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Private Prisons in the United States

Executive Summary

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Summary

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

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

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

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

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

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

Does Contracting for Prison Operations Save Money?

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

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

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

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

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

Our conclusion regarding costs and savings is that the few existing studies and other available data do not provide strong evidence of any general pattern. Some states may be willing to pay high prices for private imprisonment if they need the beds to solve short-term deficiencies. In other states, expenditures for contracting may indeed be lower than for direct public provision. However, the bottom line with respect to costs and savings is difficult to discern given the data and the assumptions made by the analysts. Drawing conclusions about the inherent superiority of one or the other mode of provision, based on a few studies, is premature.

Do Privately Operated Facilities Provide Better Services?

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

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

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

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

Legal Issues Relevant to Contracting for Imprisonment

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

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

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

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

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

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

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

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

Implications for Federal Prisons

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

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

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