessible to researchers. It is thus possible that non-frivolous suits are now in the process of being litigated. Finally, many aspects of possible noncompliance with contracts involve issues that either probably would not or absolutely would not provide a sound cause of action for a prisoner plaintiff. Once again, however, the best available evidence forms a pattern that reflects favorably on the quality of private firm performance.

Accreditation as a performance indicator The third indicator is based on independent assessments of compliance with the standards of the Commission on Accreditation for Corrections of the American Correctional Association (ACA). There is much to be said in favor of those correctional facilities that are willing to shoulder the substantial burdens associated with seeking accreditation and that are willing to accept the risks associated with independent professional assessments by ACA audit teams.[37] Thus, it is significant that private firms have been accredited far, far more often than have their public sector counterparts (Thomas and Bolinger 1996).

Accreditation by the American Correctional Association or other accrediting agencies is an imperfect performance indicator. The correlation between accreditation status and calibre of services provided is imperfect. There are public and private facilities that have not sought accreditation but within which one finds sound services; there are public and private facilities that

have been accredited but which are far from exemplary on one or more performance dimensions. Still, policy makers, corrections professionals, and the courts are in substantial agreement that the earning of accreditation is a noteworthy achievement for any public or private facility. Thus, while the pattern in this area is not in and of itself persuasive, the inferences a reasonable person would draw are certainly positive.

Objective research as a performance indicator The final indicator comes from the growing body of research literature that has examined the quality of privately provided correctional services in Australia, the United Kingdom, and the United States.[38] At least two examples warrant some discussion here.

Perhaps the most sophisticated of these reports is one published by Charles H. Logan (1992). Based on data from institutional records and modified versions of the Prison Social Climate Survey developed by the Federal Bureau of Prisons, Logan gathered detailed data on the quality of confinement in the New Mexico Women's Correctional Facility being operated by the Corrections Corporation of America, the Western New Mexico Correctional Facility that housed New Mexico's female prisoners prior to the opening of the CCA facility in 1989, and the Federal Correctional Institution in Alderson, West Virginia. The study included 333 empirical indicators designed to measure eight different aspects of the quality of confinement. His overall conclusion was simply summarized: "The private prison outperformed the state and federal prisons, often by quite substantial margins, across nearly all dimensions" (Logan 1992: 601).

Logan's general conclusion that private corrections management firms are fully capable of providing high calibre correctional services gains significant support from another longitudinal evaluation research project, the results of which were published recently by the Tennessee Select Oversight Committee on Corrections. The task before the Select Oversight Committee was to determine whether a contract award made to the Corrections Corporation in 1991 met the following statutory renewal preconditions:

> After the first two (2) years of operation, but before renewing the initial contract, the performance of the contractor shall be compared to the performance of the state in operating similar facilities . . . 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. (Tenn. Code Ann. §41-24-105(c) and §41-24-105(d))

To satisfy this statutory requirement the Select Oversight Committee selected two state-operated facilities of comparable design and mission. It then gathered a large volume of data on virtually all aspects of facility operation during the course of the two-year research project. Although the private facility cost per prisoner per day was only modestly lower than the comparable cost for the two state facilities, the private facility received a higher overall performance rating than the two public facilities.[39] This, in turned, prompted a renewal of the facility management contract.

Research results, while certainly yielding more quantitative findings than does a consideration of the other performance indicators discussed here, do not answer all of the questions one could and should pose. The sophistication and the predispositions of researchers vary. Their focus is on one or at best a few facilities, so what they see may or may not be fairly generalized. Necessarily based on data collected in the past, research results do not necessarily tell us much about either the present or the future. Yet again, however, if the key is in the general pattern rather than the individual details one finds in the research literature, then the evidence strongly suggests that private corrections management firms are fully capable of performing at a level which is at least equivalent to public agencies despite their obligation to do so at a cost that is equal to or below public agency costs.

Conclusions regarding the issues and the evidence

The patterns created by the evidence should be absolutely clear. The privatization critics who have contended or who do contend that correctional privatization is unlawful, that few or no jurisdictions will take the potentially consequential risks associated with contracting, and that private management firms will be incapable of providing services of reasonable quality at a competitive price are simply wrong. Similarly, the privatization proponents who contend that privatization inexorably leads to both substantial decreases in correctional costs and equally substantial enhancements in the quality of correctional services are simply wrong.

It is hardly startling to discover that those who have adopted extreme positions in the correctional privatization debate have depended more on the power of their rhetoric than on the persuasiveness of hard evidence. What may be surprising is that correctional privatization, despite the fact that it moved beyond its status as an interesting experiment only in the recent past, has now achieved a degree of maturity and recognition that is beyond what even its most ardent advocates would have imagined only a decade ago. Albeit not without some failures and problems, private management firms have demonstrated that there are a broad array of settings within which they can deliver professional correctional services at a competitive price.

Lessons from the evidence for public agencies

There are at least two additional lessons I believe the patterns in the available evidence can teach. One lesson is for public corrections agencies: the most successful privatization experiments are those involving agencies—including agencies whose senior officials would have preferred not to privatize any facilities within their correctional systems—that responded to policy choices made by elected officials in a positive and professional manner. I have seen such responses from, for example, the Arizona Department of Corrections, the Florida Correctional Privatization Commission, the Louisiana Department of Public Safety and Corrections, and the Tennessee Department of Corrections. Conversly, public agencies that adopt an adversarial position in the hope of producing failure rather than success can hardly claim that doing so serves the public interest. They also run the risk of learning, as the Florida Department of Corrections has learned already, that attempts to ignore the policy decisions of elected officials can yield uncomfortable consequences. The Florida Legislature simply pushed the department to the side, passed legislation that created the Florida Correctional Privatization Commission as an independent state agency, and implemented one of the most ambitious and successful privatization any state has attempted to date.[40]

Lessons from the evidence for elected officials

The other lesson is for elected officials: privatization initiatives that are structured in a suitably sophisticated way can create a viable means by which the cost effectiveness of a correctional

system can be enhanced. This is not to say that policy makers should require one or more privatized elements in the correctional systems for which they are responsible and for which they are held accountable; nothing in sound theory or practice recommends such a mandate. Instead, both sound theory and practice recommend that privatization be put forward as nothing more than a potentially useful alternative. Prudent decisions to privatize are to be made only on the basis of fair competition between alternative providers, the winner of the competition being whoever makes a legally binding commitment to providing the best possible services at the lowest possible cost.

This lesson raises very sharp questions about the wisdom of legislators who have yet to make privatization a legal option and even sharper questions about policy-makers who have preempted opportunities to select between alternative providers with statutes that preserve the monopoly of public agencies.[41] To be sure, such statutes will be favoured by those whose interests they protect. However, we are living in a time during which ownership by special interest groups can be hazardous to one's political health. And public agencies are not the only ones who can be pushed to the side when it is learned that the public interest is assigned a lower priority than special interests enjoy.

Notes

1 It is interesting to note that there is a striking difference between the official policy positions of the three largest and most influential voluntary membership organizations that represent those working in corrections in the United States. The consistent position of the American Jail Association and the National Sheriffs Association has been harshly critical of privatization. By contrast, the official position of the American Correctional Association has long been that the focus should be on the professional caliber of correctional services rather than on the public or private identity of service providers.

2 Perhaps the most widely recognized and respected scholar whose writings reflect the views of this category of privatization critics is Professor Ira P. Robbins (see, e.g., Robbins 1988). Despite the publication of Professor Robbins' monograph by the American Bar

Association, the conclusions and recommendations advanced in it were never adopted as the official position of the organization.

3 Thoughtful people will disagree with where—and indeed whether—a bright line should be drawn that separates those functions of government that cannot be delegated to a private entity from those that, subject to appropriate limitations, can be delegated. Today one sees a blurring of traditional distinctions being caused both by the broadening of the range of services that are being privatized and by public agencies adopting an entrepreneurial posture, which results in their providing various services in the hope of generating profits (see, e.g., Osborne and Gaebler 1992). My own judgment is that there are some core functions of government that should not be subject to delegation (e.g., making law, waging war, making foreign policy, operating criminal courts, and perhaps a few others). I certainly do not believe that a comparable case can be made in support of a private entity being prohibited from accepting the contractual responsibility for most of the everyday functions associated with the operation of a jail or prison. For a more comprehensive examination of this issue, see, e.g., Logan 1990.

4 Those whose interest is with the potential value of correctional privatization in other nations should still benefit from some aspects of this discussion. Even though the nature of existing law elsewhere may be quite different from what one encounters in the United States, it might well be prudent either to modify provisions of law or to shape the terms of contracts in such a way as to benefit from some elements of the American experience.

5 42 U.S.C. §1983 is generally unavailable to plaintiffs who allege that federal officials proximately caused a constitutional deprivation, but the remedy crafted by the United States Supreme Court in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), is functionally equivalent in most regards when "federal action" rather than "state action" is at issue. See also, Davis v. Passman, 442 U.S. 228 (1979); and Carlson v. Green, 446 U.S. 14 (1980).

6 The Act created the Florida Correctional Privatization Commission as a new state agency whose mandate is to contract "for the designing, acquiring, financing, leasing, constructing, and operating" of state prisons and to supervise the performance of contractors. §957.03 established the duties of the Commission; §957.04 imposes the monitoring and supervision requirement. All state-level contracts award since the enactment of the Act in 1993 have been made pursuant to that statute rather than §944.105.

7 Statues that are at least somewhat comparable have been enacted, for example, by Arizona, Colorado, Kentucky, New Mexico, Oklahoma, Tennessee, Texas, and Virginia.

8 Behavioral Systems Southwest no longer operates secure adult correctional facilities. Eclectic Communications, Inc., now operates as a wholly-owned subsidiary of Cornell Corrections, Inc.

9 The first contract awards outside the United States are even more recent, the first coming in 1989 from the State of Queensland, Australia, to the Corrections Corporation of Australia, which is the Australian extension of the Corrections Corporation of America, and the first non-Australian award coming in 1991 from the United Kingdom to Group 4 Prison and Court Services, Ltd.

10 The original contract awards in Australia and the United Kingdom also remain in force with the same management firms.

11 Florida may provide the best example that I have encountered of avoidance efforts by a correctional agency. Although Florida was one of the earliest states to enact a statute that expressly authorized full-scale private management of state prisons, the Florida Department of Corrections, which remains strongly opposed to privatization, did not receive prisoners in its single privately managed prison until ten years after the original legislative authorization was approved.

12 There is more than a little irony associated with the considerable significance of these contract awards by the Texas Department of Criminal Justice. Not unlike its public agency counterpart in Florida, the Texas Department of Criminal Justice, especially its Institutional Division, was then and is now opposed to privatization.

13 These and related statistics are drawn from Thomas and Bolinger 1996. See also the statistical data appended to this analysis for year-by-year growth trends from 1986-1995 (appendix 2) and my most recent estimates of the magnitude of the involvement of the 17 private corrections management firms that comprise the private corrections industry (appendix 1).

14 The inclusion of Canada in these statistics is not intended to mislead or over-state the privatization case. At the same time, however, the decision on June 27, 1996 by the province of Nova Scotia to select the Atlantic Corrections Group, a Canadian corporation formed by the Management and Training Corporation, as the "preferred supplier" with which it would enter into contract negotiations is an historic event for Canada. It marks the first competitive procurement in the nation's history that might well culminate in the private management of a secure adult correctional facility in Canada. Whether the contract negotiations will yield that result cannot be determined at the present time and, if they do, the number of facilities that would be privately managed would in all likelihood be greater than one.

15 A considerable body of empirical evidence on these points is now available. Much of that evidence includes comparisons with one or

more comparable facilities operated by public agencies. See, e.g., Urban Institute 1989; Logan 1992; Bowery 1994; Tennessee Select Oversight Committee on Corrections 1995; Bowery 1996.

16 Readers would be prudent to consider this statement carefully. A huge body of systematic research, which has accumulated over a period of more than a century, is far more critical of the quality of services provided by public correctional agencies than it is of the cost associated with those services: it is not that those in corrections have been subjected to harsh criticism because of how much they have spent but because one sees so little being achieved via whatever expenditures the public has tolerated. Much the same is true of research in a host of other areas within which public agencies have been the primary or exclusive service providers (e.g., public schools). Especially in the United States, however, the outcome of debates about correctional privatization too often has been determined by little more or less than whether contracting-out would yield significant cost savings. I cannot identify a single contract award in the United States that was made because a public agency was willing to tolerate some increase in service-delivery costs in return for improvements in the quality of the services, though I can identify many contract awards by decision-makers who were at least intelligent enough to avoid selecting firms that were otherwise qualified but submitted the lowest cost proposals. This is exceedingly troublesome: it is never prudent for decision-makers to become so preoccupied with cost-savings per se that they are blinded to the effectiveness of the services they purchase. There simply is no equivalence between cheap and cost-effective. Any private management firm that panders to those in government who deem cheapest to be best will learn in the long term that they have served neither the public interest nor the interest of their shareholders.

17 This generally reflects the manner in which government accounts for its expenditures rather than intentional distortions by public agencies. In correctional institutions, for example, operating costs per prisoner per day are commonly computed by dividing the funds budgeted to a facility by the average daily population of that facility and then dividing the result by 365 to produce a cost per prisoner per day. This approach fails to take into account the significant costs associated with the operation of the administrative offices of those agencies and various other costs (e.g., land acquisition costs, construction costs, major maintenance costs, etc.). It also ignores altogether the fact that correctional agencies generally benefit from the expenditures of other public agencies for a broad array of services (e.g., procurement, insurance, data processing, legal services,

the operation of employee retirement systems, etc.). Thus, when one examines per-prisoner, per-day costs of the type that are reported by most correctional agencies, one sees only the tip of the fiscal iceberg and one lacks a meaningful ability to determine what proportion of total costs to taxpayers remains unknown. See, e.g., McDonald 1989.

18 This does not mean that estimates of the cast of privately managed facilities are exemplars of accounting sophistication. The tendency is to assume that those costs can be established precisely by simply examining the amounts that have been paid to independent contractors during the time periods under consideration. This assumption is invalid. There are always costs associated with privately managed facilities that are not reflected by payments to the independent contractors (e.g., public-agency administrative costs associated with procurement, contract development, and contract compliance monitoring). Although such costs are surely substantially less than the hidden costs that escape counting in virtually all estimates of public agency costs, they are real and should be taken into account carefully.

19 Common illustrations of this would be in such areas as insurance requirements and requirements for accreditation (e.g., the American Correctional Association and the National Commission on Correctional Health Care).

20 It should be noted that this problem can be caused by a host of factors other than the higher performance-standards statutes and/or contracts imposed on private management firms. In New Mexico, for example, the only state prison that houses sentenced female offenders is operated by the Corrections Corporation of America. Consequently, there is at least no in-state public prison for women with which one could directly compare the cost or quality of the services the Corrections Corporation of America is providing.

21 Illustrations of this are provided by a Texas statute that precludes contract awards absent an assurance of operating cost savings of at least 10 percent and a Florida statute that precludes contract awards absent an assurance of at least a 7 percent cost savings.

22 It does not necessarily follow that the retirement package private firms make available to their employees will yield a less advantageous set of actual retirement benefits. For example, the appeal of qualified employee stock ownership plans (ESOPs) within the private corrections industry is growing. To be sure, the number of dollars flowing toward an ESOP in a given year is almost certain to be smaller than the number of dollars flowing toward a government retirement trust fund for an equivalent employee during the same year. However, the success of the firms that elect ESOP-based retirement

programs for their employees might well yield such an appreciation on the value of the shares held for those employees that the financial value of the private employees' retirement package could be greater than the financial value of defined benefit retirement plans public employees have come to expect.

23 See, e.g., Logan and McGriff 1989; The Urban Institute 1989; Sellers 1989; Albright and Harchas 1990; McDonald 1990b; Crants 1991; General Accounting Office 1991; Texas Sunset Advisory Commission 1991; Brown 1994; Tennessee Select Oversight Committee on Corrections 1995; Loux 1996: 5–13; State of Washington Legislative Budget Committee 1996; Her Majesty's Prison Service 1996; Wilson, this volume.

24 An often-ignored illustration of the factors that influence cost savings is simply the costs that government was willing to tolerate prior to contracting decisions. All other things being equal, the higher the costs paid by government prior to contracting, the greater will be the cost savings realized by contracting. For example, Crants 1991: 57, reports that Santa Fe County, New Mexico was paying a relatively high US$75.00 per prisoner per day prior to awarding a management contract to the Corrections Corporation of America in 1986 that provided for a per diem payment of US$44.50 and thus yielding an estimated operating cost savings of 40.7 percent. Seldom, if ever, does one see evidence of savings of this magnitude being achieved by jurisdictions whose pre-existing costs were more in line with relevant regional averages.

25 See, for a further explanation of this point, Logan 1989.

26 Texas Sunset Advisory Commission 1991. It is worth noting that there is evidence that suggests that the cost advantage of the private facilities in Texas is persisting. A recent report released by the Texas Criminal Justice Policy Council as is required by applicable Texas statutes estimates the average cost per prisoner per day in Texas to have been US$44.40 during fiscal year 1994 versus an estimated private facility cost per prisoner per day of $35.25 (Texas Criminal Justice Policy Council 1995).

27 In large part on the strength of this cost analysis, the Texas Department of Criminal Justice subsequently awarded multiple additional contracts for the private design, construction, and management of state prisons. See, for additional details, Thomas and Bolinger 1996.

28 A portion of the difference in cost for each facility between the first and second years is caused by a difference in the means of allocating central office overhead costs. However, even if one focuses exclusively on facility costs and ignores the troublesome task of estimating off-budget costs, the cost comparison still favours the private facility.

29 The author has served as a consultant to the Florida Correctional Privatization Commission since 1993 and the information provided in the text was derived from his reviews of Commission files and interviews with the executive director of the Commission. All of the information, however, is a matter of public record pursuant to applicable provisions of Florida law.

30 One of the dimensions of the initiative involved contracting out for prisoner transportation services. Although this aspect of privatization is beyond the scope of this analysis, it is worth noting that the task of transporting prisoners to and from court has now been contracted out in 7 of the nation's 8 escort areas, that Prison Service estimates of resulting cost savings are substantial, and that research evidence reveals high levels of satisfaction with contract arrangements on the part of the police, courts, and Prison Service staff. See Wilson, this volume.

31 Two of the 4 facilities now in operation are managed by Group 4 Prison and Court Services, Ltd., one is managed by Premier Prison Services, Ltd. (a joint venture company that involves the Wackenhut Corrections Corporation), and one is managed by U.K. Detention Services, Ltd. (a joint venture company that involves the Corrections Corporation of America). One of the two facilities not yet in operation will be managed by Group 4 Prison and Court Services, Ltd.; the other facility not yet in operation will be managed by Securicor.

32 It should be noted that not all procurement efforts in the United Kingdom have resulted in private firms receiving contract awards. At least two of these efforts authorized public employee groups to submit competitive proposals. At the close of one of these procurements, which was for the Manchester Prison, the employee proposal was selected. The other, which was for the Buckley Hall Prison, concluded with a contract award to Group 4 Prison and Court Services, Ltd.

33 Although the focus of this analysis does not include possible cost savings associated with the design and construction of new correctional facilities, it is worth noting that reported cost savings in that area quite routinely fall in the range of 15 percent to 25 percent.

34 This is perhaps too polite a description of their practice. Some privatization critics prefer, in effect, to kill the messenger by rejecting favourable research reports on technical grounds they ignore altogether when commenting on findings with which they concur. Equally often, they try to step away from the evidence by contending that positive evidence from whatever facilities or systems have been the object of research cannot possibly have any applicability to the facilities or systems whose efforts to avoid privatization they are seeking to support. The obviousness of the double standard does

little to establish the intellectual integrity of those who adopt it. Naturally, of course, any efforts by privatization proponents to ignore contracting failures or to emphasize atypically impressive success stories should be ignored.

35 This fact warrants at least some passing emphasis. Competition for facility management contract awards is nothing if not intense. If government plays its role competently—that is, if government places balanced emphasis on both the cost and the quality of correctional services and thereby precludes the success of "low-ball" bids—then the competition between the firms that comprise the private corrections industry will do much to undermine the viability of underperforming firms that are in, or that attempt to enter, the industry. Efforts to achieve this judicious balance presents government with some of the most challenging problems it confronts as a purchaser. First, if obtaining the best possible goods or services at the lowest possible cost is what allows government to become a "smart buyer" and government wishes to achieve that status, then government seeks a status it cannot achieve in the absence of fair competition between alternative suppliers. This invites the inclusion of less than demanding requirements in procurement documents regarding corporate qualifications, credentials, and financial strength and creates the possibility that inexperienced, undercapitalized firms will receive contracts. If, however, this potential problem is avoided, then other problems can easily surface. All other things being equal, the growth achieved by successful competitors tends to allow a progressively smaller number of competitors to achieve such superior positions that true competition between alternative providers becomes less and less possible. The resulting monopoly or oligopoly can thoroughly undermine the movement of government toward smart-buyer status. Thus, it seems self-evident that the key to becoming a smart buyer in the field of corrections is in the formulation of sophisticated requests for proposals and equally sophisticated methods for evaluating submissions by competing firms. Contrary views notwithstanding, the hard reality is that there is no language one can inject into contracts, or techniques one can incorporate into contract monitoring strategies that can compensate for poorly crafted procurement documents or weak evaluations of submissions. See, for a more general discussion of these issues, Kettl 1993.

36 This does not mean that no private facilities are operating under court orders or consent decrees that are applicable to the correctional systems of which they are a part. It does mean that I have found no evidence of a private firm having entered into a consent decree or being placed under a court order as a consequence of a finding of unconstitutional jail or prison conditions in a facility for which it was responsible.

37 This statement is perhaps a bit too kind to the private corrections management firms. As was indicated much earlier in this analysis, accreditation by the American Correctional Association and sometimes other accrediting bodies is often required by statute, by contract terms and conditions, or by both. On the other side of the ledger, it is also true that some management firms are operating facilities in jurisdictions whose public corrections agencies are far from enthusiastic about accreditation. Some of those agencies recommend against any effort to obtain accreditation.

38 Levinson 1985; Hackett, Hatry, Levinson, Allen, Chi, and Feigenbaum 1987; Brakel 1988; Sellers 1989; The Urban Institute 1989; McDonald 1990a; Logan 1992; Wynder 1993; Brown 1994; Macionis 1994; Bottomley, James, Clare, and Liebling 1996; Her Majesty's Prison Service 1996; and Wilson, this volume.

39 Tennessee Select Oversight Committee on Corrections 1995. Importantly, all three facilities had very high overall evaluation scores and the difference between the highest and lowest rated facility was only 1.32 points. This indication of sound performance at all three facilities is supported by the accreditation scores each received during the audit conducted by the American Correctional Association. Although there, too, the private facility had the highest score (99.29), both public facilities received very high marks (98.78 and 98.88).

40 The Correctional Privatization Commission was created during a special legislative session in mid-1993. Consisting of a five-member Commission (none of whom receive any compensation for their efforts) and a paid staff of five (two of whom are full-time contract compliance monitors), the Commission has contracted for the design, financing, construction, and operation of four state prisons: a 750-bed, medium-security prison now being operated by the Corrections Corporation of America; a 750-bed, medium-security prison now being operated by the Wackenhut Corrections Corporation; a 350-bed, medium-security prison now under construction that will be operated by the Corrections Corporation of America and is scheduled to receive its first prisoners in early January of 1997 and a 1,318-bed medium-to-close-custody prison that will be operated by the Wackenhut Corrections Corporation and is scheduled to receive its first prisoners in early February of 1997.

41 The best information available to me is that Illinois is the only state in the United States which has enacted legislation that prohibits the privatization of its local jails and state prisons. However, a bill that would have similar consequences is now being considered by New York.

Appendix 1

Table showing growth of privatization industry and

Management Firm	Capacity of facilities under contract within United States	Capacity of facilities under contract outside United States
Alternative Programs, Inc.	240	
The Bobby Ross Group	1,832	
Capital Correctional Resources	1,056	
Cornell Corrections, Inc.	1,328	
Corrections Corporation of America	34,157	1,479
Correctional Systems	30	
Dove Development Corporation	1,002	
Esmor Correctional Services, Inc.	1,270	
Fenton Security, Inc.	228	
Group 4 Prison & Court Services, Ltd.		1,395
The GRW Corporation	100	
Management & Training Corporation	3,489	
Mid-Tex Detnetion, Inc.	1,207	
RECOR	344	
Securicor		800
US Corrections Corporation	4,818	
Wackenhut Corrections Corporation	19,029	2,628
Totals	70,130	6,302

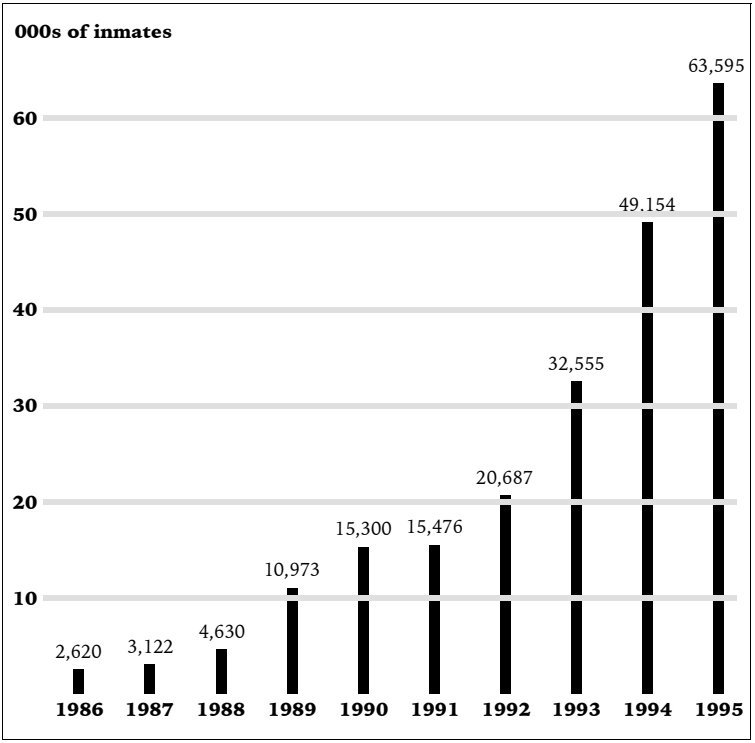
Note: Statistics for capacity include facilities under construction and contracts being negotiated as well as finalized contracts. The decrease in overall capacity for Esmor Correctional Services, Inc. is caused by conversion of facilities earlier classified as adult into juvenile facilities.

estimates of market share for July 10, 1996

Total capacity of facilities under contract	Overall change in contract capacity since Dec. 31, 1995	Market share based on contracts within United States	Market share based on contracts outside United States	International market share
240		0.34%		0.31%
1,832		2.61%		2.40%
1,056		1.51%		1.38%
1,328		1.89%		1.74%
35,636	16.42%	48.71%	23.47%	46.62%
30		0.04%		0.04%
1,002		1.43%		1.31%
1,270	-35.53%	1.81%		1.66%
228		0.33%		0.30%
1,395			22.14%	1.83%
100		0.14%		0.13%
3,489		4.98%		4.56%
1,207		1.72%		1.58%
344		0.49%		0.45%
800			12.69%	1.05%
4,818	3.43%	6.87%		6.30%
21,657	38.32%	27.13%	41.70%	28.33%
76,432	20.19%	100.00%	100.00%	100.00%

Appendix 2

Graph showing 10-year growth in rated capacity of secure, adult, private correctional facilites. Figures are based upon year-end estimates of capacity and include facilities under construction as well as planned expansions.



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