ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
11026 HOUSE STATE AFFAIRS

A second remaining question concerns Plaintiff's rights in the event of an "adverse action." The statute defines adverse action to include any act against a consumer, such as offering a higher rate or refusing to offer any insurance, that is made in reliance on their credit report. 15 U.S.C. § 1681a(k)(1)(B)(I).[16] Clearly, such an action has occurred here. Defendants acknowledge access to the credit report or its results; they also used the report to take an adverse action. In such an event, Defendants must follow several procedures that include notifying the Plaintiff of her right to look at her credit report. 15 U.S.C. § 1681m(a). The Defendants did not do this. They say such action was not required because the "adverse action" requirement only applies to cases where the plaintiff is obtaining a quote on insurance, *existing or applied for*. 15 U.S.C. § 1681a(k)(1)(B)(I). In other words, Defendants say: (1) they can access her insurance without her permission because the permissible purpose exception does not require an application, but (2) they may treat her "adversely" as to her auto insurance without any notice to her, because she had not

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[16]The pertinent portions of 15 U.S.C. § 1681a(k) state:

(k) Adverse action.

(1) Actions included. The term "adverse action"--

(A) has the same meaning as in section 701(d)(6) of the Equal Credit Opportunity Act [15 USCS § 1691(d)(6)]; and

(B) means--

(I) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

(ii) a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee;

(iii) a denial or cancellation of, an increase in any charge for, or any other adverse or unfavorable change in the terms of, any license or benefit described in section 604(a)(3)(D) [15 USCS § 1681b(a)(3)(D)]; and

(iv) an action taken or determination that is--

(I) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, or in connection with a review of an account under section 604(a)(3)(F)(ii) [15 USCS § 1681b(a)(3)(F)(ii)]; and

(II) adverse to the interests of the consumer.

yet applied. In effect, they argue that the "adverse action" provision and the "permissible purpose" section of the FCRA do not fit perfectly together; one can access a report with a permissible purpose but is not subject to the adverse action requirements. Plaintiff highlights this incongruity to argue that Defendants can "have it both ways."

Admittedly, the scope of the "adverse action" provision is not presently and may never be directly at issue. However, both Plaintiff and Defendants used the "adverse action" provision to make their respective statutory arguments. Therefore, this discussion both supports and lends proper context to the Court's conclusions in Section II of this Memorandum. To accept Defendants' argument one must admit to a vast loophole in the statute which establishes a process quite contrary to the FCRA's essential purposes. The only logical recourse is to conclude that the language in § 1681 a(k)(1)(B)(I) does not precondition an insurance company's adverse action duties on the making of a formal written application. In fact, the Court finds ample support for this conclusion at this stage.

The legislative history of this section suggests that Defendants are wrong – the adverse action section is to be read broadly, "It is the Committee's intent that, whenever a consumer report is obtained for a permissible purpose under Section 604(a), any action taken based on that report that is adverse to the interests of the consumer triggers the adverse action notice requirements under section 615." H.R. Rep.No. 103-486 at 26 (1994); *see also* H.R. Rep. No. 102-692 at 21 (1992), and S. Rep. No. 103-209, at 8 (1993). Similarly, although not binding, the FTC has taken a similar positions in an informal opinion letter addressing a related question. *See* FTC Informal Staff Opinion Letter, Hanna A. Stires (Mar. 1, 2000) (adopting the aforemetioned legislative history and concluding that "[i]n sum, the legislative history indicates that the term 'adverse

action' should be read broadly in to include *any action* taken *whenever a credit report is obtained for a permissible purpose* that is 'adverse to the interests of the consumer'"). At this time, the Court also reads the statute in the same way.

IV.

Having concluded that Defendant AIG had a permissible purpose when it obtained Plaintiff's consumer credit report, the Court now considers, in light of Defendant's cross-motion for summary judgment on all counts, each claim made in Plaintiff's complaint. In reaching these conclusions, this Court's February 1, 2001 Order limiting the parties' discovery is particularly determinative. Up to this point, all discovery has focused on facts pertinent to AIG's compliance with the FCRA and its underwriting processes. Genuine issues of material fact remain and subsequent discovery will be necessary.

As to Counts I and II, the Court is finding that AIG did have a permissible purpose in obtaining Plaintiff's credit report, does not decide whether AIG negligently or willfully violated the FCRA's requirements. Many of AIG's actions were highly suspect, including its treatment of customers unwilling to provide their social security numbers[17] and the apparent adverse action that probably occurred. Plaintiff has generally plead violations of 15 U.S.C. §1681o and 15 U.S.C. § 1681n though it does not appear to press the "adverse action" aspect of these sections. Whether Plaintiff wants to pursue those other potential violations, whether she must amend her

[17] Discovery this far has shown that AIG does not appear to be entirely honest with its customers in collecting information. According to the AIG caller instructions, if an AIG representative is asked by the consumer why a social security number is necessary, the AIG representative is instructed to state that the customer files are all indexed by social security number. In truth, however, Donald Procopio, senior vice president of AIG, testified at his deposition that AIG requests the consumer's social security number in order to facilitate obtaining the consumer's credit report. (Procopio Depo. at 57.) Consistent with this finding, Wardzinski further stated at his deposition that AIG indexes its files according to customer ID numbers that bear no relationship to a customer's SSN. (Wardinzki Depo. at 150.)

complaint to do so and whether any other defenses would bar such claims are issues which remain unresolved. Therefore, the Court will retain Counts I and II of the Plaintiff's complaint at least for the present time.

In Count III, Plaintiff alleges that AIG obtained and used her report under false pretenses in violation of the FCRA. 15 U.S.C. § 1681q. It is well-established that if a person obtains and uses a consumer report pursuant to a valid permissible purpose authorized by the FCRA, 15 U.S.C. § 1681b, it cannot be liable under a false pretenses theory. *See Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987). Because the Court concludes AIG had a permissible purpose for obtaining the Plaintiff's credit report, Count III is dismissed.

At this stage, the Court also must deny Defendant's motion to dismiss Count VIII, Plaintiff's state law invasion of privacy claim. Although it is true this Court held in *McAnly v. Middleton & Reutlinger,* 77 F. Supp. 2d 810, 815 (W.D. Ky. 1999), that a state law privacy claim cannot be based on a lawful disclosure under the FCRA, that case involved a claim in which the disclosure was concomitantly found to be lawful. The Court has not yet made its final determination on that point in this case. Rather it has more narrowly concluded that AIG had a permissible purpose to obtain the report; whether or not the rest of its actions – in particular how it went about obtaining Plaintiff's social security number – were permissible the Court is not prepared to say.

The Court denies Defendants' motion to dismiss Count X, Plaintiff's allegation that AIG and MBNA's conduct constituted an unlawful civil conspiracy. Under Kentucky law, a civil conspiracy is a "corrupt or unlawful combination or agreement between two or more persons to do

by concerted action an unlawful act, or to do a lawful act by unlawful means." *McDonald v. Goodman*, 239 S.W.2d 97, 100 (Ky. 1951). AIG has admitted that it had a contractual relationship with MBNA and there is some question as to how or where AIG obtained the Plaintiff's social security number. The facts thus far create the possibility that subsequent discovery might reveal that AIG had a permissible purpose when it obtained Plaintiff's consumer report, but that it nevertheless obtained that report through an unlawful means.

Finally, Plaintiff at this stage has yet to identify any "Unknown Persons" who, as employees of AIG and MBNA, should be held personally liable for their actions. Therefore, Counts IV, V, VI, VII, and IX are also dismissed.

The Court will enter an order consistent with this Memorandum Opinion.

JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 3:00-CV-614(H)

KATHLEEN SCHARPF — PLAINTIFF

V.

AIG MARKETING, INC., et al. — DEFENDANTS

ORDER

The Court has considered the parties cross motions for summary judgment. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment as to liability on the grounds that AIG lacked a "permissible purpose" when it obtained her credit report, is DENIED. Counts I and II are retained pending resolution of other issues, including those discussed in the Memorandum Opinion.

IT IS FURTHER ORDERED that Defendants' motions for summary judgment are SUSTAINED IN PART and Count III is DISMISSED WITH PREJUDICE and Counts IV, V, VI, VII and IX are DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment is DENIED as to Counts VIII and X.

This ___ day of January, 2003.

JOHN G. HEYBURN II
CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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March 28, 2003

Representative Bruce Weyhrauch
Chairman, House State Affairs Committee
State Capitol, Room 102
Juneau, AK 99801-1182

Re: House Bill 47
House Bill 5

Dear Representative Weyhrauch:

I am writing to you on behalf of State Farm regarding House Bill 47 and House Bill 5. I understand there is going to be a time limit for individual testimony, so I thought it might be helpful to provide some additional background information. To that end, I am enclosing herewith a copy of a March 5, 2002, letter I sent to Senator Stevens of the Senate Labor and Commerce Committee relating to the credit scoring legislation pending before that Committee last year. I am also enclosing herewith a copy of a work draft we reached agreement on last year with the sponsor of Senate Bill 320. Finally, I am enclosing herewith a copy of a brochure that explains State Farm's underwriting model.

I appreciate the opportunity the Committee gave to me to testify earlier this year. I was asked a number of questions during that hearing about studies that might show the effect of the use of underwriting scores based on credit by various insurers. There are a number of studies that are in existence. These include a recent review of various studies by the American Academy of Actuaries and most recently a study done by the University of Texas. I have enclosed copies of both of these documents for your review, as well as the very thorough study done by James E. Monaghan. I am sure you are also aware of the study done by the Alaska Division of Insurance as well as the Washington Division of Insurance.

The study by the University of Texas was based on 175,647 separate auto policies, which were transferred to Choicepoint. Choicepoint then provided credit scores for this sample of polices. This study found "there is less than a 1 in 10,000 chance that the relationship observed between credit score and relative loss ratio could be due to chance alone." The charts contained in this report vividly demonstrate the relationship between credit score and loss.

You are probably also aware that the issue of credit based insurance scoring has been before the National Association of Insurance Commissioners. We understand the NAIC recently asked to American Academy of Actuaries to review the recent studies mentioned above.

We continue to believe this tool to be a very valuable one and urge the Committee to allow its use. Should there be any further information we can provide to you, please let us know.

Sincerely,

LESSMEIER & WINTERS

By: 
Michael L. Lessmeier

MLL/caf

Rep Weyhrauch-01-MLLwpd.wpd

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3/29

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1. **hrs_0431-0010c-0207.htm**

   Abstract: 431:10C-207 Discriminatory practices prohibited. No insurer shall base any standard or rating plan, in whole or in part, directly or indirectly, upon a person's race, creed, ethnic extraction, age, sex, length of driving experience, credit bureau rating, marital status, or physical handicap. [L 1987, c 347, pt of §2]

   http://www.capitol.hawaii.gov/hrscurrent/vol09_ch0431-0435e/hrs431/hrs_0431-0010c-0207.htm
   size 841 bytes

2. **HRS 0435- ANNOTATIONS**

   Abstract: HRS 0435- ANNOTATIONS Cross References For present provisions, see chapter 431, article 10B. INSURANCE LAW REVISION CORRESPONDING SECTION REFERENCE TABLE 1987) HRS section HRS section 1985 Replacement Acts 347, 348, 349 1986 Supplement 1987 Session Laws 294-1 431:10C-102 294-2 431:10C-103 294-3 43

   http://www.capitol.hawaii.gov/hrscurrent/vol09_ch0431-0435e/hrs435/hrs_0435-_anno.htm
   size 27414 bytes

3. **TITLE 24**

   Abstract: TITLE 24. INSURANCE Chapter 431 Insurance Code 431A Readability of Insurance Contracts-Repealed 431D Insurance Company Insolvency-Repealed 431F Hawaii Life and Disability Insurance Guaranty Association Act—Repealed 431H Insurance Information Protection Act-Repealed 431J Captive Insurance Companies-R

   http://www.capitol.hawaii.gov/hrscurrent/vol09_ch0431-0435e/hrs431/hrs_0431-.htm
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To: House State Affairs Committee, 1-907-465-2273
Representative Bruce Weyhrauch

From: Philip H. Mink, President
The Insurance Center, an Alaskan Corporation

RE: Public Hearing for HB 47 and HB 5
Insurance Discrimination by Credit Scoring

Thank you for allowing an open discussion on Credit Scoring. I have over 30 years of company underwriting, wholesale and Insurance Agent ownership experience. The last 21 years has been in Alaska, providing specialty products for the more difficult lines of business. I think a thumbnail presentation of the history behind Credit Scoring is important.

The Venice merchants sending ships through the Mediterranean Sea to open trade with the Far East began the concept during the middle ages. They would ban together a fleet to make the venture and distribute the profit between participants, including those that lost ships or cargo in the venture. Participants had to provide adequate crews, sea worthy vessels and trained captains.

Credit Scoring was carried through out Europe during the Renaissance. The Lloyds coffee house was a meeting place where financial interests met with merchants and underwriters to finance business ventures into the new world. They spread the exposure of loss among several participants, insuring no one financier would suffer catastrophic failure.

Today, Insurance consumers benefit from Credit Scoring. Insurance consumers that have good credit ratings get better insurance rates. They are more financially able to respond to maintenance and unforeseen events.

Eliminating insurance underwriting Credit Scoring is likened to attorneys being barred from discovery before trial or a banker not being able to review a credit report for a loan consideration. Insurance rates and premiums could level out, but only towards highest end of the spectrum, affecting all consumers adversely.

Please let the American Free Enterprise system work. Further regulation will only stifle insurance markets in a State that is already market poor.

Thank your for your time.

Subject: House Bills 5 & 47
Date: Wed, 26 Mar 2003 23:31:07 -0900
From: Ron Sexton <rksoldotna@gci.net>
To: Ginny Austerman <Ginny_Austerman@Legis.state.ak.us>

March 26, 2003

House Bills 5 & 47

Dear Fellow Alaskans:

I am opposed to any type of credit scoring for any insurance purposes. I have been told, by an agent, that he only gets objections on credit scoring from people with poor credit. That is definitely not my case! There are legal, personal and character issues involved.

The insurance companies, for a home owners policy, don't ask if you smoke, drink or do drugs. They don't ask for urine and blood samples. I was told that credit scoring is a "tool" that the insurance industry uses to write "better business". Well, the above questions could be "tools" for writing "better business" too and in the case of life insurance are used. These types of questions and verifications would show possible risk factors. I would do the above if asked but I will not give my SSN out to anyone that doesn't have a tax related need for it.

At the present time, I am required to give a lost history report. I have no problem with that. The insurance company can do a drivers report. They can do a personal interview and a inspection of my property that I want insured. If they want to check out other public sources of information they can go to the courthouse and check out small claims, civil and criminal records. They could even check the Permanent Fund records for claims against people who fail to meet their obligations. I think this is more then enough information for any company to do an evaluation.

Asking me to give my SSN, which is my private number for income tax purposes only, is an violation of my privacy and the law and in my opinion a conspiracy of the insurance industry to get access to information that has been collected by a third party with or without my knowledge. The fact that I must give my permission for them to use my number demonstrates that it is a private number and it should stay that way.

I urge you to pass a bill that will eliminate the need for credit scoring and thereby the need for a Social Security Number, for any type of insurance, whether for personal or business needs.

Sincerely,

Ron Sexton
Owner
Trinity Enterprises dba Trinity Greenhouse
P.O. Box 882
Soldotna, AK 99669
WK 907-262-9242
HM 907-262-4177

Subject: HB47 Important!
Date: Wed, 05 Feb 2003 11:41:32 -0900
From: Ron Sexton <rksoldotna@gci.net>
To: Representative_Bruce_Weyhrauch@legis.state.ak.us

To whom it may concern,

I need to express my concern about the insurance industry having the need to collect credit information, in order to price their insurance policies to potential customers. They do not ask for lost history reports from people who are shopping for new insurance coverage. They just seem interested in credit information and the red flags that information will bring up.

The discrimination that is taking place because of this policy is outrageous. I think this policy is two fold. First, people who have insurance will be forced to stay with coverage they have in order to keep insurance enforce without having to give up their personal information to shop around. Second, if you do allow a credit check, to find some reason to put people into a higher rating. If this were not so, why don't they ask for lost history reports? If you don't have any insurance history, isn't that in and of itself possible reason to increase the rate, until a track record is established.

In order to get a quote on coverage, they want your social security number to run the check. The Social Security Administration states "Prevent identity theft - protect your Social Security number", form #SSA-7005-SM-SI (10-2002). We have become so loose with giving this number out that we now face identity theft in our society in a big way.

I for one have never participated in any credit card offer. So what do you think my credit report would show? Some people have said to me how do you rent cars or get advanced room reservations. Just let me say " there is more than one way to skin a cat". My wife and I have no problem in living life without credit cards. The requirement of needing the social security number, for any other purpose than what it is mandated for, is use and abuse of our personal freedom.

I ask you this, how many times has an insurance agent been on your property to evaluate their risk in insuring your property? They do it sight unseen. I have lived in Alaska for 28 years and 26 of those years on the same property. I have never had an insurance agent on my property. They now want to use our credit information to see just what risk we are to them, while they sit in their office and drink coffee.

I encourage the passage of this bill. I would also recommend it include business insurance for the same reasons. My business property has had only one insurance representative on site in the 27 years of coverage. They are the current underwriters and have offer the best price and coverage and service over any other company we have had. They did not ask for any credit review!

Let us stand united on preserving our personal identity and freedoms. It is time to say enough, on information gathering.

Sincerely Submitted,

Ron Sexton

Alaska State Legislature
Representative Harry Crawford
Senator Kim Elton

www.akdemocrats.org

FOR IMMEDIATE RELEASE • February 9, 2002

CONTACT: Rep. Crawford (907) 465-3438
Sen. Elton (907) 465-4947
Actualities: (907) 465-5001

Elton, Crawford Bills Prohibit Discrimination in Insurance Rates

Bills ban use of credit score to rate auto and home insurance.

JUNEAU – Sen. Kim Elton (D-Juneau) and Rep. Harry Crawford (D-Anchorage) introduced bills to prohibit the use of credit scores in underwriting and rate setting for home and auto insurance.

The insurance industry began using credit scores in underwriting and rate-setting in Alaska in 1993. The industry claims there is a strong correlation between a consumer's credit score and the likelihood that the consumer will file a claim, but they won't explain why the correlation may exist. Credit scores are generated by third-party organizations that run a consumer's credit history through a secret formula. The credit score and the method of its generation are unavailable to both consumers and insurance regulators. This leaves insurance regulators without the knowledge they need to fulfill their statutory obligation to protect Alaska's consumers from discrimination.

"Credit scoring is bad business in Alaska," said Elton. "Why should an Alaskan who doesn't believe in buying on time, but who has a good driving record pay higher car insurance premiums? Why should a woman who divorces a bum but has a good driving record pay a lot more for car insurance? Why should a couple who is approved for a home mortgage not be approved for the insurance coverage necessary to purchase the house?"

"Self-employed workers, recent divorcees, and members of minority and religious groups can be denied insurance if a credit bureau scores them low," said Crawford. "Discrimination in any form is objectionable, but when it works economic hardships on groups and individuals without explanation, we have to put a stop to it."

Crawford also noted that many older Alaskans prefer to pay cash, saying, "Our seniors aren't an insurance risk simply because they don't choose to borrow. How can you defend a rate-setting method that says they are?"

Credit scoring has been a topic of debate across the nation, and research in other jurisdictions has shown clear evidence that the method is discriminatory. One report, done by the Maryland division of insurance, showed that credit scoring resulted in low-income families paying up to twice as much for insurance premiums, regardless of claim history.

- 30 -

seattletimes.com
The Seattle Times

Tuesday, January 29, 2002, 12:00 a.m. Pacific

Kreidler's weak case to limit 'credit scoring'

Insurance Commissioner Mike Kreidler proposes to restrict the use of "credit scoring" by insurance companies. He has made an interesting argument but has not proved his case.

It was in the early 1990s that insurance companies found a correlation between people's use of credit and their claims on auto and homeowners' policies. Progressive Insurance, a California company, assigned policyholders to 18 credit scores — a formula that considers whether a person is a recent bankrupt, late in payments, has opened an unusual number of credit lines, etc. The group with the worst score had claims about two-and-a-half times greater than the group with the best score.

Allstate also found a strong correlation with credit and claims.

Are they saying they can predict car accidents by looking at how people manage their credit cards? Yes. They say it and are doing it. The question is, should it be restricted?

Commissioner Kreidler thinks no one should be denied coverage on account of a poor credit score, and that it should affect rates no more than 20 percent. Why? Because he has seen a number of cases that he thought unfair. One person went bankrupt because of a medical crisis. Another, an immigrant from a culture without bank cards, didn't have credit.

Medical crises may be insured against. People who move here are presumed to learn our ways.

If car insurers were proposing for the first time to use the driving record, there would be hard-luck stories too: the story of the undeserved ticket; the story of the accident that was the other guy's fault. And on the use of age and gender, countless parents have thought, "My son is not one of these hot-rod drivers. So he's 16. Should it cost *that much?"*

If the state were to mandate only a 20-percent extra premium for 16-year-old boys, whose premium would have to be raised to pay the claims? That is the problem with the 20-percent cap Kreidler proposes: For every nickel it saves A, it will penalize B.

Kreidler worries that a high rate will cause the poor to drop their coverage. But, according to the companies, prudence is not related to income. Some of the poor benefit under the credit scoring and some don't.

The other thing that disturbs Kreidler about credit scoring is that no one can say why it works. Ask the insurers to explain why men have more car accidents than women. They don't know. Their interest is in the fact. So, too, with credit. It is a fact that people with poor credit are poor risks for wrecked cars.

If our insurance commissioner would ask the companies to ignore their discovery, he needs a stronger case than this.

Subject: USATODAY.com - Bad credit boosts insurance costs
Date: Tue, 04 Mar 2003 10:22:07 -0900
From: Jay Hardenbrook <Jay_Hardenbrook@legis.state.ak.us>
To: Ginny_Austerman@legis.state.ak.us

Just a little something extra to add to the packet. I tried to send it to you yesterday, but wasnt' sure if you got it with all of the email problems.

Thanks,
Jay

http://www.usatoday.com/money/perfi/general/2002-03-12-insurance.htm

Money

03/11/2002 - Updated 11:20 PM ET

Bad credit boosts insurance costs

By Thomas A. Fogarty, USA TODAY

Credit trouble doesn't just make it hard to get a loan. For many, it's increasing the cost of insurance.

Two dozen state legislatures are looking at curbing the growing practice of using a customer's credit history to predict insurance claims. Nearly every auto insurer in the USA has started to assign a score to a customer's credit history. Practices vary, but the score is used in deciding to issue a policy, to renew it, or to price it. Credit scoring is becoming the norm for home insurers, too. The Washington legislature this month became the first to significantly restrict credit scoring for insurance.

Political backlash is building because of cases like that of Larry Jackson and his wife, Elizabeth Alexander, of Kirkland, Wash. Last fall, their auto insurer raised their rates 40%. The bump followed six years of accident-free coverage and timely premium payments. But the insurer decided to factor credit scores into pricing decisions; that brought up a bankruptcy filing from seven years ago.

"My wife and I are careful drivers, and our credit has not been an issue for a number of years," says Jackson, 45, a mining engineer.

Not in dispute is the ability of credit scores to predict broadly the

likelihood of future claims by a certain type of customer.

Credit scores work in insurance calculations, says Lamont Boyd of credit-scoring firm Fair Isaac, because "the vast majority of people tend to do things in a certain way." Thus, he says, those who manage their credit well also tend to leave home early enough that they don't have to drive recklessly to get to work on time.

Joe Annotti, spokesman for the National Association of Independent Insurers, says banning the use of credit scores by insurers could increase rates for good credit risks because insurers could no longer distinguish good risks from bad.

3/29

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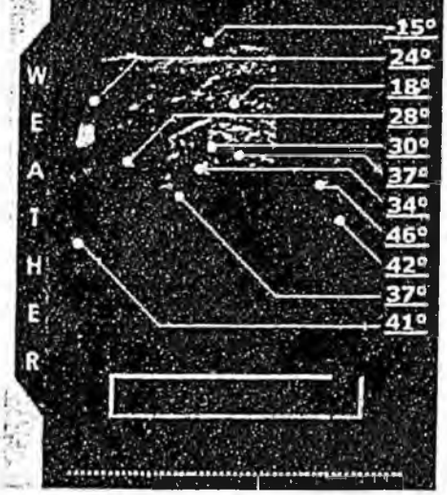

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viewpoint

Web posted Monday, February 24, 2003

Credit scoring powerful tool for predicting risky behavior

By Devery Prince
For the Journal

Centuries ago, anyone with a new idea that went against popular belief was shunned by society or its leaders. It didn't matter if they could prove their idea; the fact that it went against the beliefs of th day made it detestable to those who wanted to maintain the status quo. A well-known example is Galileo, who was sentenced to prisor for writing that the earth is not the center of the universe.

Today, some members of the state legislature appear ready to eliminate insurance companies' ability to use credit information for insurance scoring simply because they don't understand it. The fac is numerous studies have proven that using certain information contained in credit reports is an accurate predictor of insurance losses.

Two of the largest statistical consulting companies, Tilinghast-Towers, Perrin and Fair, Isaac have both published studi showing a statistically significant correlation between credit scores and insurance losses. Studies such as these employ statistical analysis methods similar to those used by universities, scholars, laboratories, businesses and a host of other groups for their research.

If you discredit the studies proving the accuracy of the use of credi scoring, then millions of other studies must be invalidated because they all depend on similar mathematical models to determine

relationships between factors. Opponents of the use of credit have yet to produce a single study that suggests that credit history is no a valid predictor of insurance losses.

Instead of looking at the compiled data and research on millions of insurance customers, the critics endlessly repeat statements that have no credible evidence or studies to back them up. The volume evidence compiled by insurance and independent research companies overwhelms the anecdotal reports being fed to the unknowing public by those opposed to credit scoring.

The bottom line is that the insurance industry wants to be able to use the tools that will allow customers to pay premiums that accurately reflect their risk of loss. Just like factors such as age, marital status, gender, driving record, miles driven and car type, a insurance score based on credit has proven to be very accurate in predicting the likelihood of insurance losses. If these weren't valid predictors, the insurance industry wouldn't use them.

Credit is, as proven by studies and industry data, the single most powerful predictor of future loss and aids the industry in fairly and accurately pricing insurance for consumers.

Banning the use of credit will take away the ability of insurance companies to identify responsible customers who should be rewarded with lower premiums. Instead, those responsible customers will have to pay higher premiums to subsidize those wh are more likely to incur a loss.

Is it fair to use unproven accusations against the use of credit simp because someone doesn't understand it or because it is new? The unfortunate victims of this campaign will be those whose good insurance scores show that they are less likely to incur losses, and yet will be forced to pay more because this accurate factor cannot considered.

Make no mistake: Someone will pay for the costs. The difference is that some legislators want one group to subsidize another group in the form of higher premiums, and insurance companies just want t reward those who are less likely to incur losses.

Devery Prince is the principal of Anchorage-based Devery Prince Agency, which provides insurance to individuals and businesses across Alaska. He can be reached at 907-279-9000.

Anchorage Daily News - Published Feb. 10, 03 3/29

Credit scoring is a useful tool for insurance companies; don't ban it

As an Alaska insurance agent, I am very concerned about proposed legislation that would ban the use of credit for setting insurance rates. Those who question credit's validity need only to look at the numerous studies that prove its accuracy in identifying people who should receive discounts because they will have fewer losses.

Your editorial of Jan. 26 brings up some valid points on the use of credit for insurance scoring, such as medical catastrophes. These issues can be addressed with some reasonable limitations. However, the philosophy of "I don't like it or understand it, so let's ban it" ignores the irrefutable fact that it is accurate and helps to promote healthy competition in the insurance industry, something Alaska desperately needs.

Let's not allow the government to pass another law to restrict business, especially a law that will prevent insurance companies from identifying people who should be rewarded for responsible behavior. If any of these bills pass, those who will suffer will be consumers and small-business owners like me.

-- Devery Prince

Anchorage

Credit scoring rewards consumers who will incur fewer losses

As an insurance agent who takes pride in providing my customers with outstanding service and fair rates, I was disappointed by your editorial (Credit scoring: either reform or abolish this insurance shortcut," Jan. 26) endorsing legislation banning the use of credit to set insurance rates.

The reason credit is a predictor of risk is not "magic." Numerous scientifically designed studies and data from the industry have proven the connection between a person's credit history and the number of losses they will incur. The way a person cares for their finances can reflect the way they maintain their homes, and taking financial risks can mirror risky behavior in activities such as driving. Why would the industry use it if it wasn't accurate?

Credit scoring will allow an insurance company to reward consumers who will have fewer losses with lower rates. If we have found an accurate predictor so we can offer those discounts to the majority of our customers, why should it be taken away by the Legislature? That seems highly unfair to those people who are responsible and deserve good insurance rates. People with responsible behavior should not have to subsidize the insurance rates of those who are irresponsible.

-- Stan Tebow

Palmer

Begich is a candidate for change after nine years of stagnation

It's refreshing to see Mark Begich is running for mayor. I was afraid he'd sit this race out and let the two other candidates go to battle.

OPINIONS

COMPASS: Points of view from the community

By RICHARD L. LOWELLEllen Goodman
comment
(Published: February 24, 2003)

Insurance crisis demands attention

As a veteran insurance broker with 26 years of experience in Alaska, I am alarmed by the never-before-seen insurance crisis in our state with regard to the large number of personal-lines companies ceasing to do business in Alaska. My fear is that, if this trend continues, the effects will be disastrous for consumers, our businesses and, ultimately, our economy. That is why it is imperative that we examine what the Legislature is proposing very closely while there is still time to make corrections.

As evidenced by three bills in the Legislature, a recent concern is the use of credit scoring to obtain a proper insurance rate. While all of us know of isolated circumstances where credit scoring may have had a negative impact on an individual consumer, the hard reality is that if the Legislature does not allow insurance companies to use some sort of credit scoring as a tool in conjunction with other guidelines, they will cease doing business in Alaska. This will reduce even further the number of insurance companies operating here.

The benefit to consumers of the use of credit is that those who will have fewer losses can be more easily identified and rewarded with discounts. Credit is another predictive factor such as age, marital status, gender and type of car. Good drivers should not be made to unfairly subsidize poor drivers.

I believe that a compromise is needed between the insurance companies and the Alaska Division of Insurance. It is critical to ensure that both consumers and insurance companies are being protected and treated fairly. The past few years have been extremely difficult within the tumultuous insurance industry. Alaska has lost many national companies representing home and auto including Kemper, Fireman's Fund, AAA, United Pacific, Deerbrook, InsurQuest, Colonial, Windsor, Atlanta Casualty, Industrial Indemnity, Alaska Insurance Co. and Continental. In particular, the loss of two major home and auto companies, Fireman's Fund and Kemper, were especially difficult for the market. Fortunately, many of these customers went with Safeco, a company that uses credit scoring in addition to its other underwriting guidelines.

Another major concern is the hastiness of this legislation at a time when a new director of insurance is being selected. Ideally, the new director should

be given time to get situated into the new position and work toward a compromise between the insurance companies and the Legislature.

The proposed bills to ban the use of credit scoring are very shortsighted. We need healthy insurance competition in Alaska. Banning the use of credit scoring will serve only to drive more companies from our state as well as take away a valuable, proven tool to set rates fairly. The Legislature should withhold any action until the new director of insurance achieves a compromise that benefits everyone.

Richard L. Lowell is an independent insurance broker with Ribelin Lowell and Co. in Anchorage.

Subject: Anchorage Daily News | Opinion
Date: Tue, 28 Jan 2003 08:01:46 -0900
From: Jay Hardenbrook <Jay_Hardenbrook@legis.state.ak.us>
To: Ginny_Austerman@legis.state.ak.us

Just a little something extra to add to the bill packet on HB 5.

Thanks,
Jay

http://www.adn.com/opinion/story/2522259p-2574956c.html

OPINIONS

Opinion

Credit scoring

Either reform or abolish this insurance shortcut

(Published: January 26, 2003)

Insurance companies love the practice of credit scoring because it's cheap and easy. By some magic known only to actuarial wizards, a person's credit records can be converted into a number that companies find useful to decide whether to insure a person or how much to charge him. No need to spend a lot of time tracking down motor vehicle files, checking property records or evaluating other information that directly bears on what kind of risk the applicant poses.

And if there is no logical connection between a person's credit history and the odds she will make auto or home insurance claims? No problem. It's magic, but it works.

Except that it doesn't always.

Some people with good driving records get socked with big rate increases because of what's in their credit file. Some people with good credit but bad driving records get lower rates they don't deserve.

Some people have less than perfect credit records for reasons beyond their control. They may have suffered a medical catastrophe. A recent divorce may have scrambled their finances. An angry ex-spouse may be withholding child support payments.

And the whole exercise of credit scoring is premised on the assumption that

what is in a person's credit file is accurate. Many an Alaskan can testify to the contrary.

Credit scoring has drawn plenty of criticism, even from inside the insurance industry. The National Association of Professional Allstate Agents has condemned it on multiple grounds. The methodology is secret, with no oversight by state insurance commissioners. Credit scores can change frequently, calling their reliability into question. Noting the impact it has on minorities, the poor, senior citizens and others who don't use much credit, the group calls credit scoring "a new method of redlining."

Anchorage state Sen. John Cowdery, R-Lower Hillside, is leading the charge to ban credit scoring in Alaska. Hardly an advocate of big government, he knows first hand from his daughter's experience how credit scoring can punish someone with a clean driving record. He's joined by colleagues from both ends of the spectrum: conservative Republican Fred Dyson of Eagle River and Democrats Kim Elton of Juneau and Gretchen Guess and Johnny Ellis of Anchorage.

At minimum, some reforms are essential. Exclusive reliance on credit scores should be banned. Customers must have a way to make sure their credit records are accurate and get refunds if errors cause them to be overcharged for insurance. Those with little credit history should not be penalized for it. State insurance regulators must be able to scrutinize the mystery formulas so they can judge how appropriate the process is.

By the time insurance companies comply with reasonable conditions like these, credit scoring may no longer be such a cheap and easy way to decide coverage and set rates. If insurance companies aren't willing to mend the practice of credit scoring, though, the Legislature should end it altogether.

Credit scoring issue may drive into Legislature

RECORD: Opponents charge discrimination while insurance companies call it a valuable tool.

By Cathy Brown
The Associated Press

(Published: January 14, 2003)

Juneau -- When state Sen. John Cowdery's daughter's insurance rates skyrocketed after she got a new truck last year, he was outraged.

He said his daughter had a clean driving record but the insurance company jacked up her premiums because of her credit score.

As chairman of the Senate Transportation Committee last year, Cowdery was in a position to do something about it. He introduced legislation to ban the use of credit scoring in setting insurance rates.

The bill did not make it through the Legislature last year, but Cowdery, R-Anchorage, is introducing the measure again. He's co-sponsoring it with Sen. Kim Elton, D-Juneau.

Reps. Harry Crawford, D-Anchorage, and Mike Chenault, R-Nikiski, are introducing similar bills in the House. The legislative session starts Jan. 21.

The lawmakers say the practice unfairly discriminates against people who may be good insurance risks, despite not having great credit scores.

The insurance industry argues, however, that there is a statistical correlation between bad credit scores and higher insurance risks and that not using the scores would penalize people who are a lower risk.

After Cowdery's daughter's case prompted him to investigate credit scoring, Cowdery said, he began hearing from other people whose rates had risen because of the practice.

"People came out of the woodwork talking about this," Cowdery said.

The use of credit scoring has become increasingly common in the insurance industry and about two dozen states considered limiting it last year, Elton said. Washington state passed a law restricting the practice.

Elton said credit scoring can unfairly discriminate against people who may have poor credit for reasons unrelated to the home they own or their driving habits.

Minorities, rural residents, senior citizens, and groups that for religious reasons do not believe in using credit are especially at risk, Elton said.

"For example, in rural Alaska where you have seasonal employment, you often deal with a grocery store kind of off the cuff, and you get carried until employment happens the next season," Elton said. Also at risk are people overwhelmed by high medical bills, he said.

Nicole Mahrt, a spokeswoman for American Insurance Association, defended the practice. Insurance companies do still use traditional factors, such as driving history and age, to set rates, but they've found credit history is also useful.

"It statistically is very effective in predicting losses," she said. "So essentially it helps people that are a better risk not subsidize those that are higher risks."

Insurance companies can account for factors that would unfairly brand someone a bad risk, such as those who never buy on credit, and look for other information in setting their rates, Mahrt said.

Also, the people who develop the models for insurance companies are trying to find a way to pull medical bills out of the formula so a serious illness does not unfairly push up auto and homeowners insurance rates, Mahrt said.

Different insurance companies give more weight to some credit factors than others, so consumers can shop around if they do not like the rates they are quoted, she added.

Elton said while there may be a statistical correlation between credit risk and insurance claims, in practice using credit scores can lead to bizarre outcomes.

An insurance agent relayed an anecdote about a person convicted of DWI paying less for insurance than a person with a bad credit score, though both drove identical vehicles, Elton said.

Elton said he believes the legislation has a good chance of passing this year because supporters began educating their colleagues about it last year.

HB

52

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 21, 2003 **FURTHER REFERRALS: Judiciary**

Date of Committee Action: 2/11/03

The STATE AFFAIRS Committee considered: **HB 52**

HOUSE BILL NO. 52 **SEX CRIME AND PORNOGRAPHY FORFEITURES**

"An Act relating to the forfeiture of property used to possess or distribute child pornography, to commit indecent viewing or photography, to commit a sex offense, or to solicit the commission of, attempt to commit, or conspire to commit possession or distribution of child pornography, indecent viewing or photography, or a sexual offense."

Recommends it be replaced with [ ] HCS *or* **[ ] CS** *for* _____(_____)
*For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR*_____ [ ] Same Title [ ] New Title

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent _____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LAA
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
PS				✓
Admin				✓

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
[signature]	Gruenberg	✓			
[signature]	SEATON	✓			
[signature]	Holm	✓			
[signature]	LYNN	X			
[signature]	Dahlstrom	X			
[signature]	Berkowitz				✓
Chair: [signature]	Meyerauch	X			
Chair:					

Alaska State Legislature

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Representative Lesil McGuire

Chair, Judiciary Committee

House Bill 52
"An Act relating to the forfeiture of property used to possess or distribute child pornography"

Sponsor Statement and Sectional Analysis

While providing instant access to useful and valuable information for business and academic research, the expansion of the Internet and corresponding development of computer technology have also created an environment in which new types of criminal enterprise are flourishing. Perhaps the most pernicious and predatory are the ever-increasing crimes against children.

It is becoming far more common for pedophiles to seek new victims through on-line chatrooms and email and for child pornography profiteers to use these technologies as a means to distribute their materials. HB 52 will provide the state courts and law enforcement agencies another tool to combat these sexual predators by giving the courts additional punitive sentencing options and, in turn, awarding forfeited computer technology back to law enforcement agencies for ongoing monitoring operations.

HB 52 will make it possible for law enforcement to stay on top of this rapidly changing industry without spending more government dollars. Advances in technology seem to happen on an almost daily basis, and new technology can frequently outperform previous models. This creates greater restrictions for police detection and monitoring operations thus leaving them at a disadvantage. In order for law enforcement to effectively combat computer crime, they must have access to the necessary hardware.

There are forfeiture laws in place across the country and at the federal level. Several other states already have similar laws on the books relating to the forfeiture of computers used in sex crimes. The use of computers in the commission of sex crimes is a national problem, and Alaska can look toward other states' laws in this area to draw realistic conclusions about the likely impact here in our own state.

HB 52 will amend AS 11.41 and AS 11.61, respectively, by adding the necessary statutory language for the forfeiture of hardware used either in a sexual offense or in indecent viewing or photography or child pornography.

Alaska State Legislature

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Representative Lesil McGuire

Chair, Judiciary Committee

HB 52 – Sectional Analysis

Section 1. Provides legislative intent that in cases where the owner of the forfeited property is innocent of the crime, their property is returned to them following existing procedure and as the courts deem reasonable.

Section 2. Adds a new section that authorizes forfeiture of property, specifically electronic equipment as defined in the section, used to aid in the commission of a sexual offense under AS 11.41.410 – 11.41.470 including inchoate forms of those sexual offenses.

Section 3. Adds a new section that authorizes forfeiture of property, specifically electronic equipment as defined in the section, used to aid in the commission of indecent photography or child pornography under AS 11.61.123 – 11.61.127 including inchoate forms of those offenses.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 52
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: An Act related to forfeiture of property used in sexual offense
BRU: Legal and Advocacy Services
Component: Public Defender Agency

Sponsor: Rep. McGuire
Requester: (H) STA
Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill would have some effect on Agency operations, simply because if the state requests forfeiture, it will make the sentencing more complicated in some cases. However we do not anticipate much of an impact.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 2/11/03 7:07 AM

Approved by: Mike Miller, Commissioner
Date 2/11/2003
Agency: Department of Administration

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 52
() Publish Date:

Revision Date/Time (Note if correction): N/A
Dept. Affected: Public Safety

Title: An act relating to the forfeiture of property used to possess or distribute child pornography....
BRU: AST Detachment
Component: AST Detachment

Sponsor: Representative McGuire
Requester: House State Affairs
Component No.: 2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

No fiscal impact to the department.

Prepared by: Lieutenant Matthew Leveque
Phone 907 269-0390
Division: Alaska State Troopers
Date/Time 2/11/03 8:09 AM

Approved by: William Tandeske, Commissioner
Date 2/11/2003
Agency: Department of Public Safety

(Revised 9/2002 OMB)

George P. Wuerch,
Mayor

Municipality of Anchorage

Anchorage Police Department
Walt Monegan, Chief

Anchorage All-America City 2002

February 6, 2003

Representative Lesil McGuire, Chair
House Judiciary Committee
716 W. 4th Avenue, Suite 300
Anchorage, AK 99501-2133

Dear Representative McGuire:

This letter is written in support of HB 52, *An Act relating to the forfeiture of property used to possess or distribute child pornography, to commit indecent viewing or photography, to commit a sex offense, or to solicit the commission of, attempt to commit, or conspire to commit possession or distribution of child pornography, indecent viewing or photography, or a sexual offense.*

Law enforcement agencies are often required to return equipment used in these crimes to the perpetrator or to another person whom the perpetrator has designated. Many of these items have been specially designed or adapted for no other purpose than to commit specific criminal acts. This equipment is generally costly and sometimes hard to obtain.

We feel it is necessary and appropriate to deprive those convicted of sexual crimes of the means to commit them again or allow others to use them for the same purpose. We therefore offer our support for House Bill 52. Thank you for bringing this legislation forward.

Sincerely,

William Miller
Deputy Chief

Subject: HB 52
Date: Fri, 07 Feb 2003 17:35:27 -0500
From: Polarcop@netscape.net (Alaska FORCES Task Force)
To: heath_hilyard@legis.state.ak.us

Heath,
Sorry about the delay but I have been swamped and am pretty much alone using old equipment trying to keep up with the fastest changing landscape seen by man. I will basically refer to the comments made in my previous letters and follow this theme:

I run a task force representing the digital evidence recovery and computer crime interests of law enforment agencies throughout the interior. Digital evidence in cases of sexual crimes has proven to be extremely valuable in obtaining convictions. The sentencing of convicted sex offenders should include the loss of the instruments of the crime. To return a computer to a sex offender who used it to stalk, harass, threaten and assault a person is not only morally reprehensible but is tantamount to encouraging it to happen again. We forfeit cars used by drunken drivers, wepaons and almost every other instrumentality but computers and digital devices have been returned for unknown reasons.

The victims message should be that the state will do everything in it's power to prevent it from happening again. The public message should be that if you choose to be a sex offender, we choose to punish you by taking anything you use to be one. The offender message will be that you will have to go out and buy another camera, computer or other device to offend again. It won't get cheaper.

The forfeited equipment can be used by investigators to further process digital evidence, conduct investigations or aid in law enforcement efforts in some way. Even if they are donated to charity, they will not be used by the offender again.

It is for the children, victims of any gender, and the good people of the state.

Sincerely,

Alaska FORCES Task Force
Marc Poeschel, Coordinator
http://www.akforces.uaf.edu/

Subject: [Fwd: Regarding House Bill 52]
Date: Mon, 10 Feb 2003 10:25:48 -0900
From: Representative Lesil McGuire <Representative_Lesil_McGuire@legis.state.ak.us>
Organization: Alaska State Legislature
To: Heath Hilyard <Heath_Hilyard@legis.state.ak.us>

Subject: Regarding House Bill 52
Date: Sun, 2 Feb 2003 18:14:07 -0900
From: "Ben Granade" <bgranade@customcpu.com>
To: <Representative_Bruce_Weyhrauch@legis.state.ak.us>,
<Representative_Lesil_McGuire@legis.state.ak.us>
CC: <Representative_Pete_Kott@legis.state.ak.us>

February 2, 2003

Hon. Bruce Weyhrauch
Chairman, House State Affairs Committee

Hon. Lesil McGuire
Chairwoman, House Judiciary Committee

regarding: House Bill 52

Dear Chairman Weyhrauch and Chairwoman McGuire:

The Naturist Action Committee (NAC) is the political arm of The Naturist Society (TNS), a membership organization that represents the interests of many thousands of naturists across North America, including many in the state of Alaska. The Naturist Action Committee is strongly opposed to House Bill 52, which will be considered by the Judiciary Committee and the House State Affairs Committee of the Alaska House of Representatives.

Naturists are skinny dippers and nude sunbathers who believe there is nothing shameful about the unclothed human body. Naturism is a non-sexual family oriented activity that includes children and adults. It is a formal name for an activity that has been an informal tradition in Alaska and elsewhere for years and years.

House Bill 52 represents itself as addressing sex criminals. However, in its present form it would clearly punish skinny dippers as well, allowing the forfeiture of "property used to aid'' the commission of the non-sexual activity of skinny dipping and other instances of mere nudity that are absent sexual context. The Naturist Action Committee, on behalf of the membership of TNS, strongly opposes House Bill 52 in its present form on the simple grounds that by adding the forfeiture of property as a punishment for skinny dipping, the punishment no longer fits the crime.

Please consider the following table, which summarizes the sections addressed by HR 52 in Chapter 11.41 of the Alaska Statutes:

11.41.410	Sexual assault in the first degree	felony, unclassified
11.41.420	Sexual assault in the second degree	felony, class B
11.41.425	Sexual assault in the third degree	felony, class C
11.41.427	Sexual assault in the fourth degree	misdemeanor,

class A
11.41.434 Sexual abuse of a minor, first degree felony, unclassified
11.41.436 Sexual abuse of a minor, second degree felony, class B
11.41.438 Sexual abuse of a minor, third degree felony, class C
11.41.440 Sexual abuse of a minor, fourth degree misdemeanor, class A
11.41.445 Incest
felony, class C
11.41.455 Unlawful exploitation of a minor
felony, class B
11.41.458 Indecent exposure, first degree
felony, class C
11.41.460 Indecent exposure, second degree misdemeanor,
class B *
* class A only if in the presence of a person under 16 years of age

Of the dozen sections of Chapter 11.41 identified by HB 52 as candidates for forfeitures, only 11.41.460 does not describe activity with sexual content. In a list dominated by felonies, the base offense of section 11 .41.460 is a class B misdemeanor, described by the term "reckless", but not by the term "sexual."

Tossing skinny dipping, nude sunbathing and other non-sexual nudity into the mix with the genuine sexual offenses for which property forfeiture would be allowed would surely make very bad law for the State of Alaska. If HB 52 were to be passed into law, naturists would have no choice other than to challenge it in court. We ask you to report HB 52 unfavorably from the committee.

As an alternative, we suggest that the bill be amended to exclude section 11.41.460, Indecent exposure in the second degree. Such a revision could be accomplished by a simple committee amendment affecting only two lines of the bill, as follows:

07 * Section 1. AS 11.41 is amended by adding a new section to read:
08 Sec. 11.41.468. Forfeiture of property used in sexual offense.
Property
09 used to aid a violation of AS 11.41.410 - 11.41.470 11.41.458 or to
aid the solicitation of,
10 attempt to commit, or conspiracy to commit a violation of AS
11.41.410 - 11.41.470 11.41.458
11 may be forfeited to the state upon the conviction of the offender.

The effect of such an amendment would be to place the emphasis of HB 52 where it was originally intended to be, while avoiding a disproportionate penalty on a clearly non-sexual activity. On behalf of naturists throughout Alaska and elsewhere, I thank you in advance for your thoughtful consideration.

Respectfully,

Ben T Granade
Area Representative, Alaska
Naturist Action Committee
18335 McCrary Rd.
Eagle River, AK 99577
(907) 696-5831

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FORFEITURE IS REASONABLE, AND IT WORKS

Stefan D. Cassella*

Asset forfeiture has become one of the most powerful and important tools that federal law enforcement can employ against all manner of criminals and criminal organizations -- from drug dealers to terrorists to white collar criminals who prey on the vulnerable for financial gain. Derived from the ancient practice of forfeiting vessels and contraband in Customs and Admiralty cases, forfeiture statutes are now found throughout the federal criminal code.

Why do forfeiture?

Federal law enforcement agencies use the forfeiture laws for a variety of reasons, both time-honored and new. Like the statutes the First Congress enacted in 1789, the modern laws allow the government to seize contraband -- property that is simply unlawful to possess, like illegal drugs, unregistered machine guns, pornographic materials, smuggled goods and counterfeit money.

Forfeiture is also used to abate nuisances and to take the instrumentalities of crime out of circulation. For example, if drug dealers are using a "crack house" to sell drugs to children as they pass by on the way to school, the building is a danger to the health and safety of the neighborhood. Under the forfeiture laws, we can shut it down. If a boat or truck is being used to smuggle illegal aliens across the border, we can forfeit the vessel or vehicle to prevent its use time and again for the same purpose. The same is true for an airplane used to fly cocaine from Peru into Southern California, or a printing press used to mint phony $100 bills.

The government also uses forfeiture to take the profit out of crime, and to return property to victims. No one has the right to retain the money gained from bribery, extortion, illegal gambling, or drug dealing. With the forfeiture laws, we can separate the criminal from his profits -- and any property traceable to it -- thus removing the incentive others may have to commit similar crimes tomorrow. And if the crime is one that has victims -- like carjacking or fraud -- we can use the forfeiture laws to recover the property and restore it to the owners far more effectively than the restitution statutes permit.

Finally, forfeiture undeniably provides both a deterrent against crime and as a measure of punishment for the criminal. Many criminals fear the loss of their vacation homes, fancy cars, businesses and bloated bank accounts far more than the prospect of a jail sentence. In fact, in many cases, prosecution and incarceration are not needed to achieve the ends of justice. Not every criminal act must be answered with the slam of the jail cell door. Sometimes, return of the property to the victim and forfeiture of the means by which the crime was committed will suffice to ensure that the community is compensated and protected and the criminal is punished.

The parade of horribles

The expansion of forfeiture into all of these areas has, of course, been controversial. When laws that were designed to seize pirate ships from privateers are applied, over the course of a decade, to the seizure of homes, cars, businesses and bank accounts, there are a lot of issues to sort out. How do we protect innocent property owners? What procedures afford due process? When does forfeiture go too far, in violation of the Excessive Fines Clause of the Eighth Amendment? The ten forfeiture cases that the Supreme Court has had on its docket in the past five terms are part of this sorting out process. There are certain to be more; and Congress will need to pass legislation to fill in many of the loopholes.

An informed debate on these issues is welcome. The debate is not informed, however, if it is muddled by the misconceptions and plain old-fashioned misstatements that seem to pop up in every article critical of asset forfeiture. Roger Pilon's article, containing the usual parade of horribles, is a good example.

Once again we are told that forfeiture is based on an absurd legal "fiction" that the property is guilty of the crime, which implies that property can be forfeited without proof that a crime was committed by a real live person. We're told that the government can seize property "almost at will," i.e. without due process, and that innocent people find the process so unfair that they walk away from their property without filing claims. And we're told that even when they do file claims, innocent owners just don't have any rights. Let's see if we can't inject a little truth and understanding into the debate on these points.

The legal "fiction"

There are three types of forfeiture under federal law: administrative forfeiture, civil judicial forfeiture, and criminal forfeiture. An administrative forfeiture is essentially a default proceeding. It occurs when property is seized and no one files a claim contesting the forfeiture. By definition, all administrative forfeitures are uncontested. Between 80 (eighty) and 85 (eighty-five) percent of all forfeitures handled by the Department of Justice fall into this category.

If someone does file a claim to the property, the government has a choice (assuming Congress has provided both options by statute). It can file a civil complaint against the property in district court, thus commencing a civil judicial forfeiture; or it can include a forfeiture count in the indictment in a criminal case, which sets the stage for a criminal forfeiture. In 1995, the Justice Department began aggressively training criminal prosecutors in the use of the forfeiture laws, so that now more than half of all contested forfeitures are criminal forfeitures.

Just because a forfeiture is handled administratively or civilly, of course, doesn't mean that there isn't a related criminal case. In all forfeiture cases there must be proof that a crime was committed by someone. In fact, in more than eighty percent of all forfeitures, including administrative and civil forfeitures, there is a parallel arrest and/or criminal prosecution. There wouldn't have been such a wail and cry about forfeiture constituting a violation of the Double Jeopardy Clause a few years ago if that weren't so. (Between the Ninth Circuit's decision in United States v. $405,089.23 in 1994 and the Supreme Court's decision putting the double jeopardy issue to rest in United States v. Ursery, thousands of federal prisoners filed post-conviction actions alleging that their criminal conviction and the civil forfeiture of their property constituted double jeopardy.)

The legal "fiction" that the property is "guilty" of the crime is simply a shorthand for the way a civil forfeiture case is styled: United States v. $405,089.23, United States v. 92 Buena Vista Ave., and so forth. In legal parlance, the property in such a case is the "defendant." But property doesn't commit crimes; people do. If there isn't proof that a person committed a crime, there is no forfeiture. If our normally verbose legal system styled its civil forfeiture cases to set forth the full legal theory, this would be obvious. The above cases, for example, might have been called United States v. $405,089.23 in Proceeds Earned by Charles Arlt From Selling Methamphetamine; or United States v. A Residence at 92 Buena Vista Ave. Purchased with Drug Proceeds that Joseph Brenna, a Drug Dealer, Gave to His Girlfriend.

In short, forfeiture is a way of reaching the property involved in a crime, but the focus is on the crime, without which there can be no forfeiture.

Why do civil forfeiture?

If all forfeitures involve the commission of a crime, and the vast majority involve an arrest or prosecution, why does the government use civil forfeiture at all? It is not, as many contend, because it is necessarily easier. To the contrary, the easiest way to forfeit a criminal defendant's property in many cases is not to file a separate civil action, but to present the forfeiture issue to the same jury that just convicted the defendant in the criminal case. But sometimes, criminal forfeiture isn't available or doesn't make sense.

Take the administrative forfeiture cases for example. There is no point in including a criminal forfeiture count in an indictment and presenting the issue to a jury if the defendant is not going to contest the forfeiture. If a defendant facing criminal conviction for drug trafficking thinks it pointless to contest the forfeiture of the cash seized from him as drug proceeds at the time of his arrest, it is equally pointless to clutter the indictment with a forfeiture count when administrative forfeiture will answer.

What about the contested forfeitures that are done civilly? The reasons for this are many. First, while there are over 100 civil forfeiture statutes, there are relatively few criminal forfeiture statutes. Drug proceeds can be forfeited either civilly or criminally, for example, but firearms, gambling proceeds, vehicles used to smuggle illegal aliens, and counterfeiting paraphernalia can only be forfeited civilly. See 28 U.S.C. §2461(a). This is a problem Congress needs to fix.

Second, criminal forfeiture requires a federal conviction for the crime giving rise to the forfeiture. If the defendant is dead or is a fugitive, there can be no prosecution and therefore no criminal forfeiture. If the defendant was prosecuted in a State case, the federal forfeiture has to be civil, because there is no federal prosecution for the criminal offense. And if the defendant is prosecuted for one crime, but the property was involved in a related but separate crime, the forfeiture has to be civil, because the criminal forfeiture is limited to the offense of conviction. For example, drug proceeds seized from a defendant at the time of his arrest must be forfeited civilly if the defendant is charged with possession of drugs with intent to distribute, because such money was necessarily the proceeds of an earlier drug deal, not the one for which the defendant is actually prosecuted.

Third, and perhaps most important, criminal forfeiture is limited to the property of the defendant. If the defendant uses someone else's property to commit the crime, criminal forfeiture accomplishes nothing. Only civil forfeiture will reach the property. For example, if a drug dealer uses an airplane to smuggle drugs into California, the government has an interest in seizing and forfeiting the plane. But suppose the only person arrested and prosecuted is the pilot. If he owns the plane outright, criminal forfeiture is the way to go. But if the plane is owned by a corporation, or a third-party in South America, or by the pilot jointly with his spouse, criminal forfeiture is pointless.

The same is true if we want to forfeit a crack house. We can prosecute the tenants in the building until the cows come home, but we will never be able to forfeit the building criminally if the tenants don't own it. If the building belongs to a slumlord who allowed his property to be turned into a crack house, we need civil forfeiture to shut it down.

Due Process

Whatever the reasons why civil forfeiture is essential to federal law enforcement, it goes without saying that the process must be fair. All property owners -- whether they be criminal defendants or third parties -- are entitled to due process of law. Mr. Pilon contends that due process is lacking. He says that the government can seize property "almost at will," that officials can "seize property, real or personal, without notice or hearing," and that innocent parties find the system so daunting that they abandon their property without filing a claim. On all points, he is greatly mistaken.

Seizures of property for forfeiture are governed by the same rules that govern seizure of property for evidence -- the search and seizure requirements of the Fourth Amendment. See United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992). If federal agents want to seize property for forfeiture, they have to get a warrant, unless one of the recognized exceptions to the Fourth Amendment applies, like when cash is found in plain view in a vehicle that can be driven away, and there is probable cause to believe it's drug proceeds, or when property is found during a search incident to a lawful arrest. In fact, in many instances, forfeiture seizures are more limited than their evidentiary counterparts. See 18 U.S.C. §981(b)(2) (in money laundering cases, warrantless seizures are authorized during searches incident to arrest, but not in other exigent circumstances).

In real property cases, the rules are still more restrictive. In United States v. James Daniel Good Property, 114 S. Ct. 492 (1993), the Supreme Court held that real property may not be seized at all, even with a warrant based on a showing of probable cause, until the property owner has been given notice and an opportunity to be heard. In short, in real property cases, the Due Process Clause of the Fifth Amendment requires the government to give property owners more "process" than is due under the Fourth Amendment.

Moreover, seizing the property isn't the end of the process; it's only the beginning. If someone wants to contest a forfeiture he has a right to file a claim, thereby forcing the government to file a civil or criminal forfeiture action in federal court. If the case is civil, the claimant has all the rights that attend normal civil litigation, including the right to discovery and the right to a trial by jury. Finally, the forfeiture verdict must be based on a preponderance of the admissible evidence, not the probable cause evidence that was sufficient for the seizure.

Of course, any system can be improved. The Justice Department has proposed legislation to make the government carry the burden of proof in civil forfeiture cases. We also have suggested making it easier for people to file claims in forfeiture cases by extending the filing deadlines, and we have proposed a remedy for those whose property is damaged in government custody. (The Justice Department's legislative proposal and supporting testimony are published in the record of the Hearing on the Civil Asset Forfeiture Reform Act, H.R. 1916, House Committee on the Judiciary, 104th Congress, 2d Sess., Serial No. 94, July 22, 1996.) But it is preposterous to say that property owners are denied due process under current law.

The Uncontested Forfeitures

What should we make of the fact that so many forfeitures are uncontested? The critics, of course, see this as evidence that innocent property owners are walking away from their property without filing a claim because the procedures are unfair. But the opposite is far more likely. Four out of five forfeitures are uncontested because in most cases the evidence is so overwhelming that contesting the forfeiture would be pointless. A defendant charged with smuggling illegal aliens, for example, might see little advantage in contesting the forfeiture of the truck he was driving when he was arrested and the aliens were found. Remember, eighty percent of all forfeitures involve a parallel arrest or prosecution. Those are cases in which the defendant is in court anyway, has counsel, and yet most of the time does not object to the forfeiture.

Certainly, there are still due process issues to be worked out. One of the most nettlesome involves the current flood of post-conviction pleadings being filed by federal prisoners who contend that they didn't contest forfeiture actions because they didn't receive proper notice. See e.g. United States v. Clark, 84 F.3d 378 (10th Cir. 1996). Most commonly, the prisoners complain that the government sent the notice to the wrong jail or to a home address when the government knew that the person was incarcerated. Criminals have due process rights just like everyone else, so the government must find a way to provide

notice of forfeiture actions to persons being held in jail. But these are hardly cases that involve innocent claimants not filing claims because the procedures are stacked against them.

Innocent Owners

In his discussion of Bennis v. Michigan, Mr. Pilon makes a persuasive argument that the Constitution does not adequately protect innocent owners in civil forfeiture cases. It is an argument, however, that has little relevance to federal forfeiture law.

Bennis, it must be remembered, was a State case. Michigan, apparently, does not provide statutory protection for innocent owners, and the Supreme Court held that no such protection is required by the Due Process Clause. Fair enough. But the fact that the Constitution doesn't protect innocent owners doesn't mean that the legislature cannot do so. In fact, Congress has included an innocent owner defense in virtually all of the most widely used federal forfeiture statutes. For example, the drug statutes, 21 U.S.C. §881(a)(4) and (7), say that neither vehicles nor real property, respectively, may be forfeited if they were used to commit a crime without the knowledge or consent of the owner.

Mr. Pilon's claim that "hotels and apartment buildings are today forfeited when their owners are unable to prevent drug transactions in them" is just plain wrong. Even a property owner who "knows" that his property is being used for an illegal purpose is protected from forfeiture if he shows that he took all reasonable steps to prevent the activity. See United States v. 141st Street Corp., 911 F.2d 870, 877-78 (2nd Cir. 1990) (landlord who knew building was being used for drug trafficking had opportunity to show he did not consent to such use), cert. denied, 111 S. Ct. 1017 (1991); United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618, 626 (3rd Cir. 1989) (wife who knew of husband's use of residence for drug trafficking had opportunity to show she did not consent to such use); United States v. One Parcel of Real Estate at 1012 Germantown Road, 963 F.2d 1496 (11th Cir. 1992).

For example, the owner of a residential hotel doesn't have to put a stop to drug transactions on his property; he just has to do what a reasonable owner would do to try to stop it, like call the police, evict tenants convicted of committing drug crimes on the premises, and install security devices like locks and adequate lighting. See United States v. All Right, Title and Interest (Kenmore Hotel), 77 F.3d 648 (2d Cir. 1996).

What Congress Can Do

A key provision in the Justice Department's legislative proposal would codify this concept and thus extend the innocent owner defense to all federal forfeiture statutes. In addition to the other due process reforms discussed above, this would go a long way toward making sure that the forfeiture laws are up to date and protect the rights of all property owners. But there is more that Congress can do to enhance the forfeiture laws.

First, the criminal forfeiture statutes should be revised to make sure the government can use them in all cases where it's appropriate to do so. Criminal forfeiture should be available wherever civil forfeiture is authorized. The government also needs better tools to enforce criminal forfeiture judgments against convicted defendants, and needs to be able to restrain property subject to forfeiture, including substitute assets, pre-trial, to make sure that the assets are still around once the defendant is convicted.

Also, there is no rhyme or reason to the current forfeiture laws regarding the forfeiture of criminal proceeds. We can forfeit proceeds in drug cases, but not in fraud cases; we can forfeit the money paid to a "bag man" in a money laundering case, but not the money paid to a "hit man" in a murder-for-hire

case. All criminal proceeds should be subject to forfeiture, and the term "proceeds" should be defined to mean gross proceeds, not net profits. It is absurd that some courts have allowed heroin traffickers to deduct their overhead expenses from the amount of proceeds subject to forfeiture. See United States v. McCarroll, 1996 U.S. Dist. LEXIS 8975 (N.D. Ill. Jun. 19, 1996).

In these and many other ways, the forfeiture laws can be improved both to protect the rights of property owners and to allow the government to make full use of this dramatically successful law enforcement tool. Congress has that opportunity this year. If we can avoid the misstatements and misconceptions that serve only to polarize the debate, law enforcement, defense attorneys and legislators can work together to produce a genuinely comprehensive and effective body of laws to make forfeiture work for all of us.

**Stefan D. Cassella is the Assistant Chief, Asset Forfeiture and Money Laundering Section U.S. Department of Justice. The opinions expressed in this article are solely those of the author and do not necessarily reflect the views or polices of the Department of Justice.*

House Bill 52

Hello,

My name is Janet Brown I'm co-founder of a group called P.O.P. I'm a mom whose life has been affected by a Sexual Predator. My daughter was RAPED by her father.. my husband.

During the Investigation there was a variety of electronic evidence...
1) Video Tapes of children while they slept showing their private areas
2) Video Tapes of an unconscious victem being Sexually Assulted & Raped
3) A voyer type video taken in my home of a family member taking a shower
4) Audio Cassettes of a Sexual Assault
5) Pictures of Unknown Females... No faces just Body Parts
6) Scanned pictures with enlarged body parts & Reprinted over 160 times

This evidence was documented back 20 years.

The Computer & Video Camera along with a 35 m/m camera played a big part in fullfilling this predators fantasies. To return these items to him upon his release from jail would surely be a catastrophe. Being in denial that he has a problem & with access to these items will definately guarantee a new victem. The return of any of these (confiscated) items needs to be decided.

So I'm asking you for my daughter and any future victems to support HB#52. Give these sexual predators one less avenge to having access to our children "Put the rights of our children first..." in deed as well as thought making these lives safer & more secure for our children by putting the needs

Thank You

HB

55

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: March 5, 2003 **FURTHER REFERRALS: Finance**

Date of Committee Action: April 1, 2003

The STATE AFFAIRS Committee considered: **SSHB 55**

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 55 **CORRECTIONAL FACILITIES**

"An Act expressing legislative intent regarding privately operated correctional facility space and services; relating to the development and financing of privately operated correctional facility space and services; authorizing the Department of Corrections to enter into an agreement for the confinement and care of prisoners in privately operated correctional facility space; authorizing the Department of Corrections to enter into agreements with municipalities to expand existing correctional facilities; and providing for an effective date."

Recommends it be replaced with [ ] HCS *or* **[ ] CS** *for* _____ (_____)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR _____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____ Committee
[ ] Letter of Intent _____ Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW FISCAL NOTES *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero

PREVIOUS FISCAL NOTES				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Paul K Seaton	SEATON		✓		
Mo Gruenberg	Gruenberg		—		
	Holmes			✓	
				~~✓~~	
	Dahlstrom		✓		
Bob Lynn	Lynn		✓		
Chair: B Weyhrauch	Weyhrauch		✓		
Chair:					

23-LS0285\W
Luckhaupt
4/9/03

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 55(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HAWKER AND ROKEBERG, Kohring

A BILL

FOR AN ACT ENTITLED

"An Act expressing legislative intent regarding privately operated correctional facility space and services; relating to the development and financing of privately operated correctional facility space and services; authorizing the Department of Corrections to enter into an agreement for the confinement and care of prisoners in privately operated correctional facility space; authorizing the Department of Corrections to enter into agreements with municipalities to expand existing correctional facilities; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* **Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. It is the intent of the legislature in sec. 2 of this Act to secure additional correctional facility space and services through a privately operated correctional facility in Alaska. The legislature anticipates a privately operated correctional

facility will bring competitive management styles and operations to Alaska and bestow economic benefits in-state as opposed to sending prisoners and associated economic support outside the state.

* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

AUTHORIZATION TO CONTRACT FOR CORRECTIONAL FACILITY SPACE AND SERVICES WITH THIRD-PARTY CONTRACTOR FOR OPERATION. (a) The Department of Corrections is authorized to enter into an agreement with a municipality for the purpose of acquiring correctional facility space and services for a minimum of 25 years for persons who are committed to the custody of the commissioner of corrections.

(b) The agreement entered into under this section is predicated on and must provide for an agreement between a municipality and one or more private third-party contractors under which private, for profit or nonprofit third-party contractors construct and operate the facility by providing for custody, care, and discipline services for persons committed to the custody of the commissioner of corrections under authority of state law. In an agreement with a municipality, the commissioner of corrections shall require that the municipality procure one or more private third-party operators through a competitive bid process. The procurement requirements of this subsection are satisfied if the municipality, in exercise of its powers under AS 29.35.010(15) for procurement of land, design, construction, and operation of a facility, follows its municipal ordinances and resolutions and procurement procedures.

(c) The authorization given by (a) of this section is subject to the following conditions:

(1) the agreement must cover a minimum of 1,200 prison beds, and, subject to (2) of this subsection, the payments by the Department of Corrections

(A) may not exceed a total per diem cost of $94 an inmate a day or 85 percent of the inmate cost per day to the state for the construction and operation by the state of equivalent facilities, whichever is less; the per diem cost shall be adjusted for

(i) changes in the cost of living from the effective date of this Act until the facility opens;

(ii) costs not incurred until full occupancy;

(B) must be sufficient to cover

(i) a capital component consisting of the cost for the development and construction of the facility, including all debt service; and

(ii) an operating component consisting of the operating costs, not including inmate transportation, based on per diem operating charges for a minimum 1,200 prison beds;

(2) the agreement must provide that the obligation of the Department of Corrections to make payments under the agreement is subject to annual appropriation of funds by the legislature;

(3) the agreement must contain terms providing that the commissioner of corrections may direct the municipality, after notice and reasonable opportunity to cure, to terminate its contract with a private third-party contractor operating the facility in accordance with the provisions of (b) of this section, and to procure a replacement third-party contractor if the commissioner finds that the private third-party contractor has failed to provide or cause to be provided the degree of custody, care, and discipline required by terms of the agreement and that the private third-party contractor has been given notice and reasonable opportunity to cure as provided in the third-party contractor's agreement with the municipality;

(4) the commissioner's authority to enter into the agreement is subject to the condition that the contract between the municipality and the operator requires the operator to provide culturally relevant reformation services to incarcerated Alaska Natives.

(d) Nothing in this section is intended to prevent a municipality from issuing bonds as permitted for municipalities under state law, including AS 29.47.390, to finance construction of the facility. The bonds may be secured by and payable from revenues of the facility, including those described in (c) of this section. Revenues of the facility are not revenues of the municipality for purposes of AS 29.47.390.

*** Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to read:

AUTHORIZATION TO LEASE CORRECTIONAL FACILITY SPACE WITH MUNICIPALITIES. (a) To relieve overcrowding of existing correctional facilities in the state, the Department of Corrections may enter into agreements with the following specific municipalities for expanded correctional facilities:

(1) Fairbanks North Star Borough - expansion of the existing Fairbanks

Correctional Center by up to 100 beds;

(2) Matanuska-Susitna Borough - expansion of the existing Mat-Su Pre-trial Facility by up to 107 beds;

(3) Bethel - expansion of the existing Yukon Kuskokwim Correctional Center by up to 96 beds;

(4) Seward - expansion of the existing Spring Creek Correctional Center by up to 150 beds.

(b) The authorizations given by (a) of this section are subject to the following conditions:

(1) the average capital costs for all beds may not exceed $155,000 a bed, adjusted for inflation at the rate of three percent a year from the effective date of this Act;

(2) if expansion of an existing facility is authorized, the state shall enter into a joint ownership agreement with the municipality of the expanded facility, enter onto a long-term lease not to exceed 25 years of the municipality's interest in the facility, and operate the facility; payments under the lease may not exceed $16,700 a bed.

* **Sec. 4.** Sections 1 - 3, ch. 32, SLA 2001, are repealed.

* **Sec. 5.** This Act takes effect July 1, 2003.

23-LS0285\V
Luckhaupt
4/5/03

CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 55(STA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES HAWKER AND ROKEBERG, Kohring

A BILL

FOR AN ACT ENTITLED

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(b) The agreement entered into under this section is predicated on and must provide for an agreement between a municipality and one or more private third-party contractors under which private, for profit or nonprofit third-party contractors construct and operate the facility by providing for custody, care, and discipline services for persons committed to the custody of the commissioner of corrections under authority of state law. In an agreement with a municipality, the commissioner of corrections shall require that the municipality procure one or more private third-party operators through a competitive bid process. The procurement requirements of this subsection are satisfied if the municipality, in exercise of its powers under AS 29.35.010(15) for procurement of land, design, construction, and operation of a facility, follows its municipal ordinances and resolutions and procurement procedures.

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(i) a capital component consisting of the cost for the development and construction of the facility, including all debt service; and

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* **Sec. 5.** This Act takes effect July 1, 2003.

Representative Mike Hawker
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House District 32:
Eagle River
Anchorage
Rainbow
Indian
Bird
Girdwood
Portage
Whittier
Sunrise
Hope

Sponsor Substitute for House Bill 55 Sponsor Statement

House Bill 55 authorizes the Department of Corrections to enter into agreement with the City of Whittier for a 1,200-bed medium security correctional facility and services for a period of 25 years. The facility shall be constructed and operated by third-party contractors procured through a competitive bid process. If the authorization is granted, the daily per diem costs may not exceed $94 an inmate a day or 85% of the inmate cost per day to the state for the construction and operation by the state of equivalent facilities.

All of Alaska's 15 regional correctional facilities are currently operating at or over capacity with over 600 Alaskan prisoners housed in Arizona. With prisoner population projected to grow at the rate of approximately 200 inmates per year, the current situation is grave.

Prison overcrowding exposes inmates and staff to the risk of serious injury and death, and exposes the State to civil liability, as well as judicial intervention into the management prerogatives of the executive branch.

The State will benefit economically and socially by procuring in-state prison beds at significantly less cost than State-operated beds; by returning Alaskan prisoners closer to the resources necessary for effective rehabilitation; by diminishing State liability for the effects of prison overcrowding; and by providing programs designed to break the cycle of Alaska Native recidivism.

This bill will create more than 500 direct and indirect, union scale construction jobs, and more than 450 permanent, direct and indirect, jobs for Alaskans associated with prison operations for the 25-year lease term authorized by the legislation. In addition, it will stimulate the Alaskan economy with the purchase of goods and services associated with a $110 million construction project.

The prison will serve as an anchor industry in Whittier, generating vital economic benefits for an economically disadvantaged rural community. Additionally, this project will utilize the recently completed $90 million Anton Anderson tunnel justifying reduced tolls and expanded hours of operation.

Whittier completed a public process documenting local support from 80% of resident, adult registered voters before competitively soliciting contractors and bringing the proposal before the legislature in 2002. Whittier renewed the process with the same results in 2003.

Additionally, this legislation authorizes the Department of Corrections to enter into agreements with the Fairbanks North Star Borough, the Matanuska-Susitna Borough, the City of Bethel, and the City of Seward for the expansion of existing correctional facilities.

Representative Mike Hawker
Alaska State Legislature

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House Finance Committee
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House District 32:
Eagle River
Anchorage
Rainbow
Indian
Bird
Girdwood
Portage
Whittier
Sunrise
Hope

Sponsor Substitute for House Bill 55 Sectional Analysis

Section 1. Provides legislative intent.

Section 2. Authorizes the Department of Corrections to enter an agreement with the City of Whittier for correctional facility space and services for a period of 25 years under various terms and conditions.

Section 3. Authorizes the Department of Corrections to enter into agreements with various municipalities for expansion of correctional facilities under various conditions.

Section 4. Repeals provisions of Chapter 32, SLA 2001, which authorized the Department of Corrections to enter into agreement with the Kenai Peninsula Borough for correctional facility space and services.

Section 5. Provides and effective date.

Chapter 032

Chapter: ⏭CH032⏮

Source: SCS CSHB 149(FIN) am S

Action Date: May 29, ⏭2001⏮

Effective Date: June 1, ⏭2001⏮

01

AN ACT

Expressing legislative intent regarding correctional facility space; relating to correctional facility space; authorizing the Department of Corrections to enter into an agreement to lease facilities for the confinement and care of prisoners within the Kenai Peninsula Borough; and providing for an effective date.

---

* Section 1. The uncodified law of the State of Alaska is amended by adding a new section to read:

LEGISLATIVE INTENT. It is the intent of the legislature to secure additional correctional facility space through a privately operated correctional facility in Alaska. The legislature expects the Department of Corrections to contract with the Kenai Peninsula Borough for private prison services similar to those currently purchased for medium-security Alaska prisoners in a private prison outside the state. The legislature anticipates a privately operated correctional facility will bring competitive management styles and operations to Alaska. The legislature expects that the initial per diem cost at a private facility (excluding costs related to major medical, prescription medication, and transportation of prisoners and other services excluded in contracts for Alaska prisoner care and custody in private facilities outside the state but including the capital costs for construction of the facility, including debt service) will be 18 - 20 percent less than the current average per diem rate for all state facilities as reported to the federal government for reimbursement purposes, and should be approximately $89 in current dollars.

* Sec. 2. The uncodified law of the State of Alaska is amended by adding a new section to read:

AUTHORIZATION TO LEASE CORRECTIONAL FACILITY SPACE WITH THIRD-PARTY CONTRACTOR OPERATION. (a) The Department of Corrections may enter into an agreement with the Kenai Peninsula Borough to lease space within a correctional facility located within the Kenai Peninsula Borough that will house persons who are committed to the custody of the commissioner of corrections. The agreement must provide that the state agrees to lease the space for a minimum of 20 years.

(b) The agreement to lease entered into under this section is predicated on and must provide for an agreement between the Kenai Peninsula Borough and one or more private third-party contractors under which private, for profit or nonprofit third-party contractors construct and operate the facility by

providing for custody, care, and discipline services for persons held by the commissioner of corrections under authority of state law. The commissioner of corrections shall require in the agreement with the Kenai Peninsula Borough that the Kenai Peninsula Borough procure one or more private third-party operators through a competitive procurement process. A municipality exercising its powers under AS 29.35.010(15) for procurement of land, design, construction, and operation of a facility, that follows its municipal ordinances and resolutions and procurement procedures, satisfies the procurement requirements of this subsection.

(c) The authorization given by (a) of this section is subject to the following conditions:

(1) the lease must have a minimum of 800 prison beds, and the lease payments must be sufficient to cover

(A) the cost for the development and construction of the facility; and

(B) the operating costs for a minimum of 800 prison beds in the facility for a period of five years, less a reasonable period to achieve full occupancy;

(2) the agreement to lease must contain terms providing that the commissioner of corrections may direct the Kenai Peninsula Borough to terminate its contract with a private third-party contractor operating the facility in accordance with the provisions of (b) of this section if the commissioner finds that the private third-party contractor has failed to provide or cause to be provided the degree of custody, care, and discipline required by terms of the lease agreement;

(3) the commissioner may not enter into the lease if the commissioner finds that the Kenai Peninsula Borough is unable to provide or cause to be provided a degree of custody, care, and discipline similar to that required by the laws of the state;

(4) the commissioner may not enter into the lease unless the contract between Kenai Peninsula Borough and the operator requires the operator to provide culturally relevant counseling services to incarcerated Alaska Natives.

* Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. The provisions of AS 33.30.031(a) do not apply to an agreement to lease a correctional facility in accordance with the provisions of sec. 2 of this Act. This applicability section does not affect the authority of the commissioner of corrections to designate the correctional facility to which a prisoner is assigned.

* Sec. 4. Section 4, ch. 15, SLA 1998, and sec. 6, ch. 35, SLA 1999, are repealed.

* Sec. 5. This Act takes effect June 1, ⏭2001⏮.

Chapter 033

Chapter: CH033

Source: CCS HB 65

Action Date: May 25, 2001

Sec. 29.35.010. General powers.

All municipalities have the following general powers, subject to other provisions of law:

(1) to establish and prescribe a salary for an elected or appointed municipal official or employee;

(2) to combine two or more appointive or administrative offices;

(3) to establish and prescribe the functions of a municipal department, office, or agency;

(4) to require periodic and special reports from a municipal department to be submitted through the mayor;

(5) to investigate an affair of the municipality and make inquiries into the conduct of a municipal department;

(6) to levy a tax or special assessment, and impose a lien for its enforcement;

(7) to enforce an ordinance and to prescribe a penalty for violation of an ordinance;

(8) to acquire, manage, control, use, and dispose of real and personal property, whether the property is situated inside or outside the municipal boundaries; this power includes the power of a borough to expend, for any purpose authorized by law, money received from the disposal of land in a service area established under AS 29.35.450 ;

(9) to expend money for a community purpose, facility, or service for the good of the municipality to the extent the municipality is otherwise authorized by law to exercise the power necessary to accomplish the purpose or provide the facility or service;

(10) to regulate the operation and use of a municipal right-of-way, facility, or service;

(11) to borrow money and issue evidences of indebtedness;

(12) to acquire membership in an organization that promotes legislation for the good of the municipality;

(13) to enter into an agreement, including an agreement for cooperative or joint administration of any function or power with a municipality, the state, or the United States;

(14) to sue and be sued;

(15) provide facilities or services for the confinement and care of prisoners and enter into agreements with the state, another municipality, or any person relating to the confinement and care of prisoners.

Sec. ⏩29.47.390⏪. Other municipal financing.

(a) A municipality may authorize by ordinance or resolution the issuance of negotiable or nonnegotiable revenue bonds to finance any project that serves a public purpose, and the bonds shall be secured and payable from any source except revenues, including tax revenue, of the municipality.

(b) Bonds issued under this section are not a debt or liability of the municipality and do not create or constitute an indebtedness, liability, or obligation of the municipality, nor do they constitute a pledge of faith, credit, or taxing power of the municipality. Each bond must contain on its face a statement that the municipality is not obligated to pay the principal or the interest on the bonds except from those sources indicated, and that neither the faith and credit nor the taxing power of the municipality is pledged to the payment of principal or interest on the bond.

(c) A municipality may

(1) loan the proceeds of the bonds issued under this section;

(2) pledge, mortgage or assign money, leases, agreements, property, or other assets of the project being financed;

(3) enter into covenants and agreements concerning bonds issued under this section that the municipality determines to be desirable;

(4) provide for any matter that affects the security of the bonds.

(d) In this section

(1) "bonds" means bonds, notes, or other evidence of indebtedness;

(2) "project" includes commercial, manufacturing, agricultural, industrial, residential housing, recreation, tourism, and medical projects and programs.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SSHB55
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Revenue
Title: Correctional Facilities
BRU: Revenue Operations
Component: Treasury Division
Sponsor: Representative Hawker
Requester: House State Affairs
Component No.: 121

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel	15.0	5.0				
Contractual	75.0	40.0				
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	90.0	45.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	90.0	45.0				
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	90.0	45.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2003) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This legislation would authorize the Department of Corrections to enter into an agreement with the City of Whittier for the purposes of acquiring correctional facility space and services for at least 1,200 state prisoners.

The legislation also would authorize the Department of Corrections to enter into agreements for expanded state prison facilities leased from the Fairbanks North Star Borough, the Matanuska-Susitna Borough, the City of Bethel and City of Seward for a total of 453 additional beds for state prisoners.

See attached page for further discussion.

Prepared by: Deven Mitchell, State Debt Manager
Phone: 465-3750
Division: Treasury Division
Date/Time: 3/11/03 6:33 PM
Approved by: Larry Persily, Deputy Commissioner
Date: 3/11/2003
Agency: Department of Revenue

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

BILL NO. SSHB55

ANALYSIS CONTINUATION

The legislation authorizes the Department of Corrections to enter into leases with the City of Whittier for at least 1,200 prison beds (and services for the facility), and four municipalities for expanded correctional facilities to be leased by the state (Fairbanks North Star Borough, 100 beds; Matanuska-Susitna Borough, 107 beds; City of Bethel, 96 beds; and City of Seward, 150 beds). The municipalities would fund these projects by issuing lease-revenue bonds. These bonds would require the municipalities to pledge the state's lease payments to the debt service, to the extent they are appropriated, and provide a trustee bank with a title interest in the new or improved facility for the benefit of the bond purchasers. This is a matter concerning the Department of Revenue as the credit of the State of Alaska is used each time a lease is directly pledged to a bond sale and, as such, the Department should be involved in the debt issuance.

Over the past 20 years the state has made a concerted effort to centralize the issuance of debt involving the state's credit through the State Bond Committee. It is noteworthy that the Anchorage jail, which is the most recent instance when the Legislature authorized a lease-revenue transaction, was approved by the State Bond Committee, including all of the Municipality of Anchorage's transaction documents and terms of sale. The national bond rating agencies' primary contact during the reveiw of the Anchorage Jail Revenue Bonds was the State of Alaska Department of Revenue. These bond rating agencies review and rate almost all transactions of the state, and a lack of direct state involvement will draw concern during the state's annual ratings review.

In providing the cost estimates in this fiscal note, the following assumptions were made:
1. The municipalities will issue bonds in FY2004 and FY2005.
2. The municipalities will bring no pledge of additional security to the financing(s), other than the state's credit and bond sale proceeds.
3. The municipalities will have to issue these bonds separately.
4. As state-supported appropriation debt, the bonds will be rated A1, A+, A+, resulting in interest rates comparable to other state-supported certificates of participation.
5. The bonds will have 15-year terms, with fixed-interest rates and level debt service.
6. The municipalities will issue the maximum amount authorized under this legislation ($218,400,000) for the projects, plus the cost of issuing these bonds (while there is no limitation, these costs are estimated at $4,368,000).*

The legislation requires at least one bond sale from each of the municipalities listed. This is an inefficient way to raise funds for projects as each transaction will have fixed costs of issuance. Rating agency, bond counsel, financial advisory, printing and other fees will be incurred four times rather than once. This results in bond issuance costs totalling an estimated $1 million to $2 million more than alternative structuring alternatives.

Due to the State Bond Committee's role in these transactions, the state's bond counsel and financial adviser will have to participate in drafting the legal documents, structuring the transaction, and working with the rating agencies for each of the bond sales. The cost of this effort is estimated at $135,000 over FY 2004 and 2005.

** If bond issuance costs are examined, there needs to be a discussion of the type of sale contemplated -- since issuance costs are ascribed differently with a negotiated sale of securities than with a competitive sale.*

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SSHB 55
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: An act expressing legislative intent regarding privately operated correctional facility...
BRU: Alaska State Troopers
Component: Judicial Services - Anchorage
Sponsor: Representatives Hawker
Requester: House State Affairs
Component No. 831

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	134.0	134.0	134.0	134.0	134.0	134.0
Travel						
Contractual	19.8	19.8	19.8	19.8	19.8	19.8
Supplies	6.4	6.4	6.4	6.4	6.4	6.4
Equipment	48.6					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	208.8	160.2	160.2	160.2	160.2	160.2
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	208.8	160.2	160.2	160.2	160.2	160.2
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	208.8	160.2	160.2	160.2	160.2	160.2

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	2	2	2	2	2	2
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This fiscal note includes two new positions to address the construction of a private correctional facility in Whittier and the expansion of Spring Creek Correctional Center in Seward. The positions would provide prisoner transport and consist of two Court Service Officers who would be stationed at the Anchorage Judicial Services office. Year one costs include one-time items for vehicle purchases, firearms, and radios.

Prepared by: Lieutenant Matthew Leveque
Phone 269-0390
Division: Alaska State Troopers
Date/Time 3/11/03 10:11 AM
Approved by: William Tandeske, Commissioner
Date 3/11/2003
Agency: Department of Public Safety

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SSHB 55
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: An act expressing legislative intent regarding privately operated correctional facility...
BRU: Alaska State Troopers
Component: AST Detachment
Sponsor: Representatives Hawker
Requester: House State Affairs
Component No. 2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	201.0	201.0	201.0	201.0	201.0	201.0
Travel						
Contractual	29.7	29.7	29.7	29.7	29.7	29.7
Supplies	9.6	9.6	9.6	9.6	9.6	9.6
Equipment	72.9					
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**313.2**	**240.3**	**240.3**	**240.3**	**240.3**	**240.3**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	313.2	240.3	240.3	240.3	240.3	240.3
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**313.2**	**240.3**	**240.3**	**240.3**	**240.3**	**240.3**

Estimate of any current year (FY2003) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time	3	3	3	3	3	3
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This fiscal note includes three new positions to address the expansion of three existing state correctional facilities in Palmer, Bethel and Fairbanks. The three positions would provide prisoner transport. The positions consist of Court Service Officers (one each in Palmer, Bethel and Fairbanks). Year one costs include one-time items for vehicle purchases, firearms, and radios.

The Department of Public Safety transported 43,904 prisoners during FY01; 49,683 during FY02 and 33,957 as of the 7th month of FY03. This cost DPS $1,597.8 (FY01) and $1,705.3 (FY02), which includes an RSA with Department of Corrections for $140.0.

There is no way to determine what the transportation costs would be for an additional 1,653 in-state prisoner beds. Dramatic increases in AST's prisoner transportation funding would likely be required.

Prepared by: Lieutenant Matthew Leveque
Phone 907 269-0390
Division: Alaska State Troopers
Date/Time 3/11/03 10:06 AM
Approved by: William Tandeske, Commissioner
Date
Agency: Department of Public Safety

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 55
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: DOT&PF
Title: An Act expressing legislative intent regarding privately operated prisons
BRU: Highways and Aviation
Component: Cental Region Highway & Aviation
Sponsor: Hawker & Rokeberg
Requester: HSTA
Component No.: 564

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	0.0	50.0	50.0	50.0	50.0	50.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	1,014.0	1,014.0	1,014.0	1,416.0	1,416.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	120.0	120.0	120.0	195.0	195.0
TOTAL OPERATING	**0.0**	**1,184.0**	**1,184.0**	**1,184.0**	**1,661.0**	**1,661.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	1,160.0	1,136.0	1,110.0	1,562.0	1,535.0
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	0.0	24.0	48.0	74.0	99.0	126.0
1037 GF/Mental Health						
Other: ARRC maintenance credits						
TOTAL	**0.0**	**1,184.0**	**1,184.0**	**1,184.0**	**1,661.0**	**1,661.0**

Estimate of any current year (FY2003) cost: 4,178.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time		1	1	1	1	1
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

1. 2004 maintains existing 17 hour per day summer schedule and 9.75 hour (average) per day winter schedule. 2005 to 2007 changes to 17 hours per day 6 am to 11 pm 365 days per year to accommodate prison construction. 2008 and 2009 represent 19 hours per day 5 am to midnight 365 days per year to accommodate private prison operations of three 8 hour shifts daily.
2. Department of Corrections vehicles on official public safety business will not be assessed tolls. All other vehicles will be assessed tolls per the current regulations.
3. Operating the Tunnel 24/7 365 days a year would require going from two shifts to three shifts of tunnel operating personnel.
4. One additional PFT State M&O employee would be needed starting in 2005.
5. Total cost of 24 hour/7day operations is $6,969.0. Total cost of 19hour/7day operation is $5,839.0.

Prepared by: Dennis R. Poshard
Phone: 465-3900
Division: Special Assistant to the Commissioner
Date/Time: 3/12/03 3:41 PM
Approved by: Commissioner Mike Barton
Date: 3/12/2003
Agency: Alaska Department of Transportation and Public Facilities

HB 55
WHITTIER PRISON / REGIONAL JAIL EXPANSION
Talking Points

JUSTIFICATION

- All fifteen in-state prisons and jails are at, or over, emergency capacity and 700 Alaskan prisoners are held in Arizona.

- Excessively crowded prisons and jails over tax facilities and staff, exposing inmates, staff and the public to an unreasonable risk of harm (riot, hostage, escape)

- Over crowded prison systems are subject to Court monitoring and Court control over legislative and executive branch prerogatives (fines & budget)

- Alaska was released from Court monitoring only two years ago. When released, over $2 million in sanctions were waived. DOC is currently at serious risk of renewed court monitoring and fines?

- Alaska's correctional system is growing at the rate of 200 inmates per year. If 1,500 to beds are opened in Alaska by 2006, the system will be as full as it is today.

- A centrally located prison will enable prisoners in Arizona to return to Alaska and provide relief to regional jails by transferring long-term sentenced felons out of regional jails, where programs and services are costly and limited.

COST

- The average daily **operating** cost for a state correctional facility ranges from a low of $95 (Palmer) to a high of $185 (Ketchikan), per bed, **without capital debt service.** The average state operating cost is $114.36 per day, per bed.

- The amortized **capital** cost for a State built prison bed ranges from $30 to $50 per day, per bed, without land acquisition and infrastructure costs.

- **The Whittier combined capital and operating cost is $91 to $94 per bed, per day,** plus major medical, for a total cost of under $100 per day, per bed.

- Exporting Alaskan prisoners represents $18 million in lost revenue and jobs, as well as the lost economic multiplier (2.5 to 3 times value) effect on the local purchase of goods, materials, services and creation of indirect jobs

- Arizona beds are not a long-term fix for in-state prison overcrowding because 48% of Alaska prisoners are pre-trial and a high percentage more are short-term, misdemeanant offenders and probation violators who are too costly to export.

BENEFITS TO THE STATE

- Returns $18 million per year to the Alaska economy, with an economic multiplier effect that benefits all Alaskans
- 325 union construction jobs available to all Alaskans
- 228 indirect construction related jobs
- 225 – 275 permanent prison jobs (correctional officers, nurses, therapists, teachers, administrators etc.)
- 200 permanent indirect jobs created as a result of prison demand
- Purchase of goods, materials and services associated with construction and operation over 25 years
- Mitigates State liability for personal injury and sanctions from prison overcrowding
- Returns Arizona prisoners closer to family and support systems
- Whittier is the only plan and legislation that expressly addresses Alaska Native programs
- Adds value to the $90 million Anton Anderson Tunnel
- Offers a Government owned, privately managed comparison to State owned and managed prisons that has stimulated efficiency, cost containment and operating budget savings in other States

WHITTIER INFRASTRUCTURE

- The City is a strategically located former military base and has a well developed utility infrastructure and deepwater port. Chugach Electric, Enstar Gas, Yukon Telephone and cable and abundant water are at, or near the site; an onsite sanitary sewer treatment is proposed similar to other state facilities
- First response, external emergency services in the Whittier/Girdwood area (15 minutes) currently consists of 8 troopers and police, over 100 on site correctional officers (after the prison is built), 47 fire fighters, 8 full response trucks, 33 emergency medical technicians, 4 emt trucks, Anton Anderson Tunnel emergency response vehicles and prison emergency response equipment and vehicles.
- Whittier is 50 minutes by highway from Anchorage fire, life, safety and health resources in the event of natural catastrophe – closer than the State medium security prison at Sutton, Alaska and the maximum security prison in Seward

NATIVE PROGRAMS

- 37% of Alaska's inmate population are Alaska Native men, while Alaska Native men comprise only 7% of Alaska's general population

- Whittier and its prison contractor have teamed with Native corporations in the construction and delivery of programs for Natives, by Natives, currently not offered in State facilities.

- State prisons have not touched the tragic cycle of recidivism among Alaska Natives through conventional State programs. The State has nothing to lose, and everything to gain, by allowing the Native community to try to effect behavioral change among Alaska Native offenders

CORRECTIONAL POLICY CONCERNS

1. Public Protection

- The contract between the State, the City and the Private contractor will require that the prison be built and operated to state and national standards of safety.

- The contract will include on site State monitoring and a provision to remove the contractor for fault

  Prisoners are not released to the community and are transported to and from the prison by troopers or D.O.C. transportation officers

- Close proximity to extensive fire, life, safety and health resources in Anchorage renders protection to the public higher than most regional prisons

2. Best Correctional Practices

- It is axiomatic that a prison built and operated to the State and National standards of the industry will deliver "best correctional practice"

- The State ensures that contract standards are met through the intergovernmental agreement with the City and Contractor

- Proximity to Anchorage ensures optimal access to stable staffing , mental health, adult education, vocational training and other services and rehabilitation resources not available in many small communities

- Starting, untrained, recruit wage and benefits ($36,000) are 20% lower than the State of Alaska, but higher than Correctional officers are paid in Seattle, Portland and other cities where cost of living is higher than the Anchorage area.

- Wage and benefits for other classes (e.g. nurses, data techs, etc.) are commensurate with Anchorage private sector wages, with an above average benefit package valued at 28%.

3. Community Participation / Procurement Integrity

- Whittier is a duly organized, second class city with access to the resources, sophistication an savvy necessary to protect the interest of its residents and negotiate a contract with the State that delivers best value to the State and the City

- Whittier completed an exhaustive public process to acquire local support of 80% of resident, adult, registered voters, *before* initiating the procurement process, or approaching the Legislature in 2002. Whittier renewed the process with the same results for 2003.

- Whittier retained the experienced procurement and construction law firm of Perkins Coie to design and administer a competitive procurement process which local State procurement expert Susan Burke testified was consistent with State competitive procurement procedure, as well as conforming to municipal code.

- The selections panel consisted of independent, unbiased Anchorage consultants and engineers experienced with design/build contracting practices, who analyzed and scored proposals from four national corrections companies through a customary competitive bid procedure.

- After the results were announced, no protests or appeals were filed by the three companies that were not selected

- Procurement expert Susan Burke has testified that the Whittier procurement process satisfied the requirements of the State competitive bid process.

4. Statewide and Regional Needs

- The Whittier prison addresses regional needs by providing long-term prison beds so sentenced prisoners can be transferred from regional jails, making room form pre-trial, pre-sentence, appeal and pre-release prisoners, as well as returning prisoners from Arizona.

5. Cost Effectiveness

The $91 to $94 combined daily capital and operating cost per bed at Whittier is a best value (25% direct savings) under any criteria when compared to the cost of State built and operated prisons and exportation of jobs and revenue.

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VOL. 115 June 2002 No. 7

III. A TALE OF TWO SYSTEMS: COST, QUALITY, AND ACCOUNTABILITY IN PRIVATE PRISONS

Private prisons are on the rise. Privately operated juvenile facilities — mostly community-based group homes or halfway houses — and federal adult halfway houses have been common in the United States since the 1960s.[1] In 1979, private firms began contracting with the Immigration and Naturalization Service to detain illegal immigrants pending hearings or deportation.[2] Private, large-scale investment in the construction and management of conventional prisons and jails dates from the mid-1980s.[3] Prison privatization has been driven not only by the growing support among lawmakers and the public for private provision of traditional government services,[4] but also by exploding prison populations resulting from stricter drug and immigration laws and changes in sentencing procedures.[5]

By the end of 2000, there were 87,369 state and federal prisoners in private detention facilities in the United States — 6.3% of all state and federal prisoners,[6] and 22.7% more than in 1999.[7] Of these, 15,524 were federal prisoners (10.7% of all federal prisoners) and 71,845 were state prisoners (5.8% of all state prisoners).[8] The use of private facilities is concentrated in the South and the West.[9] Texas and Oklahoma have the greatest numbers of inmates in private facilities; only six states — Alaska, Hawaii, Montana, New Mexico, Oklahoma, and Wisconsin, which combined account for approximately one-fifth of all state inmates -- house over 20% of their prison population in private facilities.[10] Privatization has been less widespread in local jails than in state prisons — only about 2% of jail beds are private — but jail privatization has been called the "next frontier" of privatization.[11]

Comparative studies on the cost and quality of private and public prisons give reason to be cautiously pleased with private prison performance.[12] The empirical evidence is consistent with economic theory, which predicts that with privatization, costs will fall and quality (however defined) may rise.[13] The idealist could ascribe the

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[1] *See* DOUGLAS MCDONALD, ELIZABETH FOURNIER, MALCOLM RUSSELL-EINHORN & STEPHEN CRAWFORD, ABT ASSOCS. INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 4–5 (1998) [hereinafter ABT REPORT].

[2] *Id.* at 5.

[3] *Id.* at 5–6.

[4] *See generally, e.g.*, MAYOR STEPHEN GOLDSMITH, THE TWENTY-FIRST CENTURY CITY: RESURRECTING URBAN AMERICA (1997) (discussing the desirability of contracting out many municipal services).

[5] ABT REPORT, *supra* note 1, at 7–10; Judith Greene, *Bailing Out Private Jails*, AM. PROSPECT, Sept. 10, 2001, at 23, 26 (describing the sudden interest of the Federal Bureau of Prisons in privatization, and attributing the Bureau's need for tens of thousands of new beds to harsher drug sentencing laws enacted in 1986 and to the 1996 Immigration Reform Act).

[6] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 2000, at 7 tbl.8 (2001) [hereinafter PRISONERS IN 2000].

[7] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 1999, at 7 tbl.10 (2000) (reporting that there were 71,208 inmates in private facilities (5.2% of all state and federal prisoners), of which 3828 were federal (2.8% of all federal prisoners) and 67,380 were state (5.5% of all state prisoners)).

[8] *Id.* The federal and state numbers are not directly comparable, as the federal number includes 6143 federal inmates held in private community correctional centers. *Id.*

[9] For a table of state and federal statutory authority to outsource prison operation, see Charles W. Thomas & Sherril Gnutzeux, *The Present Status of State and Federal Privatization Law*, at http://web.crim.ufl.edu/pcp/html/statelaw.html (last visited Mar. 18, 2002).

[10] PRISONERS IN 2000, *supra* note 6, at 7 tbl.8 (16,979 out of 87,369).

[11] Richard G. Kiekbusch, *Jail Privatization: The Next Frontier*, *in* PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE 133, 135 (David Shichor & Michael J. Gilbert eds., 2001) [hereinafter PRIVATIZATION IN CRIMINAL JUSTICE].

[12] *See infra* Section B.2.

[13] *See infra* Section B.3.

satisfactory performance of private prisons to the power of market incentives; the cynic could point out that given public prisons' bleak history and patchy present, private prisons perform satisfactorily compared to a rather low baseline. Each would be right.

Public prisons are not the most accountable of government systems; in fact, under certain circumstances, private prisons may be more accountable. In the qualified immunity context, recent Supreme Court decisions such as *Richardson v. McKnight*[14] and *Correctional Services Corp. v. Malesko*[15] have held private prisons to at least as high a standard of constitutional protection as public prisons.[16] Judges' and juries' greater skepticism of private agencies than of government may also make private prisons more accountable; moreover, government oversight of private prisons may be less deferential than government oversight of its own operations.[17] In addition, private prisons have substantially greater market accountability because they are concerned with winning new contracts and renewing old ones, and with avoiding both adverse publicity and drops in stock price.[18] The continued promise of private prisons requires three concurrent innovations. First, evaluators must develop a rich set of performance measures, and prison data must be gathered and publicized.[19] Second, the government must implement performance-based contracts that tie compensation to actual results.[20] Finally, the government should maximize the efficiency gains from privatization and minimize opportunities for capture by institutionalizing competition between public correctional departments and private prison firms and making contract monitoring independent of both the public and the private sectors.[21]

A. Private Prisons, Criminal Policy, and Democracy

Critics have argued that statutes authorizing private prisons unconstitutionally delegate core government functions to private parties.[22] This contention has never been tested in court, but such arguments seem dubious given the uneven history of the nondelegation doctrine and the Supreme Court's recent decision in *American Trucking Ass'ns v. Whitman*.[23] True, private prison officials "determine when infractions occur, impose punishments and . . . make recommendations to parole boards,"[24] but as long as they implement well-defined correctional policy with sufficient oversight, this delegation seems unobjectionable on federal constitutional grounds.

One modern-day objection to private prisons stems from opposition to corrections and criminal policy generally: if the problem is the incarceration of too many people, making prisons cheaper or more efficient is a false solution and may exacerbate the

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[14] 521 U.S. 399 (1997). *See id.* at 401, 412 (holding that private prison guards cannot claim qualified immunity in § 1983 suits).

[15] 122 S. Ct. 515 (2001). *See id.* at 515 (holding that companies operating private correctional facilities, like agencies operating analogous public facilities, are not subject to civil rights suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).

[16] *See infra* Section C.1(b)–(c).

[17] *See infra* Section C.1(a), (c).

[18] *See infra* Section C.2.

[19] *See infra* Section D.1.

[20] *See infra* Section D.2.

[21] *See infra* Section D.3.

[22] *See, e.g.*, Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649 (1987). *But see* Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 915 (1988) (arguing that the case against private prisons on delegation grounds is "extremely close").

[23] 121 S. Ct. 903 (2001) (upholding a portion of the Clean Air Act against a nondelegation challenge).

[24] Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 188 (2000) (footnote omitted).

problem.[25] Another objection is the "expressivist" critique "that to turn over responsibility for administering prisons and jails to private, for-profit companies at some level compromises the legitimacy of the state's exercise of its authority to punish."[26] This Part takes a frankly consequentialist view of private prisons and this does not address these critiques. Private prisons might be inherently problematic under some moral theories and acceptable under others (both consequentialist and deontological),[27] but space constraints preclude engaging this debate.

What about the specter of corruption? Industry lobbies government, and regulatory agencies can be captured by the entities they regulate; the private prison industry is no different.[28] Not only may private prison companies lobby for preferential treatment, they may also, as entities that directly profit from incarceration, influence substantive criminal legislation by supporting tough-on-crime candidates, scaring the public about crime, and advocating tougher sentencing.[29] The story is plausible,[30] but it does not explain current levels of prison privatization or modern-day demand for more and cheaper prisons because the forces leading to the explosive growth of the prison population substantially predate the modern growth of the private prison industry.[31]

Moreover, though private prison companies do lobby state and federal governments, so do prison guard unions, which also benefit from increased incarceration rates and prison construction.[32] Prison guard unions generally contribute vastly more money to politicians than do private prison companies.[33] The California prison guard union, for

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[25] Greene, *supra* note 5, at 26 ("[L]ike the state legislators before them, members of Congress were madly building new prisons . . . , searching for cheap new private-prison beds, and refusing to consider changes in the draconian sentencing laws that were causing most of the increase in prisoners."); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 145 (2001) (arguing that all imprisonment is "intensely problematic and in many ways inherently irrational," "dysfunctional," and "socially malignant," and that government should "wage its own wars against its citizens . . . in an obvious and maximally costly way").

[26] Sharon Dolovich, The Ethics of Private Prisons 73–74 (Nov. 1999) (unpublished manuscript, on file with the Harvard Law School Library); *see also* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2233–34 (2001).

[27] The consequentialist treatment does not abandon the moral high ground — consequentialism itself implies certain normative commitments. Even for a nonconsequentialist, private prisons may not be especially problematic. *See, e.g.*, Markel, *supra* note 26, at 2234–40 (arguing that private prisons are consistent with the "confrontational conception of retribution").

[28] *See* RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 42–47 (1997) (discussing capture or the risk of capture in private prisons in Australia, Florida, and the U.K.); *id.* at 159 (arguing that under the "basic model" of accountability, in which the public sector correctional agency is at the center of privatization decisions, "[c]apture occurs frequently"); DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 240–41 (1995) (noting the involvement of Tennessee state officials with the Corrections Corporation of America (CCA) while CCA was bidding on the management of Tennessee's prison system in 1985); Greene, *supra* note 5, at 27 (describing links between the federal government and private prison companies).

[29] SHICHOR, *supra* note 28, at 236.

[30] This very claim is made about prison labor contractors in the nineteenth century. *Id.* at 37 ("[T]hree governors [of Tennessee] during the 1870s and 1880s expressed a negative opinion of the convict lease system but realized that the abolition of this practice would create a severe financial burden on the state, and therefore they continued, albeit reluctantly, this policy.") (footnote omitted); Beverly A. Smith & Frank T. Morn, *The History of Privatization in Criminal Justice*, *in* PRIVATIZATION IN CRIMINAL JUSTICE, *supra* note 11, at 3, 17 ("Prosecutions, sentences, and paroles were all manipulated to ensure a supply of a disproportionately high number of black inmates, in what some have seen as replication of or an economic replacement for slavery without a capital investment in workers.") The claim is also made about modern-day prisons. *See, e.g.*, Greene, *supra* note 5, at 23 (describing how the warden of CCA's Tulsa Jail in Oklahoma had directed the addiction treatment manager "to make a 'sales pitch' to local judges, urging them to sentence offenders to a treatment program in the jail even though the program had been eviscerated in order to cut operating expenses").

[31] HARDING, *supra* note 28, at 94.

[32] *See* Mark Arax & Mart Gladstone, *State Thwarted Brutality Probe at Corcoran Prison, Investigators Say*, L.A. TIMES, July 5, 1998, at A1 ("[State investigators] had watched the [prison guard] union under president Novey ride the prison construction wave, growing from a kind of social club into one of the more powerful forces in the state, with a rank-and-file 27,000 strong.").

[33] *See* ADRIAN T. MOORE, PRIVATE PRISONS: QUALITY CORRECTIONS AT A LOWER COST 33–34 (Reason Public Policy Inst., Policy Study No. 240, 1998) (comparing correctional officers' $1.5 million donations to Pete Wilson alone during his 1990 and 1994 California gubernatorial bids with private prison companies' $150,000 total political contributions nationwide in 1995–1996).

example, endorses and contributes millions of dollars to state candidates and "is among the largest campaign donors in the state."[34] Does privatization further distort criminal policy by replacing a single strong voice for incarceration with two voices? Or does the second, private, voice weaken the first by generally weakening the underlying public sector union? The answer is unclear.

Quite apart from whether political influence peddling distorts criminal policy, does such peddling weaken the case for privatization? Not necessarily, particularly when one considers different kinds of influence peddling: corruption and patronage. If a politician is corrupt and uses his power to extract money from the contractor, then privatization is likely to be inferior to public provision. Conversely, if a politician is involved in patronage and uses his power to pursue other political objectives, like serving politically powerful interest groups such as public employees' unions, private provision is preferable.[35]

B. Do Private Prisons Work?

1. Obstacles to Effective Assessment. — Effectively evaluating prisons requires specifying goals and objectives, developing measures and indicators, and collecting comparison group data. Unfortunately, the political process does not value rigorous evaluation highly.[36] Some states require only cost evaluation;[37] only a handful require comparisons of both cost and quality, often to comply with statutory targets.[38] Some neglect evaluation altogether. What monitoring data exist are often inadequate for outcome evaluation.[39]

As if that were not enough, "cost" and "quality" are not clearly defined. Public agencies and private firms measure costs differently. Public prison budgets usually exclude various central administrative and support expenses, such as medical, legal, and

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Straight by-the-numbers comparisons are not enlightening because private prisons remain smaller players than public prisons. The interesting point is merely that whoever provides prison services will seek to influence the political process.

[34] Dan Morain, *Davis To Close State's Privately Run Prisons*, L.A. TIMES, Mar. 15, 2002, at A1, *available at* 2002 WL 2461282 (noting that the Correctional Peace Officers' Association spent $2.3 million to help elect Governor Gray Davis); *see also* Arax & Gladstone, *supra* note 32 (listing donations of $5.2 million to state candidates from 1987 to 1998, including $667,000 to gubernatorial candidate Pete Wilson, $159,000 to Attorney General candidate Dan Lungren, and an additional $760,000 in 1990 to defeat Wilson's gubernatorial opponent, Dianne Feinstein).

[35] *See* Oliver Hart, Andrei Shleifer & Robert W. Vishny, *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1144–47 (1997).

[36] Alexis M. Durham III, *Evaluating Privatized Correctional Institutions: Obstacles to Effective Assessment*, FED. PROBATION, June 1988, at 65, 67.

[37] *See, e.g.*, OHIO REV. CODE ANN. § 9.06(A)(4) (West 2001 Supp.) (requiring that the contractor "convincingly demonstrate" that it can operate the facility and provide required services with at least a 5 percent savings over the projected cost to the public entity).

[38] *See, e.g.*, ARIZ. REV. STAT. § 41-1609.01(G) (2001) (requiring the contractor to offer cost savings); *id.* § 41-1609.01(H) (requiring the contractor to offer services of "at least equal" quality); *id.* § 41-1609.01(K) (requiring a biennial comparative public-private performance comparison study); *id.* § 41-1609.01(L) (requiring a five-year cost comparison); TENN. CODE ANN. § 41-24-104(c)(2)(A) (1997) (requiring quality to be at least equal to that provided at state prisons); *id.* § 41-24-104(c)(2)(B) (requiring cost to be at least 5% less than the state's cost); *id.* § 41-24-1-105(a) (mandating the establishment of objective performance and cost criteria); *id.* § 41-24-1-105(c) (requiring evaluation of performance, with the contract to be renewed only if the contractor provides "essentially the same quality" as the state at 5% lower cost, or superior services at "essentially the same cost" as the state, where "superior" is defined as 5% better and "essentially the same" is defined as within 5%). The Florida statute requires evaluation of both cost and quality, though only cost savings and not quality improvements are required by the statute. FLA. STAT. ANN. § 957.07 (West 2002) (requiring 7% cost savings, where a private entity's corporate income and sales tax payments count as an offset to costs, and where the cost of services provided to the public entity at no direct cost by other government agencies is allocated to the public entity); *id.* § 957.11 (requiring evaluation of "costs and benefits" of contracts).

[39] Durham, *supra* note 36, at 67; *see* Robert B. Levinson, *Okeechobee: An Evaluation of Privatization in Corrections*, 65 PRISON J. 75, 76, 88 (1985) (citing the vague or nonexistent goals specified in the 1982 contract to run the Florida School for Boys in Okeechobee, a secure facility for adjudicated delinquents; the contract focused on administrative inputs rather than outcomes or even outputs).

personnel administration services, which other state agencies typically handle. Private budgets include these costs but do not include the government's costs of preparing and monitoring contracts.[40] As for quality, definitions differ across studies, and quality is difficult to compare in any case. If one facility has fewer assaults but more escapes than another, is it better or worse?

Few studies are rigorous.[41] Even reasonably good studies leave much to be desired. No study seriously controls for many important factors that influence misconduct rates, such as staff-to-inmate ratios, custody technology, correctional policies, or age and race of inmates.[42]

Furthermore, comparative studies do not adequately address serious overcrowding problems.[43] Overcrowding, which may increase inmate violence and the incidence of infectious and stress-related diseases,[44] thereby contributing to unconstitutional conditions,[45] is a serious problem in prisons and jails. Less expensive prisons allow for more capacity because the same prison budget can build more prisons, and increased capacity can relieve overcrowding. (Of course, cheaper prisons do not guarantee greater capacity, and greater capacity does not guarantee decreased crowding; still, it is reasonable to expect that cheaper prisons will not *exacerbate* crowding.) Thus, to the extent that private prisons decrease costs,[46] privatization can improve conditions in both public and private prisons. Comparative studies between private and public prisons at a specific moment in time cannot register this across-the-board quality increase.

Finally, most studies do not analyze both cost and quality and thus are of limited value in assessing private prisons. Studies that do not look at both elements simultaneously cannot begin to analyze the costs and benefits of private prisons.[47]

2. Evidence from the Studies. — Studies that look at cost or quality alone do, however, provide some information. The most rigorous studies[48] find clearly positive

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[40] ABT REPORT, *supra* note 1, at 35–37; MOORE, *supra* note 33, at 10.

[41] For a summary of the cost and quality studies on private prisons and a brief discussion of which studies are more methodologically sound, see 2 GEOFFREY F. SEGAL & ADRIAN T. MOORE, WEIGHING THE WATCHMEN: EVALUATING THE COSTS AND BENEFITS OF OUTSOURCING CORRECTIONAL SERVICES 2, 3 & tbls.2A–2C, 9–10 & tbls.4A–4B (Reason Public Policy Inst., Policy Study No. 290, 2002). For a highly critical evaluation of all prison privatization cost and quality studies (even some of the ones the Reason report considered sound), see also ABT REPORT, *supra* note 1, at app. 2.

[42] Scott D. Camp & Gerald G. Gaes, *Private Adult Prisons: What Do We Really Know and Why Don't We Know More?*, *in* PRIVATIZATION IN CRIMINAL JUSTICE, *supra* note 11, at 283, 285 (attributing the insufficiency of current empirical studies to a failure to control for structural factors and only weak attempts to control for age and race); *see also* ABT REPORT, *supra* note 1, app. 2, at 18 ("[T]hese background data are a sine qua non of valid institution performance comparisons. What may appear to be differences in institution performance may be nothing more than differences in the background characteristics of inmates. . . .").

[43] *See generally* Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209 (1998).

[44] *Id.* at 2211.

[45] *See generally* Susanna Y. Chung Note, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2362–66 (2000).

[46] *See infra* Section B.2.

[47] *See* U.S. GEN. ACCOUNTING OFFICE, PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE 13 (1996) ("[I]t is important that any study focus on both operational costs and quality of service."). Interestingly, in the GAO study itself (which is really just a literature review), only the Tennessee studies compare both cost and quality, *id.* at 23–25, and these are not particularly rigorous, *see* SEGAL & MOORE, *supra* note 41, at 3 tbl.2B, 10 tbl.4B. Surprisingly, given the solid methodological discussion, the GAO did not examine the Louisiana State University study, the Arizona DOC studies, or the Florida OPPAGA study, which analyzed both cost and quality. Nonetheless, later writers have called the GAO report a "thorough[] review[]," Greene, *supra* note 5, at 25, "one of the more comprehensive reviews," BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS 26 (2001), and the "most comprehensive study to date," JOEL DYER, THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME 229 (2000).

[48] Six of the twenty-eight cost studies are considered especially methodologically sound. *See* SEGAL & MOORE, *supra* note 41, at 2–3.

cost savings.[49] On the quality side, comparisons are trickier, as there is no single metric representing quality. But none of the more rigorous studies[50] finds quality at private prisons lower than quality at public prisons on average, and most find private prisons outscoring public prisons on most quality indicators.[51] Most of these quality studies do not examine cost, but as private prisons are not expected to be more expensive, this result belies statements in the prison literature that assume that cost reductions must come at the expense of quality.[52] Indeed, the few methodologically sound studies that evaluate both cost and quality suggest that cost is no higher in private facilities and quality is at least roughly equivalent.

Researchers at Louisiana State University compared three Louisiana prisons, one public and two private.[53] The researchers concluded that the prisons were "as comparable as reasonably possible in terms of history, capacity, design, types of inmates, number, gender and ethnicity of inmates."[54] Privatization produced estimated cost savings of 12–14 percent (costs of $22.93 and $23.49 per inmate per day for the two private facilities, compared to $26.60 for the public facility).[55] The quality comparison was a wash, with the private facilities faring better in some areas and worse in others. The private facilities, among other things, reported fewer critical incidents, provided safer work environments for employees and safer living environments for inmates, and had proportionately more inmates complete basic education, literacy, and vocational training courses.[56] The public prison had fewer (zero) escapes and fewer aggravated sex offenses, more effectively controlled substance abuse among inmates, more consistently offered a broad education and vocational adult education program to inmates over four years, and provided more treatment, recreation, and rehabilitative services to inmates.[57]

An Arizona study performed in 2000 by the state Department of Corrections compared three private prisons with fifteen public ones.[58] The study found average savings of 13.6% at the private prisons in 1998 ($40.36 per inmate per day compared to $46.72 at public prisons) and 10.8% in 1999 ($40.88 compared to $45.85).[59] The quality comparison gave the edge to neither group: private and public prisons had about equal inspection results, though public prisons generally had somewhat less severe disciplinary problems.[60]

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[49] *Id.* at 3 tbl.2A. Most of the less rigorous studies also report cost savings, and none reports that private prisons are more expensive. *Id.* at 3 tbls.2B, 2C. The causes of private prison cost savings are explored below in Section B.4.

[50] Segal and Moore consider eleven of the eighteen quality studies methodologically more sound. *See id.* at 9–10.

[51] Of the eighteen studies, only one clearly gives the edge to public prisons. *Id.* at 9–10, tbls.4A, 4B.

[52] *See, e.g.*, Greene, *supra* note 5, at 25 ("[Quality] problems seem to be endemic to the enterprise [of private prisons] — a result, in great part, of the private companies' mission to hold down costs.").

[53] WILLIAM G. ARCHAMBEAULT & DONALD R. DEIS, JR., EXECUTIVE SUMMARY, COST EFFECTIVENESS COMPARISONS OF PRIVATE VERSUS PUBLIC PRISONS IN LOUISIANA: A COMPREHENSIVE ANALYSIS OF ALLEN, AVOYELLES, AND WINN CORRECTIONAL CENTERS, PHASE I (rev. ed. Dec. 10, 1996).

[54] *Id.* at 25.

[55] *Id.* at 73.

[56] *Id.*

[57] *Id.* at 74.

[58] ARIZ. DEP'T OF CORR., PUBLIC-PRIVATE PRISON COMPARISON (2000).

[59] *Id.* at 47.

[60] *Id.* at 2–4. A 1997 study of Arizona's correctional system, which compared a private prison to fifteen public prisons, found 14 percent cost savings in the private prison relative to the public prison average and 17 percent cost savings after adjusting for the private prison's property tax payments. CHARLES W. THOMAS, COMPARING THE COST AND PERFORMANCE OF PUBLIC AND PRIVATE PRISONS IN ARIZONA: AN OVERVIEW OF THE STUDY AND ITS CONCLUSIONS (1997), *available at* http://web.crim.ufl.edu/pcp/research/Ariz.html (last visited Mar. 18, 2002). *But see* Abt Report, *supra* note 1, at 45 (criticizing this study's methodology).

Finally, a 2000 study of Florida prisons compared the private South Bay Correctional Facility, operated by Wackenhut Corrections Corporation, with the most comparable public facility, Okeechobee Correctional Institution.[61] After adjusting for various differences, including capacity, the study found that the private prison's costs were 3.5% lower than the state's costs for fiscal year 1997–98 and 10.5% lower for 1998–99,[62] meeting the 7% cost reduction mandate established by law.[63] Additionally, construction costs were 24% lower for the private prison.[64] As for quality, the study found that South Bay had fully operational programs within six months of opening (as opposed to three years for Okeechobee), had fewer health service deficiencies than Okeechobee, was able to house more inmates three months after opening than Okeechobee could house after seventeen months, and implemented an innovative approach to housing certain "close management inmates."[65] On the negative side, two inmates escaped from South Bay in 1999, while none had ever escaped from Okeechobee.[66]

3. That's Fine in Practice, but How Does It Work in Theory? — Private prisons fare rather well in quality comparisons, but why? Contracts are necessarily incomplete: because the government and the private provider can only describe a general service and cannot specify beforehand in full detail exactly how the contractor should provide that service, the contractor has wide latitude in running the prison.[67] This latitude permits the contractor to cut corners, reducing costs by reducing quality. It is no surprise that early economic models of privatization predicted that private ownership would reduce both cost and quality.[68]

But more recently, economists have observed that cutting corners is not the only way to make money. It is easy to assume that an aversion to out-of-pocket costs will deter firms from implementing a "quality innovation"[69] — but this assumption ignores opportunities for contract renegotiation. Because private prison companies can suggest such innovations to the government and renegotiate their contracts (or, in the real world, include extra services in a higher bid), they *can* capture some of the gains from quality innovation. They therefore have greater incentive to innovate in this way than their public counterparts, who cannot capture such gains.

Thus, while economic theory predicts that costs will decline under private management, it does not necessarily predict the same of quality.[70] Whether quality increases or decreases overall depends on whether cost-cutting or quality innovation has a greater effect.[71]

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[61] OFFICE OF PROGRAM POLICY ANALYSIS AND GOV'T ACCOUNTABILITY, FLA. LEGISLATURE, PRIVATE PRISON REVIEW 2 (2000) [hereinafter FLORIDA STUDY].

[62] *Id.* at 5.

[63] *See* FLA. STAT. ANN. § 957.07 (Supp. I 2002).

[64] FLORIDA STUDY, *supra* note 61, at 3.

[65] *Id.* at 10.

[66] *Id.*

[67] Hart, Shleifer & Vishny, *supra* note 35, at 1134 (discussing the assumptions motivating their incomplete contracting model).

[68] *See* JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION 231 (1993) (noting that "[a] high concern for quality [requires] low-powered incentive schemes" because providers who care too much about cost will reduce quality).

[69] *See* Hart, Shleifer & Vishny, *supra* note 35, at 1133.

[70] *See id.* at 1143 ("Costs . . . are always lower under private ownership. Quality . . . may be higher or lower under private ownership.").

[71] *Id.* at 1137–43.

This simple model does not take into account other factors that may strengthen the case for privatization. For instance, the government may observe a provider's harmful cost cutting and hold it against the provider in future rounds of bidding or decline to renew the contract. If even a few private providers compete against each other, the government can seek an alternative provider once it observes harmful cost cutting, rather than having to retake control of the prison.[72] In addition, because of inefficiencies in current prison practices, there may be opportunities for cost cutting that does not reduce quality.[73]

4. How Does the Private Sector Save Money? — The private sector saves money in several ways. First, private companies save money at the design and construction stage. They can typically design and build prisons in half the time required for governments to do so, because they can avoid the layers of red tape that play a role in safeguarding against government corruption[74] but are arguably unnecessary when the government purchases a service from the private sector (using a procurement process that itself has safeguards against government arbitrariness). Private firms are also usually free of purchasing restrictions and subcontracting quotas. Contracting out prison design and construction reduces costs by 15 to 25 percent.[75]

Second, private companies save money at the operation stage. The main savings come from reducing labor costs, both through lower wages[76] and through more efficient use of labor. A private firm that had a role in designing a facility would be likely to use innovative design techniques that could minimize the number of guards required to monitor inmates. Moreover, because they are not bound by civil service rules in managing their personnel,[77] private prisons use roughly one-third the administrative personnel of government prisons and use incentives to reduce sick time and consequent overtime expenditures.[78] Private firms also save money by "maintaining tight control of inmates and keeping them well-fed and occupied with work, education, or recreation."[79] Finally, private firms are free from many bureaucratic purchasing rules and can often buy supplies at lower cost than the government.[80]

C. Public and Private Accountability

Abuses happen in any system. But how do different systems react to abuse when it occurs? While there is no systematic information about the reaction to prisoner abuse in

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[72] *Id.* at 1143–44.

[73] The Hart-Shleifer-Vishny model assumes that all cost cutting decreases quality — in other words, that the public sector already operates at the frontier of technological efficiency. *Id.* at 1133. But no one *knows* the most efficient way to run a prison; this information must be discovered. Markets can encourage the discovery of efficient methods; government bureaucracies often do not. *See generally* FRIEDRICH A. HAYEK, *The Use of Knowledge in Society*, *in* INDIVIDUALISM AND ECONOMIC ORDER 77, 77–78, 84, 86 (reprint 1980) (1948).

[74] MOORE, *supra* note 33, at 5 (noting the "often laborious approval process and multiple contact requirements a government construction project must go through").

[75] *Id.* at 4–5.

[76] *See* DYER, *supra* note 47, at 214 (noting that "[m]ost guards at state and federal facilities earn union-scale wages and receive both retirement benefits and health insurance," while "their counterparts at private prisons . . . often earn as little as $7.00 an hour, with little or no benefits"); Greene, *supra* note 5, at 25 (citing "wages and benefits substantially lower than those in government-run prisons").

[77] MOORE, *supra* note 33, at 17.

[78] *Id.* at 16.

[79] *Id.*

[80] *Id.* at 18. Moore provides an interesting example of private sector cost savings: Virginia prisons once kept thirty days of food on hand in expensive warehouses. This practice possibly dated back to when prisons were remote and supplied by mule train, and was never questioned until a private company did something different. *Id.* at 19.

public and private prisons, case studies may provide a flavor of the accountability mechanisms at work.

1. Private Prisons' Legal Accountability. — The traditional hostility of juries toward corporate defendants, private prison guards' inability to claim qualified immunity in § 1983[81] civil rights suits, and courts' unwillingness to defer to the judgment of corporations all increase private prisons' legal accountability relative to public prisons.

(a) Jury Hostility. — Empirical studies have found that juries are more likely to award large verdicts against corporations than against governments.[82] Jury hostility also affects settlements, which are made in the shadow of expected recovery amounts at trial. Consider, for example, the case of the Northeast Ohio Correctional Center, a federal prison in Youngstown, Ohio, run by CCA under a contract with the District of Columbia. As part of a recent settlement of a lawsuit alleging inadequate security and medical treatment as well as excessive force, CCA paid $1,650,000 in damages to the 2000 members of the inmate class — an extraordinarily high settlement amount for class actions involving prisoners.[83] This huge settlement amount probably reflects the well-known tendency of juries, rightly or wrongly, to be less sympathetic to large corporate defendants. Moreover, monetary awards against public prisons are more limited.[84]

(b) Qualified Immunity: The New Bifurcated Regime. — A danger inherent in privatization is that public responsibilities will be performed by private individuals without effective oversight. Recent cases, however, have sought to avoid this pitfall and, in some ways, hold private prisons to an even higher standard than public prisons. Under *Harlow v. Fitzgerald*,[85] government officials (including prison guards[86]) performing discretionary functions are shielded from liability for civil damages if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[87] In *Richardson v. McKnight*,[88] however, the Supreme Court held that private prison guards do not enjoy this qualified immunity.[89]

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[81] 42 U.S.C. § 1983 (1994 & Supp. II 1996).

[82] There is no statistical evidence on jury attitudes toward corporations in the prison context, but more general jury studies suggest that juries tend to be turned off by a defendant's wealth and by arguments that a defendant's behavior was profit maximizing. *See* Daniel Kahneman, David A. Schkade & Cass R. Sunstein, *Shared Outrage, Erratic Awards*, *in* PUNITIVE DAMAGES: HOW JURIES DECIDE 31, 40 (2002) (showing higher punitive damage awards for corporations with greater wealth), *cf.* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 550 (2000) (discussing juror bias against companies merely for having undertaken a risk analysis); *see also* Greene, *supra* note 5, at 23 (reporting that in December 2000, a South Carolina jury awarded $3 million in punitive damages against a CCA juvenile prison for abusing a youth using a level of force "malicious to the conscience of mankind").

[83] Alphonse Gerhardstein, *Private Prison Litigation: The "Youngstown" Case and Theories of Liability*, 36 CRIM. L. BULL. 183, 198 (2000). CCA also paid class counsel of the city of Youngstown $803,000 in litigation expenses, and agreed to pay annual fees to Youngstown for ongoing monitoring. *Id.*

[84] *See* 42 U.S.C. § 1997e(d)(3) (capping attorney fees at 150 percent of statutory hourly rates); *id.* at § 1997(e) (barring recovery for emotional injury in the absence of physical injury). The limitation on recovery for emotional injury may not apply in many cases, but the attorney fee cap may be more significant in cases in which inmates seek damages. Even if the settlement by its terms included attorney fees, the total amount of the recovery would probably be lower than it otherwise would be because expected recoveries affect settlement amounts.

[85] 457 U.S. 800 (1982).

[86] *See* Procunier v. Navarette, 434 U.S. 555, 561 (1978).

[87] *Harlow*, 457 U.S. at 815–19.

[88] 521 U.S. 399, 412 (1997).

[89] Private guards might still have a good faith defense to a § 1983 suit. *Id.* at 413–14.

Thus, *McKnight* bifurcates the treatment of public and private prisons in a way that makes private prisons more, not less, accountable.[90]

Does this dichotomy make sense? If governments are cost-minimizers, it does not.[91] In the presence of liability, cost-conscious governments would hire timid guards, who require less indemnification, for public prisons, and would choose timid contractors, who submit a lower bid, for private prisons; thus, the argument for qualified immunity would not depend on whether the prison is public or private.[92] But governments often do not minimize costs. They often face soft budget constraints, may award contracts to friends or political allies, and may monitor prisons more or less depending on their political ideology.[93] Because government officials' motivations are complex, it is difficult to predict how the effects of qualified immunity will vary as between public and private prison operators. The efficiency arguments for only extending qualified immunity to public guards are thus somewhat indeterminate.

Considerations of compensation and accountability, however, cut against immunity for *both* public and private prisons. On the compensation side, immunity presumably makes a difference in some cases, and where it does, it may prevent victims from being compensated. On the accountability side, immunity allows prisons to externalize the cost of constitutional violations onto prisoners — not a particularly well-represented segment of society.

Nor does qualified immunity seem necessary to reduce the drain on the court system. Most § 1983 prison lawsuits are considered frivolous, and almost all fail before getting to the merits.[94] Qualified immunity would probably not change inmates' filing behavior, and even if it did, it is not clear that this would be desirable, because our system deliberately tolerates a certain amount of meritless litigation to avoid missing the occasional worthwhile claim. A regime of liability, with high procedural hurdles (such as requirements of exhaustion of administrative remedies[95]) or penalties for frivolous litigation (such as the frequent-filer penalties in the Prison Litigation Reform Act[96]), may better serve the goals of compensation and accountability for both government and private actors.

Thus, given the bifurcated regime established in *McKnight*, private prisons are, if anything, more accountable for their constitutional violations than are public prisons.

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[90] In *Correctional Services Corp. v. Malesko*, 122 S. Ct. 515, 517 (2001), the Court held that private companies operating federal halfway houses, like their public counterparts, were not subject to civil rights suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395–97 (1971), though the offending officials could personally be sued under *Bivens*, which allows awards of monetary damages against federal agents for a violation of federal constitutional rights. *Malesko*, 122 S. Ct. at 517. *Malesko* held private operators to the same standard as public agencies.

[91] *See* Clayton P. Gillette & Paul B. Stephan, Richardson v. McKnight *and the Scope of Immunity After Privatization*, 8 SUP. CT. ECON. REV. 103, 123–24 (2000).

[92] *See id.* at 126. Different prisons may react to liability in different ways; one might imagine reactions that either increase or decrease costs. For instance, a prison may save money by instructing guards to discipline inmates less. Or a prison may spend more money if guards, who would rather avoid litigation even if they are fully indemnified, always call for more backup before disciplining an inmate, to avoid the possibility of a violent confrontation that could lead to a civil rights suit. But under competitive bidding with a cost-conscious government, the cost-cutting reactions will tend to win out over the cost-increasing reactions. Because some forms of timidity decrease costs, while overzealousness presumptively increases costs, a liability regime fosters timidity.

[93] *See id.* at 125–26.

[94] *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 19 tbl.4 (1994).

[95] 42 U.S.C. § 1997e(a) (1994 & Supp. II 1996) (prohibiting a prisoner from bringing a section 1983 action unless he has exhausted available administrative remedies).

[96] 28 U.S.C. § 1915(g) (1994 & Supp. II 1996) (prohibiting a prisoner from suing in forma pauperis if, on three previous occasions while he was imprisoned, an action of his was dismissed as frivolous, malicious, or failing to state a claim, unless he is "under imminent danger of serious physical injury").

The presence of this additional judicial check should in turn increase private prison quality.

(c) Other Legal Accountability Mechanisms. — Not only may privatization make juries more skeptical of prisons and guards more susceptible to suit, but it may also make judges less deferential. Courts have traditionally been deferential to the government in prison suits because of the common judicial unwillingness to second-guess the political branches.[97] Though this unwillingness is understandable, deference is the enemy of robust accountability. Yet courts have often been hostile to private, for-profit delegations; while the nondelegation doctrine is almost never applied, judicial hostility manifests itself through more vigorous due process scrutiny.[98] As administrative power moves to private prison corporations, courts may abandon their deference to prison officials, because conflicts of interest will appear more obvious and contractual terms will necessarily be incomplete.[99]

In addition to litigation, government monitoring adds a further layer of review. While public prisons have government monitors, monitors of private prisons (even if captured to some degree) are likely to be more independent than monitors of government-run prisons.[100]

2. Private Prisons' Market Accountability. — Market mechanisms, such as governments' ability to rescind or decline to renew private firms' contracts, and more generally, the potential for bad publicity to cause a drop in firms' stock prices, further increase private prison companies' accountability.

(a) Contract Rescission. — A private prison may have its contract rescinded. This possibility is not always as easy as it sounds — the private prison industry is a somewhat concentrated oligopoly, though that may change with increased privatization. But as long as more than one firm is operating and the government continues to run part of the prison system, someone will be available to take over a dysfunctional prison, making the government's threat to rescind a contract somewhat credible. At any rate, even such imperfect discipline is more difficult to impose on public prisons — the government cannot take over its own prison except by firing civil servants, and it cannot have a private firm take it over except by opening a new bidding process, which is more difficult than finding someone to take over an existing contract.

In 1995, for example, an investigative reporter and a surprise inspection revealed appallingly crowded, unsanitary, and abusive conditions at the Bowie County Correctional Facility, a private "warehouse turned prison facility" in Texarkana, Texas, housing 500 inmates from Colorado.[101] After a federal lawsuit and a riot, the state of Colorado terminated Bowie County's contract and relocated its inmates.[102]

At the Seal Beach City Jail, operated by the private Correctional Systems, Inc. since 1994,[103] two private prison guards were indicted in August 2001 for allegedly "arranging and concealing an attack on a drunken inmate who was singing boisterously

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[97] *See* David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 819–20 (1987).

[98] *See id.* at 822–28.

[99] *See id.* at 829–33.

[100] *See* CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 65 (1990).

[101] DYER, *supra* note 47, at 200–01; Steve Lipsher, *Colorado Withdraws the Rest of Its Inmates from Texas*, DENVER POST, Jan. 1, 1998, at B3, *available at* 1998 WL 6097832.

[102] DYER, *supra* note 47, at 200–01; Lipsher, *supra* note 101. When the prison crowding crisis that prompted Colorado to send inmates to Texas was over, Colorado returned its inmates to in-state prisons, some of which were private. *Id.*

[103] Monte Morin & Stuart Pfeifer, *2 Jail Officers Indicted Over Inmates' Fight*, L.A. TIMES, Aug. 30, 2001, at B8.

in the jail's detoxification cell."[104] Within ten weeks of the attack, both guards had been fired; one guard was charged with federal civil rights violations and the other with being an accessory after the fact for trying to conceal the attack.[105] The first guard was sentenced to over four years in prison.[106] This incident prompted the city to review its contract with CSI and to consider other options.[107]

Similarly, in Santa Fe County, New Mexico, CCA brought in prisoners convicted of murder and rape from Oregon to fill its private jail cells but reportedly failed to notify the Sheriff's Department that it was housing inmates who posed a danger to the public. The Oregon prisoners were removed from the jail only after county officials threatened to cancel the county's contract with the company.[108]

(b) Adverse Stock Price Effects. — Private corporations are sensitive to drops in their stock prices. Contract rescission, as well as the possibility of lawsuits with high damage awards, affects profitability, and perceptions of a company's profitability are reflected in the price of its stock. Thus, a private corporation is punished financially for bad news, and possibly for mismanagement that may impose costs in the future. For example, the INS detention center in Elizabeth, New Jersey, run by Esmor Corrections, erupted in a massive riot in 1994 because the company had continuously cut corners on food and facility upkeep. Esmor's stock price dropped from $20 a share to $7 after news of the riot became known.[109]

While fear of stock price drops may make private prisons conceal their problems[110] — CCA has been accused of covering up escapes from the Youngstown prison described above — such secrecy has its limits, because escapes, riots, and prisoner litigation are hard to cover up. Following disclosure of the problems at the Youngstown prison, CCA's stock hit a one-year low.[111] A more plausible story is that private companies are more concerned with keeping their stock prices high over the long term by insisting on sound management and that guards and wardens can be encouraged to act responsibly through stock ownership in the company.[112]

(c) Greater Market Flexibility. — Not only are private prisons under greater market pressure to keep conditions from getting out of hand, they are also more able to change because they are free from some of the constraints of government management. In July 2001, for instance, four hundred prisoners in a CCA prison in Kentucky started a riot in which "inmates set[] mattresses on fire and toss[ed] TVs and toilets through the windows. Two weeks later, CCA fired the warden and his top assistant, citing 'policy violations.'"[113] Government employment protection, in this case, would have been an obstacle to disciplining the offending prison officials.[114]

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104 *Id.*

105 *Id.*

106 Lisa O'Neill, *Riverside Man Receives Prison in Civil Rights Case*, PRESS-ENTERPRISE (Riverside, Cal.), Mar. 12, 2002, at B2.

107 Morin & Pfeifer, *supra* note 103.

108 DYER, *supra* note 47, at 206.

109 *Id.* at 203–04; *see also id.* at 211 (contract rescinded after a private prison riot in Texarkana).

110 *Id.* at 204; *see also id.* at 211 (dubbing the tendency to cover up bad news the "Esmor effect"); *id.* at 221 (calling honest disclosure "financial suicide" for a private prison firm and interpreting private firms' fiduciary duty to their shareholders as "an obligation to prevent bad press").

111 *Id.* at 211.

112 *See id.* at 214 (noting that some private firms offer guards and wardens "stock in the prison company in an effort to reduce turnover," but arguing that such stock ownership exacerbates the Esmor effect described above, *supra* note 110).

113 Greene, *supra* note 5, at 23–24.

114 *See supra* p. 1879.