

Objections and Refutations

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For many years now, I have been studying the arguments for and against private prisons. In the process, I have discovered that while each side of the debate has some valid arguments, there is one key principle that is absolutely crucial to thinking clearly about the issues involved. That principle is this: there must be no double standard. When discussing private prisons, it is not enough to identify potential, or even actual, problems. Nor is it helpful to raise questions or concerns about private prisons and then just walk away, as critics so often do, without applying those same questions and concerns to prisons run by the government. If problems, questions, or concerns are to be arguments against privatization, it must be shown that they apply *more* to private than to governmental prisons.

In my reading and discussions and debates with others on privatization, I have never found a potential problem with private prisons that is not matched by an identical or closely related problem with prisons that are run by the government. Privatization raises no unique or truly new issues for prisons but it does offer some new solutions.

Note will be found on page 137.

Issues

The full range of issues can be organized into ten categories: propriety, cost, quality, quantity, flexibility, security, liability, accountability, corruption, and dependency.

Propriety

Critics of private prisons often ask, rhetorically, whether it is “proper” for anyone but the state to deprive people of their freedom (Robbins 1986: 24–30; DiIulio 1988: 66–83). That, however, is a loaded statement of the issue. *Keepers* do not take away anyone’s freedom; catchers and convicts and sentencers do so. The pertinent question is whether duly authorized punishment is any more or less legitimate when administered by government employees as opposed to contracted agents.

First, it should be noted that the government does not own the authority to punish. (For an extension of this argument, see Logan 1990: ch. 4, *The Propriety of Proprietary Prisons*.) That authority originates in the people and is delegated to government, which administers it in trust, on behalf of the people and subject to the rule of law. In a system characterized by rule of law, both state and private actors are bound by the law, and it is the law, not the civil status of the actor, that determines whether any particular exercise of force is legitimate.

Consider the case of a government-employed prison guard who engages in a clear-cut instance of extreme brutality. We do not say that his act is authorized or legitimate, or even that he is acting at that moment as an agent of the state. In fact, we deny it, in spite of his uniform and all the other trappings of his position. We say that he has “overstepped his authority” and behaved in an unauthorized and unlawful fashion. There is, in effect, an implicit contract between the state and its agents that makes the authority of the latter conditional on the proper performance of their roles. This conditional authority can be bestowed on contractual agents of the state just as it is on those who are salaried.

Cost

John Donahue of Harvard, a prominent critic of privatization, argues that the scope for cost savings in corrections is very limited. Imprisonment is such a simple, basic arrangement, he says, that there is almost no room for improvements in efficiency

(1988: 4). If this argument were correct, there would be little room for variation among public prisons, either in performance or in cost. Since we know that there is variation—great variation—in both performance and cost, it must be true that there is room for variation.

There are structural differences between the public and private sectors that affect efficiency and cost. For example, contracting avoids cumbersome and rigid government procurement procedures; private vendors can purchase more quickly, maintain lower inventories, and negotiate better prices and values. Contracting avoids civil service and other government (and sometimes union) restrictions that interfere with efficient personnel management (*e.g.*, hiring, firing, promotion, and salary setting; assignment of duties, work schedules, vacations, and leaves; adequate staffing to avoid excessive overtime; delegation of authority). Finally, the need to show a profit is a powerful incentive to reducing waste and increasing productivity.

Newspaper stories comparing the cost of private facilities to government facilities have made claims of savings ranging from 5 percent to 20, 30, or even 50 percent. Little weight should be given to most of these simple comparisons because they generally compare apples to oranges and because they ignore the enormous problem of “hidden costs.” A realistic expectation of savings through contracting is probably in the range of 5 percent to 15 percent. Support for this estimate comes from a study for the National Institute of Justice, based on data provided by the county auditor of Hamilton County, Tennessee (Logan and McGriff 1989). Because a county auditor is in a good position to identify and estimate hidden costs such as interagency or indirect costs, this study was unusually thorough.

When Corrections Corporation of America (CCA) assumed management of the Hamilton County Penal Farm, a 350-bed minimum-to-medium security county prison located near Chattanooga, Tennessee, the facility was in a state of deterioration and neglect and required extensive renovation by the contractor. In addition, that region of the country has relatively low correctional costs and the county was already spending less on its prison than other jurisdictions in the same region were spending on their facilities. Since the county was already among the lowest of the low spenders, this facility provides a fairly severe test of a private contractor’s ability to lower costs still further while

simultaneously renovating the physical plant, expanding capacity, and improving the quality of operations. Yet, Corrections Corporation of America accomplished all this.

Consistently conservative assumptions—conservative in the sense that they were designed to err in the direction of underestimating the costs of county operation—were used to estimate all the direct and indirect costs that the county would have incurred if it had retained, or if it resumed, operation of the facility itself. These costs were then compared to the costs of contractual operation, which included not only the contractor's fee but all the direct and indirect county costs that continued to exist in addition to that fee, including the cost of contract administration and monitoring. The study concluded that, over the three years examined, the county was cutting its costs of corrections by at least 4 percent to 8 percent per year, and more probably by 5 percent to 15 percent.

While that study deserves special attention because of the rigor of its methodology, a considerable and growing body of evidence indicates that privatization produces savings for corrections just as it does for a wide variety of other governmental operations. Indeed, most contracts are—and all contracts should be—the result of site-specific comparisons between the costs of governmental and private operations. Some jurisdictions even require by law that privatization must achieve a certain level of savings: ten percent in Texas, seven percent in Florida. Tennessee law required one contract to demonstrate “at least the same quality of services as the state at a lower cost” or “services superior in quality to those provided by the state at essentially the same cost.” A study by the state's Select Oversight Committee found the contract was in fact providing higher quality service at lower cost (Thomas 1995: 20, 10–16).

Quality

If private prisons are cheaper, say the critics, that can only come at the cost of quality. Corner cutting will occur and this will mean poorer food and less of it, fewer services, and cheaper labour with lower “professionalism” and less training (Shen 1984, quoting Houston ACLU attorney Steffan Presser that it is “impossible to make a profit and not cut those corners”; see also Donahue 1988: 14 and, generally, Logan 1990: ch. 6). Systematic evaluation studies conducted so far, however, have

generally been quite positive. An evaluation of a privately contracted secure training school for delinquents produced mixed findings, including a list of 36 positive results and 22 negative results (American Correctional Association 1985; see summary in Logan 1990: 137–43). A survey of inmates at a privately run prison in Tennessee elicited 320 responses, of which 49 percent were positive, 21 percent were ambivalent, and 30 percent were negative. However, prisoners who were able to compare the private management with previous management by the county were overwhelmingly positive—24 out of 28 comparison responses (Brakel 1988: 175–244). A third study compared the performances of private juvenile facilities in Massachusetts and a private prison in Kentucky with matched governmental counterparts. On a substantial majority of performance indicators, the private facilities had at least a small advantage: “By and large, both staff and inmates gave better ratings to the services and programs at the privately operated facilities; escape rates were lower; there were fewer disturbances by inmates; and in general, staff and offenders felt more comfortable at the privately operated facilities” (Hackett, Hatry, Levinson, Allen, Chi and Feigenbaum 1987).

The most comprehensive and carefully structured study to date (Logan 1992) compared the performances of a private, a state, and a federal women’s prison on 333 empirical indicators covering eight dimensions of the quality of confinement, including security, safety, order, care, activity, justice, living conditions, and management. While all three prisons were regarded as having been high in quality, the private prison outscored its two governmental counterparts on nearly every dimension, in some cases by quite substantial margins.

Private facilities are often required by contract to be certified as meeting the standards of the American Correctional Association. Except for the Bureau of Prisons and a few state systems, such as Florida, this is a rare condition among government facilities. Certification does not guarantee quality but its requirement is evidence that private prisons are expected to meet high standards and their high rate of certification is evidence that they do.

Other evidence of quality is indirect. For example, contracts are regularly renewed by satisfied government agencies. Further, no state is under court order to rectify poor conditions caused

by private operations while the majority of American states are under such orders as the result of governmental failures (Thomas 1995: 16–20).

Quantity

Many critics, especially members of the American Civil Liberties Union (ACLU), are opposed to private prisons largely because they are opposed to prisons generally. If, through efficiency, more prisons are built (argue the critics), they will be filled because they are there (see critical citations in Logan 1990: ch. 7). For over three decades, prison reform groups have advocated a moratorium on all new prison construction, believing that capacity drives use and hoping that lack of capacity would curtail use. That strategy has backfired and increasing numbers of prisoners are paying the price in terms of overcrowding and deteriorating physical conditions.

Critics also fear that private prison companies will become powerful lobbyists for harsher punishment in an attempt to stimulate demand for their product artificially. Commercial enterprises survive and prosper in the long run, however, not by artificially stimulating a spurious demand for their products but by accurately anticipating and responding to shifts in real demand. Right now, there is a big overhang of genuine, unmet demand for imprisonment. However, if there is also a demand for alternatives to prison, or if that demand should grow, commercial companies will be able and willing to respond rapidly to that demand as well. For example, some detention contractors also provide, and aggressively market, electronic monitoring and other alternatives to jail.

One irony must be noted regarding the critics' fear of lobbying to increase the supply of prisons. The largest contributor to Pete Wilson's gubernatorial campaign was the California Correctional Officers Union and so it was not a corporation but a public employee union that most strongly backed Wilson in promoting the largest prison expansion program in the country. A study of New York state government found that the great bulk of campaign contributions and lobbying came from the state teachers union, other public employee unions, regulated industry groups such as medical and banking associations, school boards, and the Conference of Mayors. In short, the biggest lobbyist of government is government itself, along with the *nomenklatura*¹ of the government class (Stern 1995).

Flexibility

Critics of contracting argue that it is impossible to write a contract that is as broad and flexible as the mission of a public agency needs to be; that contractors may be reluctant to depart from the provisions of their contracts; that renegotiating and changing contracts is time-consuming and terminating a contract is often very difficult. Thus, it may be hard for the government, under contracting, to order and control marginal changes.

This is one of the weaker objections to contracting. It is one of the most widely acknowledged strengths of private prisons that their greater management flexibility and more rapid speed of response promote both minor innovations and major program changes, including initiation, expansion, contraction, or termination.

In any case, if a particular contract turns out to be too costly or unsatisfactory, it is always possible to terminate it or fail to renew it. In contrast, how feasible is it to replace or halt the activities of government agencies staffed by tenured and unionized civil servants whose services are found to be unsatisfactory? It may not always be easy to terminate a contract but experience has shown that it is nearly impossible to terminate a government agency, even one supposedly made mortal by a “sunset” law (Behn 1977: 103–18).

Security

What happens in the case of a riot or a strike? Many times, I have heard critics of private prisons ask this question, then move on to other issues as if it were unanswerable—or required no answer. The answer, however, is about the same as it would be for a government-run prison. It may be unclear whether or not contracted prison guards would have the right to strike but the absence of such a right has not prevented public guards from engaging in strikes, sickouts, and other job actions. At one point, in a coordinated action prison guards in Rhode Island and at 6 penal institutions in Ohio walked off their jobs. In another case, almost all the guards at New York’s 33 correctional facilities went out on a strike that lasted 17 days. The Governor called in the National Guard, who were met with violence and property damage by the striking prison guards (Logan 1990: 176–180).

Unemployment as the result of a strike may be a more credible threat to private than to public guards because a strike or other

disruption would allow the government to terminate a contract. Prison contracts typically include contingency plans to deal with emergencies or disruptions, such as strikes, riots, or bankruptcy. State police and the National Guard provide the ultimate backup for prison staff, whether private or public. Further, a performance bond can be used to defray the government's cost if it has to take control of a contracted facility.

The number of escapes from private jails and prisons has been no worse than that of their government-run counterparts. None of the private prisons, however, has been as lax in its security as the District of Columbia's government-run Oak Hill Youth Center, a high security detention facility for juveniles in Laurel, MD, where a journalist's check of the official log showed that 30 percent of the 197 detainees were missing and listed as escapees (Walsh 1987), or the Prince George's County (MD) Jail—much celebrated for its New-Generation design—which 11 times during its first year of operation released the wrong prisoners under mistaken identities (Yorke and Meyer 1988).

Liability

Critics warn that governments will not escape liability by contracting the administration of their prisons as some advocates supposedly claim. To some extent, this is a strawman argument since private vendors do not claim that contracting can *immunize* the government from legal liability. Prisoners in private facilities have at least as many avenues of civil redress as do their fellows in government-run prisons. Total liability, in other words, is not decreased.

It is possible, however, that contracting could reduce government's actual exposure to liability as opposed to its potential legal liability. That is, the financial damages likely to be suffered by government as a result of its legal liabilities can be reduced. Liability exposure can be reduced in several ways:

- by running prisons better and thus avoiding lawsuits
- by achieving certification, which greatly enhances the defense against lawsuits
- by carrying adequate insurance
- by agreements in which the contractor defends the government in court and indemnifies it against legal damages

- by developing extensive legal expertise and resources, both for preventing and for fighting lawsuits
- by settling quickly out of court, which is easier for private firms than for public agencies.

Accountability

Critics claim that contracting reduces accountability because private actors are insulated from the public and not subject to the same political controls as are government actors. The critics also charge that contracting diffuses responsibility: government and private actors can each blame the other when something goes wrong.

Proponents reply that contracting increases accountability because the government is more willing to monitor and control a contractor than it is to monitor and control itself. Contractors, just like their governmental counterparts, are accountable to the law, to governmental supervisors and, ultimately, to the voting public through the political system. In addition, they are accountable through a competitive market to certain forces not faced by government agencies; they are answerable to insurers, investors, stockholders, and competitors. As a mechanism of accountability and control, the force of market competition is unmatched.

The most obvious form of accountability in corrections, however, is legal accountability. If the rule of law can limit and constrain the power of the state, then surely it can hold a private firm at least equally accountable. Constitutional standards, for example, will apply equally to all prisons, whether run by government employees or by contractors.

Corruption

Critics contend that contracting invites corruption in the forms of favouritism, bid-rigging, conflict of interest, bribes, kick-backs, and so on. They point to contemporary examples in other areas of contracting and to historical examples of corruption in contracting for inmate labour.

The historical abuses came at a time when corruption and abuse was much more prevalent in the criminal justice system generally. For example, some states, without the aid of private contractors, ran their prisons as profit-making enterprises just

as ruthlessly and exploitatively as other states did with them. In today's political and legal environment, such extreme and flagrant corruption and abuse are very unlikely.

Political corruption is a corollary of government, not just of government contracting. The ingredient common to all instances of corruption is not private ownership but public power. Payroll padding, nepotism, cronyism, patronage, bribery, payoffs, featherbedding, dishonest budget inflation, conflicts of interest, misuse of public funds, links to organized crime, and many other kinds of corruption also occur within unions of public employees and within governmental units that provide services directly rather than through contracts.

Dependency

Critics worry that contractors will engage in "lowballing," that is, that they will obtain contracts by making unrealistically low bids. Then, when government becomes dependent, the contractor will be free to increase prices. Worse yet, the contractor may go bankrupt, leaving the government without any correctional capacity.

Market entry costs for single facilities (and especially for single, low-security facilities) are well within the reach of small businesses or groups of investors. As a new corporation, CCA was able to site, finance, build, and open a 350-bed prison within 7 months for US\$5 million. The US Corrections Corporation, founded by two men with an initial investment of US\$1.9 million, opened its first facility at a seminary purchased for US\$695,000. If this is all it takes to enter the market, it is well within the resources of numerous potential competitors (Logan 1990: 227).

Public agencies can guard against lowballing by evaluating proposed budgets for their realism rather than looking only for the lowest bidder. Also, regular rebidding of contracts can make lowballing a strategy too costly to pursue. No private company can raise its fees very high above a reasonable profit margin without inviting exposure and opposition by competitors. Competing contractors have the information, motivation, and organizational resources to control each others' prices to a much greater degree than the information, motivation, and resources of taxpayers can control government costs.

Dependence, as an objection to private prisons, has a self-defeating character. If dependence is a real problem, will the problem be solved if there are no private vendors? If a public service can only be supplied by government employees organized into unions, is that not also a form of dependence? To argue that private suppliers of a public service will not be sufficiently competitive is not a very good argument for public monopoly.

Conclusion

By way of summary, let me list the six most prominent areas in which I see potential advantages from the private operation of prisons and jails:

- cost containment
- speed and flexibility in expanding (or contracting) both physical capacity and programs
- effects on standards, expectations, and quality of operations
- indemnification and other protections against liability
- enhancement of justice by allowing supply to respond to demand instead of vice versa
- enhancement of accountability and due process through additional monitoring and independent review.

Perhaps, however, the most important function of private prisons is in providing a comparative yardstick against which to measure performance. How do we know if the government is running our prisons in the most humane, effective, and efficient manner possible? As with any service, the best test—and the best guarantee—of quality is competition and comparison.

Note

- 1 The word *nomenklatura* is a Russian term used to refer to the politically most privileged class under the Soviets, the “new class” beneficiaries of government. The reference is to the class of people whose livelihoods and interests are promoted by increasing expansion of the state. See Stern 1995.

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