

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004

8672

11330 SENATE STATE AFFAIRS

Cost Comparison 1,200 Medium/Close Security Prison Beds

"Our first and foremost concern is cost"

Department of Corrections Commissioner Marc Antrim 2-20-03 Senate State Affairs

	SB 65 (Sutton) Govt. Owned and Managed	HB 55 (Whittier) Govt. Owned and Privately Managed	Arizona Privately Owned and Managed
Capital Cost	Daily Cost Per Bed \$27.63*	Included in the operating cost	Included in the operating cost
Operating Cost	\$82.76**	\$94.00	\$70.00
Total Daily Cost Per Bed	\$110.39	\$94	\$70
Total Annual Cost	\$48.3 m***	\$41 m	\$30.6 m direct + Econ. multiplier**** (1.5 to 3 x \$30.6 m)
Annual Savings		\$7.3 m 15% under the State	see following report

* D.O.C. estimated the construction cost for medium security beds at \$131,250 to \$156,250 per bed. SB 65 (Sutton) caps construction costs at an optimistic average \$135,000 per bed. HB 55 (Whittier) establishes a fixed rate that includes capital, thereby placing the risk of cost over run on the private contractor, rather than in a supplemental state budget.

** Source: D.O.C. testimony before Senate State Affairs 02-20-03.

*** The annual reported cost of SB 65 does not take into consideration several million dollars of additional costs to the State associated with a State built and operated prison. Under HB 55, construction and operating losses, overtime, lawsuits, insurance, retirement benefits, recruiting and training are borne by the private sector through a fixed per diem rate. Private contractors cannot submit supplemental budget requests to pay for failed expectations. Additional costs to the state associated with the State-built and operated prison but not accounted for in SB 65 include:

- Interest and COLA adjustment. The State prison will be open in "4 to 5 years" (D.O.C. testimony) rather than in two years as projected by the HB 55 Whittier Prison. The Whittier prison is a fixed cost to the State with no risk of budgetary increases to meet construction cost over-runs, interest, etc.
- Long-term costs to the State associated with hiring 200 new Correctional Officers eligible for 20-year retirement (not available in Oregon, Washington and most other states).
- Cost of prisoner litigation, judgements and DOC's several full time Assistant Attorneys General.

**** When lost jobs, lost purchasing power, lost corporate taxes and other economic multipliers of out-of-state spending are considered, exporting prisoners will cost the State and the Alaska economy more than the cost of providing the service in Alaska by the private sector.

**HB 55/SB 99
WHITTIER PRISON PROJECT
ECONOMIC IMPACT**

“At a time when the State of Alaska is actively promoting development opportunities in an attempt to offset the declining stimulus from oil and gas exploration and production, the Whittier proposal offers a significant advantage over many alternative development projects because of its exceptional impact per dollar of additional public expenditure. In effect, the proposal shows why, in selective instances, a policy of “Buy Alaska” should have considerable appeal.”

Prepared: March 6, 2003

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ECONOMIC IMPACT
WHITTIER CORRECTIONAL CENTER
(David M. Reaume, March 6, 2003)

The HB55/SB99 proposed Whittier Correctional Center will house up to twelve hundred inmates and will directly employ up to three hundred Alaska residents. This report identifies the Alaska economic impacts that can reasonably be attributed to the operation of the facility.¹ Only the permanent impacts resulting from the Center's operation have been considered here. No attempt has been made to measure the short-term impacts associated with construction of the facility. All dollar estimates are in constant 2002 dollars unless otherwise stated.

Tables 1 and 2 summarize the economic impacts that can be expected. According to information provided by Cornell Companies, the facility will directly employ up to three hundred workers with total annual expenditures of \$ 41 million. Based on normal staffing patterns for such facilities, the \$ 41 million will include \$ 10.8 million in direct payroll and an additional \$ 2.9 million in direct employee benefits. Given (rounded) employment and income multipliers derived from the author's proprietary Alaska Econometric Model, approximately 150 additional permanent jobs are likely be generated in South Central Alaska, with an accompanying additional payroll of \$ 3.3 million and additional employee benefits of \$ 0.9 million. **In total the facility will create or lead to the creation of 450 direct and induced permanent jobs and \$ 17.9 million in direct and induced annual payroll and employee benefits.**

In addition to direct and induced payroll, other elements of personal income will increase, principally proprietor's income and the earnings of Internal Revenue Service Type-S corporations. Including these elements of personal income brings **direct and induced Alaska resident personal income gains to \$ 16.5 million per year with attendant employee benefits of approximately \$ 4 million per year for a total annual increase in income and benefits of \$ 20.5 million.**

¹ Total cost of \$41 million is based upon the proposed legislative per diem cap of \$94.00/day, per inmate, total cost to the state D.O.C, less inmate transportation.

The State of Alaska D.O.C. reports that it currently houses prisoners in Arizona at a total cost of \$ 70 per prisoner per day. Twelve hundred (1,200) Alaska prisoners are expected to be housed in Arizona by 2006, at an annual cost of \$ 30.6 million. The principal advantage of the Whittier proposal compared to the status quo is that its projected extra \$ 9.4 million in 2006 annual expenditure would allow the State of Alaska to capture not only the employment and income benefits from this additional \$ 9.4 million but also capture the benefits associated with the \$ 30.6 million that by 2006 would otherwise go to Arizona. *By allowing the State of Alaska to leverage the (by 2006) \$ 30.6 million in outside correctional costs, the Whittier proposal would provide over \$ 4 of direct economic stimulus for every additional \$ 1 in annual operating costs, when compared to the status quo of continued outsourcing from Arizona.*

Just comparing the \$ 9.4 million in additional annual expenditure to the \$ 20.5 million annual increase in personal income and employee benefits we see that the Whittier proposal would return *over \$ 2.00 in personal income and employee benefits for every dollar of additional expenditure.*

The SB 65 Sutton Public Prison proposal directs the State of Alaska to both build and operate the correctional facility at an annual cost of \$ 48.3 million. Although the SB 65 option would also allow the State of Alaska to leverage the additional jobs and income now going to Arizona, it would do so at an additional annual cost of \$ 17.7 million, or some \$ 8.1 million more per year than the Whittier proposal.

At a time when the State of Alaska is actively promoting development opportunities in an attempt to offset the declining stimulus from oil and gas exploration and production, the Whittier proposal offers a significant advantage over many alternative development projects because of its exceptional impact per dollar of additional public expenditure. In effect, the proposal shows why, in selective instances, a policy of "Buy Alaska" should have considerable appeal.

TABLE 1
DIRECT EMPLOYMENT AND PAYROLL
(DOLLAR AMOUNTS IN 2001 DOLLARS UNLESS OTHERWISE NOTED)

JOB TITLE	BLS NUMBER	NO. JOBS	HOURLY WAGE	ANNUAL PAYROLL
Human Resource Assistants	43-4161	12	\$ 15.96	\$ 373,463
Cooks	35-2012	9	13.42	235,521
Guards and Correctional Officers	See Note	200	16.38	6,388,200
Librarian	25-4021	2	23.84	92,976
Substance Abuse Counselors	21-1011	9	16.60	291,330
Social Workers	21-1023	15	14.81	433,192
Senior Correctional Officers	33-3051	21	24.26	993,446
Food Service Manager	11-9051	1	16.12	31,434
Supervisors, Corrections	33-1011	6	31.56	369,252
General Maintenance Worker	49-9041	3	23.26	136,071
Registered Nurse	29-1111	9	26.13	458,582
Administrative Service Manager	11-3011	4	22.15	172,770
General Manager	11-1021	1	31.56	61,542
Psychologists	19-3031	4	27.11	211,458
Education Director	25-9031	4	21.34	166,452
TOTAL		300		\$ 10,415,689

TOTAL PAYROLL, 2002 DOLLARS: \$ 10.8 million

SOURCE: Wage Rates: U.S. Department of Labor, Bureau of Labor Statistics,
 "2001 Occupational Employment and Wage Estimates,
 Alaska"

NOTE: Guard and Correctional Officer wage rate is the mean of 33-3012
 (Correctional Officers and Jailers) and 33-9032 (Security Guards).

Annual Payroll assumes 37.5 hour workweek, 52 weeks per year.

TABLE 2
ECONOMIC IMPACT
WHITTIER CORRECTIONAL CENTER
(DOLLAR AMOUNTS IN CONSTANT 2002 \$)

Direct Employment:	300 jobs
Direct Payroll:	\$ 10.8 million per year
Mean Direct Pay Per Worker:	\$ 36,100 per year
Induced Employment:	150 jobs
Induced Payroll:	\$ 3.3 million per year
Mean Induced Pay Per Worker:	\$ 22,000 per year
Total Employment:	450 jobs
Total Payroll:	\$ 14.1 million per year
Total Personal Income:	\$16.5 million per year
Population Change:	Approximately 800 persons

NOTE: Earnings were re-stated in 2002 dollars by multiplying the wage rates shown in Table 1 by the ratio of July 2001 to July 2002 U.S. average hourly earnings for service industry workers. SOURCE: U.S. Bureau of Labor Statistics, MONTHLY LABOR REVIEW.

II. METHODOLOGY

It should be noted that no Whittier-specific impacts have been estimated. The assumption here is that the bulk of the jobs and income will go to residents in Anchorage and nearby communities. Workers are assumed to commute to Whittier although some unidentified percentage will be required to (or choose to) live there.²

Table 1 shows the types of jobs that need to be filled at the proposed twelve-hundred-inmate facility. Associated with each of these is a median hourly wage rate (2001\$) that was obtained from the U.S. Department of Labor, Bureau of Labor Statistics (BLS) at the following Internet web site.

http://stats.bls.gov/oes/state/oes_ak.htm

Some judgment was used in determining which wage rate to associate with each occupation. The second column of Table 1 gives the BLS occupational numbers for the job titles that were chosen. Columns three, four and five give the number of each type of job at the facility, the Alaska median wage rate and the total annual payroll for that occupation. In all cases but one the Alaska wage rate was either taken from the Department of Labor survey or its construction is described in Table 1.

Table 2 shows the number of direct and induced Alaska jobs, the associated payroll restated in 2002 dollars, total induced personal income and an estimate of population change. "Induced" jobs include both those associated with Alaska establishments that would sell products and services to the correctional facility and also jobs that would be generated as these persons and those employed directly at the facility spend a portion of their earnings in Alaska. The number of such jobs was set at a multiple of 1.5 times the number of direct jobs. This 1.5 "multiplier" is a rounded average derived from three simulations of the author's proprietary Alaska Econometric Model. "Mean induced pay per worker" shown in

² Whittier's current resident population is approximately 300 persons.

Table 2 as \$ 22,000 per year is also a rounded average derived from three simulations of the Alaska Econometric Model.

The \$ 16.5 million in "total personal income per year" was similarly derived. The difference of \$2.4 million between the gain in total personal income and the gain in payroll (wages and salaries) represents the correctional facility's positive impact on the sum of rental incomes, interest incomes, dividend incomes and, most importantly, the income of unincorporated enterprises (i.e. proprietorships). The latter, proprietor's income includes the earnings of both proprietorships and Internal Revenue Service Type-S corporations.

Employee Benefits

According to the United States Chamber of Commerce annual report THE 2002 EMPLOYEE BENEFITS STUDY, apart from payments for time not worked employee benefits were 27.3 percent of payroll for the industry "health care" and 28.4 percent for "total non-manufacturing" (U.S. average, 2001). These percentages were used to estimate employee benefits for the facility itself and for jobs elsewhere in Alaska, respectively. Although a correctional facility is not, strictly speaking, a health care facility, the structure of employment and the types of jobs overlap at least somewhat. Benefits that are paid by correctional institutions are not shown in the publication cited above because most such institutions have historically been publicly operated.

Size Distribution of Incomes

Not every worker in a given job classification will be paid the median wage rate shown in Table 1. Some will be below and some above. Because the percentage of a household's income that is spent increases as income increases, it is important to capture this dispersion of wage rates when preparing estimates of induced employment and income. Accordingly, within each job classification the number of workers has been distributed evenly in a range from 20 percent below the median wage to 20 percent above the median wage with the results shown in Table 3, below. For example, the staffing pattern shown in Table 1 calls for

fifteen social workers at a median wage rate of \$ 15.38 per hour (\$14.81 per hour in 2001\$). Five of these have been assigned wage rates 20 percent below the median wage rate, a second five have been placed 20 percent above the median wage rate and five have been placed at the median wage rate. That places ten social workers in the \$ 20,000 to \$30,000 annual wage bracket and five in the \$ 30,000 to \$ 40,000 annual wage bracket.

Consumer Expenditure

Table 4 provides estimates of consumer expenditure by employees of the correctional facility. These estimates may be of interest to persons who own or operate businesses in places where these employees will live. They were used here in preparing the simulations of the Alaska Econometric Model that, in turn, provided estimates of induced employment and income. No estimates of consumer expenditure out of induced income have been made.

TABLE 3
SIZE DISTRIBUTION OF DIRECT PAYROLL
(Number of jobs by annual earnings in 000's of 2002 \$)

JOB TITLE	MEDIAN ANNUAL WAGE	***** NUMBER OF JOBS *****				
		20-30	30-40	40-50	50-60	60+
Human Resource Assistants	\$31,122	4	8			
Cooks	26,169	6	3			
Guards and Correctional Officers	31,451	100	65	35		
Librarians	46,488		1	1		
Substance Abuse Counselors	32,370	3	6			
Social Workers	28,880	10	5			
Senior Correctional Officers	47,307		7	7	7	
Food Service Manager	31,434		1			
Supervisors, Corrections	61,542			2	2	2
General Maintenance Workers	45,357		2	1		
Registered Nurses	50,954			3	4	2
Administrative Service Managers	43,192		2	1		
General Manager	61,542					1
Psychologists	52,864			2	1	1
Education Directors	41,613		2	2		
TOTAL		123	102	54	15	6

TABLE 4
CONSUMER EXPENDITURE OUT OF DIRECT PAYROLL
BY PAYROLL SIZE CLASS
(thousands of 2002 \$ per year)

<u>EXPENDITURE TYPE</u>	<u>ANNUAL EARNINGS (000'S of \$)</u>			<u>TOTAL</u>
	<u>20-30</u>	<u>30-50</u>	<u>50-70</u>	
Total Direct Payroll	3,120	6,088	1,208	10,416
Total Expenditure	3,593	5,806	1,013	10,412
Food at home	365	516	75	956
Food not at home	200	332	64	596
Shelter	676	1,028	182	1,886
Utilities	308	431	62	801
Other housing	212	351	66	629
Vehicle purchase	339	628	94	1,061
Gas & oil	132	209	33	374
Other transportation	238	420	74	732
Drugs & supplies	74	89	12	175
Other health care	188	261	40	489
Apparel & services	133	274	43	450
Entertainment	149	275	53	477
Personal care	50	86	12	148
Tobacco	41	60	7	108

SOURCE: Based on earnings by income from Table 3 and U.S. Department of Labor, CONSUMER EXPENDITURE SURVEY, 2001

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THE
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DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

Fiscal Year 2003 COST OF CARE
(Based on Fiscal Year 2002 Actuals)

BILLING RATE CALCULATION

ANNUAL TOTAL MANDAYS 1,040,831

INDIVIDUAL INSTITUTION RATES

Institutions	Total Cost	Mandays	Inst. Cost	Inmate Programs	Inmate Hlth.Care	Div.of Admin.& Support Cost	Statewide Direct Cost	Total
Anchorage Jail	\$ 4,207,448.53	26,755	\$ 157.26	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 193.51
Anvil Mt.CC	\$ 3,827,124.93	36,430	\$ 105.06	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 141.30
Cook Inlet	\$ 9,521,144.63	149,163	\$ 63.83	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 100.08
Fairbanks CC	\$ 6,843,374.90	76,109	\$ 89.92	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 126.16
Hiland Mt.CC	\$ 7,142,287.06	105,991	\$ 67.39	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 103.63
Ketchikan CC	\$ 2,759,922.38	20,515	\$ 134.53	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 170.78
Lemon Creek	\$ 5,827,761.36	61,080	\$ 95.41	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 131.66
Mat-Su Pre-Trial	\$ 2,699,075.64	30,399	\$ 88.79	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 125.04
Palmer CC	\$ 8,207,261.58	143,570	\$ 57.17	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 93.41
Sixth Avenue	\$ 3,419,265.19	31,339	\$ 109.11	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 145.36
Spring Creek	\$ 13,586,189.51	188,030	\$ 72.26	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 108.50
Wildwood CC	\$ 8,134,816.59	130,178	\$ 62.49	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 98.74
YKCC	\$ 3,868,924.76	35,373	\$ 109.37	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 145.62
Tents	\$ 165,372.83	5,901	\$ 28.03	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 64.27
Totals	\$ 80,209,969.89	1,040,831	\$ 77.06	\$ 4.43	\$ 16.88	\$ 4.44	\$ 10.50	\$ 113.31

COMPONENT	TOTAL EXPENSES	LESS REIMB	ADJUSTED COSTS	BILLING RATE
INSTITUTIONS	\$ 80,278,687.89			
Institutions	\$ 80,113,315.06			
Less: DHSS RSA Youth Meals		\$ (68,718.00)		
Alternative Housing	\$ 165,372.83		\$ 80,209,969.89	\$ 77.06
INMATE PROGRAMS	\$ 4,609,357.59		\$ 4,609,357.59	\$ 4.43
Inmate Programs	\$ 3,420,352.87			
White Bison	\$ 50,000.00			
ACI Administration	\$ 1,139,004.72			
INMATE HEALTH CARE	\$ 17,571,477.44		\$ 17,571,477.44	\$ 16.88
ADMIN & SUPPORT	\$ 4,615,630.87	\$ -	\$ 4,615,630.87	\$ 4.44
% for Institution Operations	\$ 4,615,630.87			
STATEWIDE DIRECT COSTS	\$ 11,065,350.54	\$ -		
Institutions Director's Office	\$ 969,679.34			
Equipment & Bldg. Depreciation	\$ 7,807,705.89			
Facility Planning - CIP	\$ 296,954.94			
Transportation & Classification	\$ 1,991,010.37			
Less: DPS RSA Transport		\$ (140,000.00)	\$ 10,925,350.54	\$ 10.50
BILLING RATE	\$ 118,140,504.33	\$ (208,718.00)	\$ 117,931,786.33	\$ 113.31

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS
Commissioner's Office

TONY KNOWLES, GOVERNOR

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March 22, 2001

CAPITAL COST FOR A STATE BUILT 800 BED, MEDIUM SECURITY PRISON:

The Honorable John Torgerson
Alaska State Senate
State Capitol, Room 427
Juneau, Alaska 99801

\$131,250 to \$156,250

Dear Senator Torgerson:

Thank you for your letter of March 19, 2001, regarding HB 149, relating to a private prison in Kenai. In this letter, you asked five questions. Our answer to these questions is as follows:

Cost of construction: You indicate that the Borough has estimated capital costs at between \$60 and \$80 million, while the Department of Corrections has estimated higher numbers; you ask for an explanation of these differences. The Department of Corrections does not know what facility design the Borough is envisioning and thus we cannot speak to the costs of their proposal. We can arrive at a very rough estimate, however, of what it would cost to build an 800-bed medium security facility by applying certain assumptions:

a gross square footage per inmate of 434 square feet,
an infrastructure growth factor of 1.10,
construction costs of \$215 per square foot,
costs for needed site improvements and a perimeter fence, and
a project factor of 1.45 for the design of the facility, management of the construction, FF&Es, and contingencies.

Given the above assumptions, the state estimates total capital costs between \$105 and \$125 million. This does not include land acquisition costs. These figures calculate out to between \$131,250 and \$156,250 per bed. For informational purposes, the costs for the Anchorage jail were limited in HB 53 to \$146,000 per bed.

Cost of operation: You ask, "what cost per day are you estimating this facility will run?" The Department does not have sufficient information to be able to estimate costs for the facility. Costs are driven by numerous factors such as design, staffing levels, location, capacity, security level, etc. We can advise you that the institutional cost of care at Spring Creek (a maximum security facility for approximately 500 inmates) is \$77.48; at Palmer (which consists of both a minimum and a medium security facility for a total of approximately 400 inmates) it is \$62.03;

Bernice Torgerson
March 22, 2001

Page 2

and at Arizona (a medium security facility where we have 800 inmates) it is \$54.57 per prisoner per day. Please note that these figures are just the institutional (or, in the case of Arizona, just the contract per diem cost) and does not include other costs such as medical.

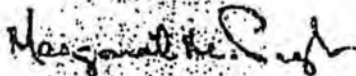
Halfway housing: You have inquired whether the Department will require one or more halfway houses to be located in Kenai if a new prison is built there. The need for a halfway house in the Kenai area already exists and the Department looks forward to working with the Borough on this issue.

Staffing requirements: There is no "industry standard" or formula for determining proper staffing levels. Instead, a number of factors must be carefully considered to determine proper staffing levels. These factors include: Design of the facility, function of facility (jails vs. prison); its rated bed capacity; the security level of the institution; the custody level of the prisoners to be held in the institution; the level of admissions to the facility; and the programs to be provided.

Training requirements: The Department is not aware of any specific standards that apply for the training of personnel who work in private prisons. It is our understanding that training standards are set by the employer, perhaps with a certain level having been agreed to in its contract with the public sector partner. Alaska statutes require correctional officers in public facilities to be certified by the Alaska Police Standards Council. One of the requirements for certification is that the officer meet specified training standards, both during basic training and on an annual basis thereafter. Basic training is usually accomplished by the officer attending and successfully completing a program held at the state's Training Academy. Personnel who work in private prisons are not required by state law to be certified.

If you have any further questions, please let me know.

Sincerely,



Margaret M. Pugh
Commissioner

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Summary Statements for Referenced Documents

**Harvard Law Review, May 2002
Developments in the Law – The Law of Prisons
Section III:**

A Tale of Two Systems: Cost, Quality and Accountability in Private Prisons

“The most rigorous studies find clearly positive cost savings...none of the more rigorous studies 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.”

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

“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.”

“...private prisons are, if anything, more accountable for their constitutional violations than are public prisons. The presence of this additional judicial check should in turn increase private prison quality.”

“...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...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.”

**United State Department of Justice
Emerging Issues of Privatizing Prisons
February 2001**

“Certainly in those markets where correctional officer salaries and fringe benefits have been excessive, privatization has fostered a reexamination of those costs, which has led to cost savings...privatization has served as a catalyst for change by demonstrating other means of doing the business of corrections.” Pg 60

**State of Arizona
Performance Audit – Private Prisons
July 2001**

“...contracted facilities operate almost exactly like state operated facilities, and at a lower cost.” Pg i

“Department reviews show that its contractors met or exceeded Department operational standards at a cost averaging about 12 percent less than state-operated beds for similar inmates.” Pg ii

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Published eight times during the academic year by Harvard law students.

Citations conform to *The Bluebook: A Uniform System of Citation* (17th ed. 2000), published by the Harvard Law Review Association for the *Columbia Law Review*, the *Harvard Law Review*, the *University of Pennsylvania Law Review*, and *The Yale Law Journal*.

VOLUME 115

MAY 2002

NUMBER 7

HARVARD LAW REVIEW

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The *Harvard Law Review* (ISSN 0017-811X) is published monthly eight times a year, November through June, by the Harvard Law Review Association at Gannett House, 1511 Massachusetts Ave., Cambridge, MA 02138. Periodicals postage paid at Boston, Mass., and additional mailing offices. POSTMASTER: Send address changes to the Harvard Law Review, Gannett House, 1511 Massachusetts Avenue, Cambridge, MA 02138.

Current subscription: \$50.00 domestic / \$56.00 foreign, payable in advance; \$11.00 single issue. Remittance must be made by U.S. Dollar Draft payable at a United States bank. Subscription requests that are received midvolume may be subject to an additional postage and handling charge. Domestic claims of nonreceipt of issues should be made within 90 days of the month of publication, overseas claims within 180 days; thereafter, the regular back issue rate will be charged for replacement. All notifications of change of address should include old and new addresses, with zip codes. Please inform us one month in advance to ensure prompt delivery.

Single issues and unbound volumes for volume 114 are available from the Harvard Law Review Association at the following prices: single issues, \$13.00 domestic / \$15.50 foreign; unbound volumes, \$58.00 domestic / \$66.00 foreign. Back issues prior to volume 114 are available from William Hein Co., 1285 Main St, Buffalo, NY 14209-1987. For price of issues, volumes, and sets prior to volume 114, please inquire of William Hein Co.

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HARVARD LAW REVIEW

VOLUME 115
NOVEMBER 2001-JUNE 2002

Subscription — one year \$50.00 (Foreign — \$56.00)
two years \$91.00
three years \$126.00
air mail subscription \$125.00

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DEVELOPMENTS IN THE LAW
THE LAW OF PRISONS

"[I]t is impossible for a written opinion to convey the pernicious conditions and the pain and degradation which ordinary inmates suffer within [the] prison walls"

Ruiz v. Estelle, 503 F. Supp. 1265, 1391 (S.D. Tex. 1980) (Justice, J.)

"The objective above all, by whatever means it may be achieved, is to launch an upward spiral of improved penal practice from the stagnant plateau which has all too often over many decades characterized purely public systems in the [United States]."

RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC
ACCOUNTABILITY 148 (1997)

"When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable."

O'Lone v. Estate of Shabazz, 482 U.S. 342, 355 (1987)
(Brennan, J., dissenting)

"Freedom from imprisonment — from government custody, detention, or other forms of physical restraint — lies at the heart of the liberty that [the Due Process Clause] protects."

Zadvydas v. Davis, 121 S. Ct. 2491, 2498 (2001) (Breyer, J.)

"Ultimately, we must decide what kind of society we hope to live in. We can try to comfort ourselves by calling prisons 'correctional institutions,' but it is clear that, after two centuries, we as a nation still cage the least fortunate among us to solve our problems."

MARC MAUER, RACE TO INCARCERATE 194 (1999)

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received intense scrutiny from the presidential administration,¹¹⁹ and as a result, the members of the current Court are likely to be more in step with the presidents who appointed them than in the past.

In contrast to the increasingly politicized and conservative Supreme Court, some lower court federal judges have continued to perform the countermajoritarian role that Justice Stone envisioned for the federal judiciary.¹²⁰ Even if one does not consider prisoners' rights to be a priority, the fact that Congress and the Court have worked together to disfavor unpopular constitutional rights — Congress by reducing the remedial powers of the federal district courts and the Court by declining to protect federal district courts from this usurpation while protecting its own jurisdiction — should be cause for concern.

E. Conclusion

The choices made over the last several decades by the Supreme Court and, more recently, by Congress in AEDPA and the PLRA about how much authority to vest in the federal district courts have historically been treated as secondary to the choice between state courts and federal courts. Yet as the higher federal courts become increasingly conservative, and, consequently, federal district courts become more important to advocates of the rights of prisoners and criminal defendants, the balance between district court discretion and higher court authority deserves note. Obviously, the substantive limitations that AEDPA and the PLRA impose on prisoners' suits will significantly affect prisoners' rights, but the less-discussed provisions described above will also have an impact on prison reform and criminal procedure. Furthermore, the PLRA and AEDPA should be alarming even to those who do are not active supporters of prisoners' rights, because the recent legislative and judicial treatment of those rights suggests that, in the future, Congress and the Court could ally to curtail district court protection of other politically unpopular rights as well.

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 —

1999), which argues that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), asserted only a judicial power "to declare politically inconsequential laws unconstitutional," Graber, *supra*, at 31.

¹¹⁹ See, e.g., YALOF, *supra* note 116, at 142-44 (recounting a Reagan administration task force's development of a report of each potential nominee's opinions, noting that "[n]ever before in history had there been such an excruciatingly detailed examination of judicial rulings by the Justice Department in anticipation of a Supreme Court nomination").

¹²⁰ In fact, this activism is exactly what led Congress to constrain the remedial powers of federal district courts. See *supra* pp. 1854-55.

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

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 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 Gautreaux, *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 (15,979 out of 87,369).

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 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 de-

¹¹ Richard G. Kickbusch, *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.

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.

partments 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'n 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 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

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).

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).

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

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 SHICOR, 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 SHICOR, *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 & Mark 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.")

unions generally contribute vastly more money to politicians than do private prison companies.³³ The California prison guard union, for 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

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). 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.*

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 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

§ 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).

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. . . .").

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 studies⁴⁸ find clearly positive cost savings.⁴⁹ On the quality side, comparisons are trickier, as there is no single metric representing quality.

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.

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.

But none of the more rigorous studies⁵⁰ 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

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).

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

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 priva-

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).

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).

tization 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

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 safe-

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.

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).

guarding against government corruption⁷⁴ 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 wages⁷⁶ 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 public and private prisons, case studies may provide a flavor of the accountability mechanisms at work.

i. Private Prisons' Legal Accountability. — The traditional hostility of juries toward corporate defendants, private prison guards' inability to claim qualified immunity in § 1983⁸¹ civil rights suits, and

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.

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

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 guards⁸⁶) 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

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 Gerhardtstein, *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).

have known."⁸⁷ In *Richardson v. McKnight*,⁸⁸ however, the Supreme Court held that private prison guards do not enjoy this qualified immunity.⁸⁹ 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

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.

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.

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 remedies⁹⁵) or penalties for frivolous litigation (such as the frequent-filer penalties in the Prison Litigation Reform Act⁹⁶), 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. 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,

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").

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.

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 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

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.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

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 problems¹¹⁰ — 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

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).

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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

3. *Are Public Prisons Any More Accountable Than Private Prisons?* — (a) *The Dynamics of Organizational Stasis*. — Susan Sturm describes the "dynamics of organizational stasis," which "lock in the current conditions in prisons" (both public and private) and "disable regular prison participants from achieving institutional self-correction":¹¹⁵

Even in the face of riots, violence, or public exposure of brutal conditions, legislatures frequently provide minimal support for change. The familiar study commission or task force conducts a public hearing or investigation, culminating in a report with recommendations that are infrequently enacted into law. Even when the legislature does respond to abuse with legislation, there is little accountability for its enforcement and the administration may comfortably ignore it without legislative sanction.¹¹⁶

Much of Sturm's description of prisons applies equally to public and private prisons — inmates are generally powerless to change prison conditions,¹¹⁷ and both guards and administrators often resist reform.¹¹⁸ Other elements, however, apply primarily to public prisons: unions concentrate on preserving their members' pay, benefits, and seniority,¹¹⁹ and the budgetary process, in which this year's allocation is presumed to be the baseline for next year's, supports the status quo.¹²⁰ It is well known that public bureaucracies have different incentives and attitudes toward change than do private companies.¹²¹ Companies concerned about winning a bid, retaining their contracts, maintaining their stock price, or just being marginally more protected against prisoner lawsuits seem more likely to overcome their institutional stasis.

(b) *Corcoran State Prison*. — Contrast the above factors, which promote accountability in private prisons, with the sad tale of Cor-

¹¹³ Greene, *supra* note 5, at 23-24.

¹¹⁴ See *supra* p. 1879.

¹¹⁵ Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 810-11 (1990).

¹¹⁶ *Id.* at 840 (footnote omitted).

¹¹⁷ *Id.* at 824-26.

¹¹⁸ *Id.* at 816, 820-21.

¹¹⁹ *Id.* at 836.

¹²⁰ *Id.* at 832.

¹²¹ See, e.g., JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 72-89 (1989) (describing the nonmarket incentives that operate in agencies).

coran State Prison, a California public prison, in which guards killed seven inmates and wounded forty-three others between 1989 and 1995.¹²² Rival gang members fought in human cockfights overseen by prison guards; officers abused and beat inmates; problem inmates were disciplined by being locked in a cell and then beaten or raped by an inmate enforcer dubbed the "Booty Bandit."¹²³

Conditions at Corcoran are not typical of public prisons. What is striking about Corcoran, however, is how little was done to alter these conditions even once they were discovered. The Corcoran episode serves as a reminder of the weakness of public prisons' accountability. When replacing one's service provider is difficult — and especially when the provider is identified with the purchaser, capturing the policy advice process — moral outrage at abuses can only get one so far.

In 1994, the FBI began its probe of Corcoran, and in 1996, prompted by media attention, the state launched a pair of investigations, one by the Department of Corrections and another by the Attorney General's office.¹²⁴ These investigations were stymied by political pressure from the governor's office and the prison guard union, and the state probes yielded not a single criminal charge.¹²⁵ Instead, state investigators "spent considerable manpower trying to dig up dirt" on the whistleblowers who had reported these abuses to the FBI.¹²⁶ One whistleblower, Richard Caruso, was the only officer disciplined as a result of the state investigations (though he sued and received a large settlement from the state, the largest amount ever given to a whistleblowing officer in California).¹²⁷ Another whistleblower changed jobs within the prison system because of alleged retaliation by prison officials (and recovered nothing).¹²⁸ The FBI inquiry ultimately resulted in charges against eight officers, but all were acquitted in June 2000.¹²⁹

D. The New Frontier: Information, Contracts, Monitoring

While private prisons today provide acceptable quality at a lower cost than do public prisons, they will only continue to do so as long as

¹²² Arax & Gladstone, *supra* note 37.

¹²³ *Id.*; see also Mark Arax, *Ex-Guard Tells of Brutality, Code of Silence at Corcoran*, L.A. TIMES, July 6, 1998, at A1.

¹²⁴ Arax & Gladstone, *supra* note 37.

¹²⁵ *Id.* (describing also how union officials told guards not to cooperate with the earlier county prosecution of two lieutenants who "delivered a Taser jolt to an inmate's testicles in 1989 and engaged in a cover-up").

¹²⁶ *Id.*

¹²⁷ *Id.*; Mark Arax, *Defense Landed All the Punches in Corcoran Case*, L.A. TIMES, June 11, 2000, at A1.

¹²⁸ Mark Arax, *Judge Dismisses Lawsuit by Prison Whistle-Blower*, L.A. TIMES, Oct. 4, 2000, at A19.

¹²⁹ Arax & Gladstone, *supra* note 37; Arax, *supra* note 127.

their buyers — federal and state governments — care. Bad things still happen at private prisons. Private prison companies have not always been forthcoming with information about the types of inmates they are holding,¹³⁰ and reports of maximum-security prisoners being housed in portions of private prisons designed for the general population are not uncommon.¹³¹ Effective judicial, legislative, and administrative oversight continues to be necessary. Perhaps the scope of prison litigation should be expanded to keep both public and private prisons honest, but there is no substitute for performance contracts that encourage quality improvements, effective monitoring, and information gathering and disclosure.

1. *Performance Measures.* — Susan Sturm notes that prison officials often know little about their own operations.¹³² Prison administrators gather some information to prove the prison's compliance with court orders,¹³³ but it would be preferable for them to do so without being forced. One way to increase private prisons' disclosure, at least in the case of federal institutions, is by subjecting them to the same Freedom of Information Act disclosure requirements as public prisons¹³⁴ — though this, too, is a piecemeal solution.

Perhaps the environmental information regime can provide a model for the disclosure of prison information. The Toxics Release Inventory (TRI),¹³⁵ which requires that industrial facilities report the release and transfer of specific chemicals, has been credited with dramatic reductions in pollution.¹³⁶ In part because of the existence of these reporting requirements, much formerly fragmented and incomparable data has become standardized and can be aggregated to allow

¹³⁰ DYER, *supra* note 47, at 206 (describing a case in which Texas authorities learned that a CCA facility was housing sex offenders from out of state only when a few of them escaped); *id.* at 207 (describing a case in which, without the knowledge of local authorities, a privately run Denver drug rehabilitation program accepted felons from out of state, one of whom, after being expelled from the program, allegedly raped and murdered a local resident); *see also* Gerhardstein, *supra* note 83, at 184–85 (reporting that the private prison in Youngstown did not inform local authorities of the transfer of maximum-security inmates to a medium-security prison).

¹³¹ *See* DYER, *supra* note 47, at 206 (noting that the CCA Houston facility was not designed for inmates with a "violent criminal history"); *id.* at 207 (reporting that at a Texarkana private prison, "murderers and other violent offenders from Colorado were . . . housed in the general population, despite the facility not being rated for maximum-security inmates"); Gerhardstein, *supra* note 83, at 184–85 (noting that at Youngstown, a medium security prison in Ohio, hundreds of inmates "were transferred directly . . . from the Maximum Security Facility at Lorton").

¹³² Sturm, *supra* note 115, at 898.

¹³³ *See id.*

¹³⁴ *See* DYER, *supra* note 47, at 216; Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J.L. REFORM 249, 296–99 (1995).

¹³⁵ 42 U.S.C. § 11023 (1994).

¹³⁶ Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 287–88 (2001).

comparisons of different firms or states, or to track performance over time.¹³⁷

Of course, TRI mandates only that information be gathered and made public, not that anything be done with that information. But the mere availability of information, whether environmental information about industrial facilities or correctional information about prisons (floor space, number of violent incidents, recidivism), has real effects.¹³⁸ First, "you manage what you measure" — administrators have a natural desire to improve what they have data about.¹³⁹ Second, information gathering encourages peer monitoring within an industry, and industry self-regulation can be a valuable supplement to other forms of monitoring or control.¹⁴⁰ Third, information is valuable to regulators, would-be regulators, industry actors seeking to stave off regulation, community monitors and "informal regulators," capital markets, labor markets, and customers (in the prison case, state and federal government entities).¹⁴¹

Information as regulation has its critics. Regulation proponents charge that information does not guarantee any action or results and that it is most useful in combination with other regulation.¹⁴² From the other side, critics charge that because information is highly contextual, any mandated information will be too simplistic and perhaps misleading, especially when presented at a high level of aggregation.¹⁴³ But while particular information initiatives may be flawed, and while mere disclosure may not be sufficient, collecting and publicizing a rich (and meaningful) set of performance indicators will increase the incentives for improvement that are already inherent in the competitive contracting process.

2. *Improving Performance Through Contract.* — At best, contracts "represent potentially useful accountability instruments [and] vehicles for achieving public law values, such as fairness, openness, and accountability."¹⁴⁴ Private prison contracts should have specific terms, graduated penalties, and strong oversight by a "contract manager" working for the public agency; they should require private prisons to "observe minimal administrative procedures such as notice and hearing requirements," and perhaps explicitly give inmates or surrounding communities third-party beneficiary rights, which would allow over-

¹³⁷ *Id.* at 260-61.

¹³⁸ *Id.* at 295.

¹³⁹ *Id.* at 295-305.

¹⁴⁰ *See id.* at 309.

¹⁴¹ *See id.* at 309-31.

¹⁴² *See id.* at 338-45 (noting that industry laggards may be unconcerned with improving their reported information).

¹⁴³ *See id.* at 331-38 (also raising data quality and timeliness issues).

¹⁴⁴ Freeman, *supra* note 24, at 201-02.

sight through contract litigation when government oversight fails.¹⁴⁵ States could also require, as contractual terms, compliance with American Correctional Association and National Commission of Correctional Health Care standards.¹⁴⁶

Moreover, states could mandate that private prisons provide the same training that is required of public prison guards,¹⁴⁷ though requiring certain inputs is presumptively less effective than looking to outcomes where these are measurable. Contracts could require that private firms carry civil rights liability and other insurance; that they disclose conflicts of interest; that they allow access to records and entry to the facility by inspectors; or that they be independently monitored or audited by certified professionals.¹⁴⁸ Finally, contracts could tailor termination rights and provide for easy amendment of contractual terms. In short, contract designers can be highly creative — and thorough — in writing accountability into contractual terms.

Most basically, corrections departments should move toward performance-based contracts. Ideally, performance-based contracts should “clearly spell out the desired end result” but leave the choice of method to the contractor, who should have “as much freedom as possible in figuring out how to best meet government’s performance objective.”¹⁴⁹ These contracts also structure contractor payments to encourage the desired results, rewarding the contractor for improvements and penalizing it for poor performance or rising costs.¹⁵⁰

This approach seems feasible for corrections. The American Correctional Association is revising its accreditation standards to include performance measures, and the Office of Juvenile Justice and Delinquency Prevention is developing performance-based standards for juvenile correctional facilities.¹⁵¹ Performance measures for prisons could include process measures such as the number of educational or vocational programs, or outcome measures such as the Logan quality

¹⁴⁵ Cf. *id.* at 202 (making this argument in the context of private nursing homes); see also Gerhardstein, *supra* note 83, at 197.

¹⁴⁶ Freeman, *supra* note 24, at 204–05.

¹⁴⁷ *Id.* at 205.

¹⁴⁸ *Id.* at 206.

¹⁴⁹ WILLIAM D. EGGERS, PERFORMANCE-BASED CONTRACTING: DESIGNING STATE-OF-THE-ART CONTRACT ADMINISTRATION AND MONITORING SYSTEMS 2 (Reason Public Policy Inst., How-To Guide No. 17, 1997).

¹⁵⁰ *Id.* at 10–14.

¹⁵¹ See *Performance Standards Home: Performance-Based Standards for Juvenile Correction and Detention Facilities*, at <http://www.performance-standards.org> (last visited Mar. 18, 2002); see also I GEOFFREY F. SEGAL & ADRIAN T. MOORE, WEIGHING THE WATCHMEN: EVALUATING THE COSTS AND BENEFITS OF OUTSOURCING CORRECTIONAL SERVICES 15–16 (Reason Public Policy Inst., Policy Study No. 289, 2002).

of confinement index,¹⁵² the number of assaults, or the recidivism rate. Governments could even require that contractors pay for elements that are often externalized, such as the cost of escapes.¹⁵³ Because no single statistic adequately captures "quality," and because focusing on any single measure could have perverse effects,¹⁵⁴ performance-based contracts should tie compensation to a large and rich set of variables.

3. *Awarding and Monitoring Contracts To Maximize the Gains from Privatization and Minimize Capture.* — Accountability can also be improved by redesigning correctional agencies. Under the basic model of accountability, the public correctional agency sets contract terms, awards contracts, and monitors compliance. Capture is frequent, cross-fertilization rare.¹⁵⁵

But there are other models of accountability. In the United Kingdom, "the role of the chief inspector of prisons brings some external scrutiny to the prison system generally, including the private sector This aspect of the accountability system is vigorously independent, with no danger of capture to date."¹⁵⁶ However, the chief inspector's reports are not binding, and the government has resisted attempts to give the office more teeth.¹⁵⁷ In Florida, private prisons have their own regulatory authority that operates independently of that of public prisons; the private prison monitor is in turn independent of the private prison authority.¹⁵⁸ This system minimizes capture, but it also minimizes cross-fertilization.¹⁵⁹ Moreover, "[t]here is also a danger that the monitors may develop a loyalty to the Privatization Commission which in turn might inhibit their willingness to make public criticisms — a variant of the capture principle."¹⁶⁰

Perhaps the most promising model is one suggested by British penologist Richard Harding, in which both public and private prisons are subject to, and monitored by, an independent body that takes over new prison projects from the outset and allows both public and private systems to bid on them.¹⁶¹ After the contract term expires, both public and private systems may bid on the prison again, so that facilities can

¹⁵² See HARDING, *supra* note 28, at 113-15 (describing Charles Logan's index of prison quality, which includes measures of "security, safety, order, care, activity, justice, conditions and management").

¹⁵³ Cf. OHIO REV. CODE ANN. § 9.07(D)(16)(b) (imposing reimbursement requirements for certain externalized costs).

¹⁵⁴ Tying compensation to safety alone could encourage abuse; tying it to the number of civil rights complaints could harm safety.

¹⁵⁵ See HARDING, *supra* note 28, at 159.

¹⁵⁶ *Id.* at 159-60.

¹⁵⁷ *Id.* at 160.

¹⁵⁸ *Id.* at 161.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 161-62.

move among private firms and between the private and public sectors, promoting both accountability and cross-fertilization.¹⁶² This model separates the roles of government as purchaser and provider, making it more difficult for service departments to capture the policy advice process and use their power to recommend themselves as service providers.¹⁶³

E. Conclusion

This Part has not engaged the "softer" arguments about privatization, but has rather taken correctional policy as given and prison privatization as ethically neutral in itself. Does political influence peddling weaken or strengthen the case for privatization? It depends whether corruption by corporations is worse than patronage of public prison guard unions — a question that calls for further research.

Turning to the cost and quality comparisons, what imperfect empirical evidence there is suggests that private prisons cost less than public prisons and that their quality is no worse; it is perhaps unsurprising that prison privatization behaves in this respect much like privatization of other state and local services.¹⁶⁴ Moreover, there are many reasons to believe that private prisons are more accountable than public prisons — both because of heightened legal and market accountability for private forms and because accountability in the public sector is so limited. There are also numerous untapped opportunities for improving private prisons even further with richer information gathering and dissemination, performance contracts, and better monitoring. In short, despite all of their possible faults, private prisons are a promising avenue for the future development of the prison system.

IV. IN THE BELLY OF THE WHALE: RELIGIOUS PRACTICE IN PRISON

Prisons are closely regulated environments in which uniformity of schedule, appearance, and diet are, for reasons of security and economy, high priorities. Yet the First Amendment guarantees — even to

¹⁶² *Id.* at 162.

¹⁶³ WILLIAM D. EGGERS, *COMPETITIVE NEUTRALITY: ENSURING A LEVEL PLAYING FIELD IN MANAGED COMPETITIONS* 28 (Reason Public Policy Inst., How-To Guide No. 18, 1998).

¹⁶⁴ See, e.g., ADRIAN T. MOORE, GEOFFREY F. SEGAL & JOHN MCCORMALLY, *INFRASTRUCTURE OUTSOURCING: LEVERAGING CONCRETE, STEEL, AND ASPHALT WITH PUBLIC-PRIVATE PARTNERSHIPS* (Reason Public Policy Inst., Policy Study No. 272, 2000) (discussing water and wastewater, solid waste, and highway and street maintenance, in addition to jails and prisons). For a wider-ranging argument in favor of privatizing more of the criminal justice system, see BRUCE L. BENSON, *TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE* (1998).

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BJA Bureau of Justice Assistance

Emerging Issues on Privatized Prisons

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National Council on Crime and Delinquency

February 2001

Monograph

NCJ 181249

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This document was prepared by the National Council on Crime and Delinquency, under grant number 97-DD-BX-0014, awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime.

The Future of Privatization

Despite these criticisms, privatization still provides a vital function within the correctional system. Although the private sector has been unable to keep its promise of greatly improving prison operations, its mere presence has had a significant impact on traditional prison operations. Gaes and colleagues (1998) acknowledge that privatization has forced the public sector to reexamine how it conducts business. Certainly in those markets where correctional officer salaries and fringe benefits have been excessive, privatization has fostered a reexamination of those costs, which has led to cost savings. In this sense, privatization has served as a catalyst for change by demonstrating other means for doing the business of corrections. As limited as they are, however, these cost-saving innovations should not be the only items on the privatization agenda.

It would be extremely interesting and productive for the private sector, in partnership with the public sector, to become the vehicle for testing far more substantive changes in correctional policy in a number of areas—not just prisons and jails. For example, an extremely promising strategy would be for the private sector to test the long-term effects of state-of-the-art correctional programming in reducing recidivism in the areas of education, vocational training, and various forms of counseling, both in prison and after release. One could also test the effects of reducing prison terms and other correctional policies using the flexibility of the private sector. Finally, new management techniques, staff training, and facility designs could be tested by the private sector under controlled conditions. All such innovations should be directed at reducing the current ineffective correctional practices rather than producing a system that is less expensive but as ineffective as the public-sector system.



State of Arizona
Office
of the
Auditor General

PERFORMANCE AUDIT

**ARIZONA
DEPARTMENT
OF
CORRECTIONS**
Private Prisons

Report to the Arizona Legislature
By Debra K. Davenport
Auditor General

July 2001
Report No. 01-13

SUMMARY

The Office of the Auditor General has conducted a performance audit of the Private Prisons subprogram at the Arizona Department of Corrections (Department) in response to a June 16, 1999, resolution of the Joint Legislative Audit Committee. This performance audit was conducted under the authority vested in the Auditor General by A.R.S. §41-1279 and as part of the Sunset review set forth in A.R.S. §41-2951 et seq. This audit is the fourth in a series of six audits of the Department of Corrections. Previous audits focused on Security Operations, Human Resources Management, and Support Services. The remaining audits will focus on Agency Information Systems and Correctional Industries.

Arizona statutes authorizing the Department to do so offers a cost-effective alternative to state-operated facilities at comparable levels of security and cost. The Department has contracts for three private prison facilities, with a total capacity of 1,450 inmates. These facilities, located in Florence, Marana, and Phoenix, primarily house inmates who have committed Driving Under the Influence (DUI) or drug-related offenses. In addition to a Department administrator who is responsible for all privatization projects, 15 Department employees administer the subprogram. These employees monitor contract compliance and carry out functions such as classification and discipline of inmates housed in the private prisons. Most of these employees work on-site at the private prisons.

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The Department Exercises Strong Oversight of Prison Contractors (See pages 9 through 12)



Through strong contract requirements and extensive oversight activities, the Department has ensured that contracted facilities operate almost exactly like state-operated facilities, and at a lower cost. The Department requires its contractors to follow the

same policies and procedures as its state-operated prisons, extending to specific details such as following the same daily menus as state-operated facilities. Full-time contract monitors at each private prison assess compliance with Department requirements, and additional on-site Department staff perform inmate classification and handle inmate grievances and discipline. Department reviews show that its contractors met or exceeded Department operational standards at a cost averaging about 12 percent less than state-operated beds for similar inmates. This difference resulted in a savings of \$5.5 million in fiscal years 1998 and 1999, including the costs of program administration and contract monitoring. These savings are derived mainly from providing lower salaries and benefits compared to those of state employees.


The Department's review and oversight activities are more extensive than those in most other states. However, the approach appears to be effective, based on the private prisons' compliance with Department standards and the lower cost of housing inmates in private prisons compared to the cost of state-operated facilities.

**The Department Should Begin
Gathering Information To Make
Future Privatization Decisions
(See pages 13 through 17)**

The Department should plan ahead so it can use private prisons most effectively when it needs more beds to accommodate inmate population growth or replace unsatisfactory facilities. In addition to the substance abuse and DUI inmates already sent to private prisons, the Department may wish to consider privatizing incarceration of other inmate groups, such as women, geriatric inmates, sex offenders, or mentally ill inmates. Other states have privatized or are considering privatizing some of these populations. However, in order to compare the costs of incarcerating in state-operated versus private facilities for such inmates, the Department needs to begin tracking such costs as health care,

special programs, or facility modifications required for these inmate groups. Because the Department has moved many of these types of inmates into separate units within Department-operated complexes, it may be easier to track these costs.

**Other Pertinent Information
(See pages 19 through 23)**



The prisons that have contracts with the Department are not the only private prisons operating in Arizona. Three additional prisons operate in Arizona and house inmates from other jurisdictions, such as three federal agencies, two other states and the District of Columbia, and a tribal government. More such prisons may open in the near future. Currently, state regulation of prisons without Department contracts is minimal. However, the Department would like the State to have more stringent regulation of these prisons.

CONTRACTS WITH PRIVATELY OPERATED PRISONS ON JANUARY 1, 2001

Agency	Private Facility's Name	Security Level	Rated Capacity 1/1/01	1/1/01 Inmate Population	
Alaska	Central Arizona Detention Center	Medium	1,000	793	
Arizona ¹	Phoenix West	Minimum	400	397	
	Florence West	Minimum	600	591	
	Marana Community Correctional Treatment Facility	Minimum	450	442	
Arkansas	Ronald McPherson Correctional Facility	Medium/Maximum	600	677	
	Scott Grimes Correctional Facility	Medium/Maximum	600	580	
California	Baker Community Correctional Facility	Minimum/Medium	262	263	
	Leo Chesney Community Correctional Facility	Minimum/Medium	195	193	
	Victor Valley Community Correctional Facility	Minimum/Medium	500	496	
	Central Valley Community Correctional Facility	Minimum/Medium	525	497	
	Desert View Community Correctional Facility	Minimum/Medium	550	545	
	Eagle Mountain Community Correctional Facility	Minimum/Medium	423	428	
	McFarland Community Correctional Facility	Minimum/Medium	215	211	
	Golden State Community Correctional Facility	Minimum/Medium	525	517	
	Mesa Verde Community Correctional Facility	Minimum/Medium	340	340	
	Colorado ²	Bent County Correctional Facility	Medium	700	623
		Huerfano County Correctional Facility	Medium	752	644
		Crowley County Correctional Facility	Medium	500	464
Dist. of Col.	Kit Carson Correctional Facility	Medium	590	368	
	Correctional Treatment Facility	Medium	800	771	
	Northeast Ohio Correctional Center	Medium	1,700	974	
Florida	Central Arizona Detention Center	High		140	
	Torrance County Detention Facility	High		178	
	Gadsden Correctional Facility	Medium	696	882	
	South Bay Correctional Facility	Close	1,284	1,184	
Georgia	Moore Haven Correctional Facility	Medium	750	685	
	Bay Correctional Facility	Medium	750	697	
	Lako City Correctional Facility	Medium	350	345	
Hawaii ³	D. Ray James	Medium	1,550	1,550	
	Coffee Correctional Facility	Medium	1,500	1,022	
	Wheeler Correctional Facility	Medium	1,500	1,247	
Idaho	Diamondback Correctional Facility	Medium/Minimum	2,160	295	
	Central Oklahoma Correctional Facility	Medium/Minimum	886	79	
	Prairie Correctional Facility	Medium/Minimum	1,365	555	
	Florence Correctional Facility	Medium/Close		258	
Indiana	Idaho Correctional Center	Multi	1,272	1,183	
Kansas ⁴	Marion County Jail	Medium		399	
	Otter Creek Correctional Center	Medium		592	
Kentucky	Lebanon Woman's Correctional Camp	Minimum	32	29	
	Marion Adjustment Center	Minimum	700	681	
Louisiana ⁵	Leo Adjustment Center	Multi	600	586	
	Winnfield Correctional Center	Multi	1,538	1,535	
	Allen Correctional Center	Multi	1,538	1,531	
Michigan	Michigan Youth Correctional Facility	Maximum	480	449	
Mississippi	Delta Correctional Facility	Medium	1,000	754	
	East Mississippi Correctional Facility	Medium	1,000	494	
	Marshall County Correctional Facility	Medium	1,000	736	
	Walnut Grove Correctional Facility	Medium	976	0	
	Wilkinson County Correctional Facility	Medium	1,000	880	
Montana	Crossroads	Multi	512	455	
Nevada	Southern Nevada Women's Correctional Center	Multi	500	500	
New Mexico	Lea County Correctional Facility	Medium	1,200	1,200	
	Guadalupe County Correctional Facility	Medium	600	600	
	Torrance County Detention Facility	Medium	156	156	
	New Mexico Women's Correctional Facility	Multi	313	300	

Contracts with Privately Operated Prisons on January 1, 2001, continued

Agency	Private Facility's Name	Security Level	Rated Capacity 1/1/01	1/1/01 Inmate Population
North Dakota	Prairie Correctional Facility	Medium	1,365	98
Ohio ⁶	North Coast Correctional Treatment Facility	Minimum	552	544
	Lake Erie Correctional Institution	Medium	1,380	1,366
Oklahoma	Central Oklahoma Correctional Facility	Medium	872	570
	Cimarron Correctional Facility	Medium	960	899
	Davis Correctional Facility	Medium	970	846
	Diamondback Correctional Facility	Multi	1,920	941
	Great Plains Correctional Facility	Medium	812	810
	Lawton Correctional Facility	Medium	1,892	1,857
Tennessee	South Central Correction Center	Medium	1,506	1,504
	Hardeman County Correctional Center	Medium	2,016	2,008
Texas ⁷	Bartlett State Jail	Minimum	1,001	957
	Gregg County Detention Center	Minimum	463	376
	T. Don Hutto Correctional Center	Minimum	330	318
	Jefferson County Correctional Center	Minimum	500	484
	Karnas County Correctional Center	Minimum	200	193
	Kyle Correctional Center	Medium	520	517
	Limestone County Detention Center	Minimum	868	827
	John R. Lindsay State Jail	Minimum	1,031	989
	Lockhart Work Program	Medium	500	490
	Newton County Correctional Center	Minimum	860	765
	Titus County	Minimum	100	99
	Willacy County State Jail	Minimum	1,069	987
	Bowie County	Minimum	240	233
	Cleveland Correctional Center	Medium	520	520
	Diboll Correctional Center	Minimum	518	518
	James Bradshaw State Jail	Minimum	1,980	1,857
	Comanche County	Minimum	100	79
Dickens County Detention Center	Minimum	490	445	
Bridgeport Correctional Center	Medium	520	519	
Jesse R. Dawson State Jail	Minimum	2,218	2,168	
Sanders Estes Unit	Medium	1,000	1,000	
BM Moore Correctional Center	Minimum	500	497	
Utah	Promontory Correctional Facility	Minimum	400	280
Virginia	Lawrenceville Correctional Facility		1,578	1,569
Wisconsin	Whiteville Correctional Facility	Medium	1,500	1,500
	Northfork Correctional Facility	Medium	1,440	1,440
Wyoming	Prairie Correctional Facility	Medium	1,365	700
	West Tennessee Correctional Facility	Medium	450	371
	Crowley County Correctional Facility	Medium	1,200	205
	McCloud Correctional Facility	Medium	1,200	70
	Taft Correctional Facility	Low	1,766	1,831
	Cibola CO Correctional Center	Low	1,164	335
Federal	California City Correctional Center	Low	2,650	775
	Eloy Detention Center	Low	1,500	1,440
	Taft Camp	Minimum	589	517

June
2001
Volume 21
Number 6

ALASKA ECONOMIC TRENDS

<http://www.labor.state.ak.us/research/research.htm>

ISSN 0160-3345

Alaska Economic Trends is a monthly publication dealing with a variety of economic-related issues in the state.

Alaska Economic Trends is funded by the Employment Security Division and published by the Department of Labor and Workforce Development, P.O. Box 21149, Juneau, Alaska 99802-1149.

Printed and distributed by Assets, Inc., a vocational training and employment program, at a cost of \$.82 per copy.

For more information, email the authors.

For mailing list changes or back copies, contact the subscriptions desk.

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4 Runzheimer International Living Cost Standards

December 2000

	Total Standard Costs	Percent of Standard City Taxation	Percent of Standard City	Transportation	Percent of Standard City Housing	Percent of Standard City	Misc. Goods & Services, Other	Percent of Standard City		
State of Alaska composite	\$35,331	110.4	\$2,756	77.9	\$4,807	105.2	\$17,469	124.6	\$10,028	104.4
Anchorage, AK	33,518	104.7	2,892	81.8	4,918	107.6	15,656	111.7	9,781	101.9
Fairbanks, AK	34,398	107.5	2,927	82.8	4,825	105.6	16,325	116.4	10,050	104.7
Juneau, AK	38,076	119.0	2,448	69.2	4,678	102.4	20,426	145.7	10,253	106.8
West										
Eugene, OR	33,368	104.3	3,703	104.7	4,351	95.2	15,697	111.9	9,346	97.3
Las Vegas, NV	32,518	101.6	3,144	88.9	5,416	118.5	13,708	97.8	9,979	103.9
Los Angeles, CA S4 ✓	33,756	105.5	2,997	84.8	5,300	116.0	14,907	106.3	10,281	107.1
Portland, OR ✓	35,014	109.4	3,480	98.4	4,544	99.4	16,819	119.9	9,900	103.1
Sacramento, CA ✓	34,017	106.3	2,895	81.9	5,002	109.5	15,713	112.1	10,136	105.6
Salt Lake, UT ✓	35,262	110.2	3,111	88.0	4,631	101.3	17,457	124.5	9,792	102.0
San Diego, CA ✓	39,618	123.8	2,448	69.2	4,965	108.6	21,621	154.2	10,313	107.4
Seattle, WA S1 ✓	39,433	123.2	2,448	69.2	5,023	109.9	21,076	150.3	10,615	110.6
Spokane, WA ✓	34,062	106.4	2,899	82.0	4,807	105.2	15,514	110.6	10,571	110.1
Southwest/Mountain										
Boise, ID	32,142	100.4	3,281	92.8	4,351	95.2	14,949	106.6	9,290	96.8
Dallas, TX	30,117	94.1	3,344	94.6	4,702	102.9	12,365	88.2	9,435	98.3
Denver, CO	38,270	119.6	2,734	77.3	5,065	110.8	20,515	146.3	9,685	100.9
Phoenix, AZ	31,749	99.2	3,612	102.1	5,066	110.9	13,188	94.1	9,612	100.1
Midwest										
Columbia, MO	29,004	90.6	3,935	111.3	4,252	93.0	11,516	82.1	9,030	94.1
Dayton, OH	30,971	96.8	4,533	128.2	4,176	91.4	12,454	88.8	9,537	99.3
Oklahoma City, OK	29,221	91.3	4,272	120.8	4,494	98.3	10,397	74.1	9,787	101.9
Southeast										
Augusta, GA	27,303	85.3	4,248	120.1	4,585	100.3	8,638	61.6	9,561	99.6
Orlando, FL	29,523	92.3	3,361	95.1	4,445	97.3	11,674	83.3	9,772	101.8
Raleigh, NC	31,029	97.0	3,337	108.5	4,281	93.7	13,250	94.5	9,390	97.8
Atlantic/New England										
Baltimore, MD	33,828	105.7	3,649	103.2	4,663	102.0	15,585	111.1	9,660	100.6
Washington, DC	37,231	116.3	3,033	85.8	4,724	103.4	19,176	136.8	10,027	104.4

Runzheimer's Living Cost Index, December 2000

HB55 / SB99

THE WHITTIER PRISON

A Government / Private Sector Partnership

Background

In 1995, all fifteen of Alaska's regional prisons and jails were operating at emergency levels of overcrowding. The State was held in contempt of court, fined over two million dollars and ordered to reduce the inmate population. To provide *temporary* relief, the Department of Corrections entered into a contract to house up to 1200 Alaska prisoners in a two-thousand bed, privately owned and operated prison in Arizona.

The Arizona private prison contract is a model government/private sector partnership. Alaskan corrections officials have testified that the contractor has delivered safe and humane prison services that meet or exceed the standards of the State of Alaska, at one half the cost of comparable in-state prison services.

Public Policy

While exporting Alaskan prisoners to Arizona was a necessary, "stopgap" measure to relieve in-state prison overcrowding, it is poor long-term public policy.

From an economic perspective, over the past eight years Alaska has poured more than 100 million dollars into the Arizona economy, funding hundreds of Arizona jobs and supporting the bottom line of a corporation that doesn't even do business in Alaska.

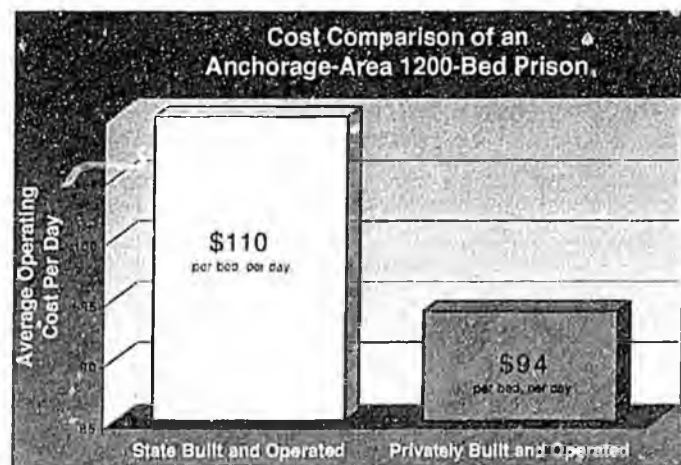
From a social perspective, confining prisoners (38% of whom are Alaskan Native) three thousand miles from family and support systems has a dampening effect upon rehabilitation, family cohesion and prisoner morale.

The Challenges

COST: If exporting Alaskan prisoners to other states is poor public policy, why is the Arizona contract in its eighth year? Answer: Under the Department of Corrections' historical operational structure and personnel policies it simply costs too much to build and operate a state correctional facility.¹ Alaska's daily cost, per inmate, in Arizona is \$64.83, without travel, major medical and State contract administration.

In Alaska, the statewide average cost of care, per day, per inmate is \$113.31 *without capital debt service.*

In current dollars, the Alaska Department of Corrections estimates that the combined capital and operating cost of the 1200-bed SB 65 medium security prison is over \$110 per day, per bed and can be completed in four to five years. The total combined capital and operating cost for the 1200-bed HB 55 Whittier Prison is \$94 per day per bed² and can be completed in two years.



¹ Legislative Packet: Alaska Projected Bed Demand & Cost Analysis, Sec. 1

² *ibid.*

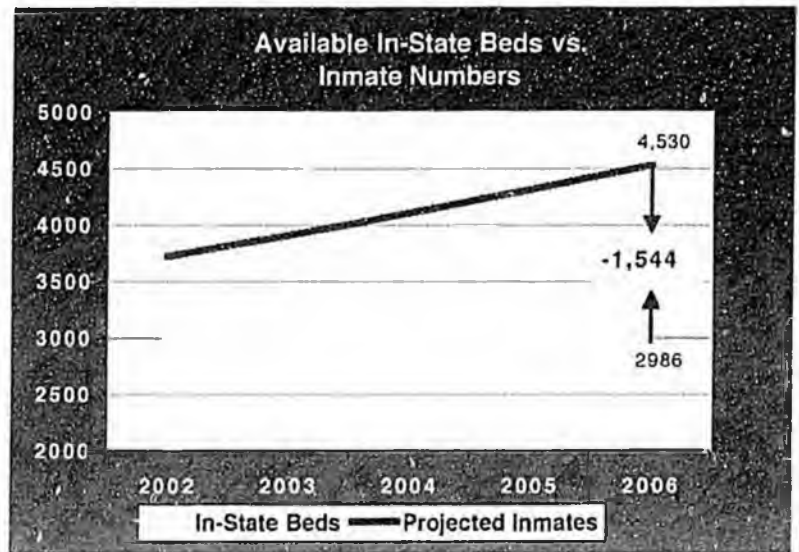
HB 55: A Government / Private Sector Partnership

The Challenges – Continued

INEFFICIENCY: Jails are meant to hold prisoners from arrest until sentencing. The mission of a jail is safe, secure confinement... no frills, no programs, just confinement. After sentencing, long-term prisoners (usually felons) should be transferred to central prisons that capture the efficiency and cost savings of economy of scale, and provide meaningful access to rehabilitation resources. Only prisoners with short sentences should remain in local jails.

The Department of Corrections' regional correctional facilities are multi-purpose facilities that house prison and jail services under one roof. Duplicating prison and jail services throughout the State is expensive, inefficient and ineffective.

GROWTH: The State currently houses 640 sentenced Alaskan prisoners in Arizona. The remaining sentenced and pre-trial prisoners occupy every available bed, in every available facility in Alaska, and the inmate population continues to grow by 200 prisoners, per year. *By 2006, the State of Alaska will be short 1,544 prison and jail beds and more than 200 halfway house beds.*³



The Solution

HB 55: An Act Authorizing the Department of Corrections to enter into an agreement with the City of Whittier for the care and confinement of 1200 prisoners in a government-owned, privately built and managed prison, and authorizing the expansion of existing correction facilities where justified and necessary.

The Whittier prison plan is a logical and cost effective plan to return Alaska prisoners from Arizona and to provide relief for regional jail overcrowding. In combination with the strategic expansion of existing State facilities, long-term sentenced offenders can be moved out of regional facilities and the Alaska inmate population can be safely and efficiently managed for another five years.⁴

³ Legislative Packet: Alaska Projected Bed Demand & Cost Analysis, Sec. 2

⁴ *ibid.*

HB 55: A Government / Private Sector Partnership

What are the Benefits of the Whittier Plan?

BENEFITS TO THE STATE

- The State makes no capital lease payments to the City of Whittier. The cost for construction is paid from the per-diem rate for operations.
- Minimizes financial risk to the State by having one firm responsible for design, construction and, for the first five years, operations.
- Diminishes State legal liability for overcrowding in existing State prisons and regional jails.
- Proximity to Anchorage, as compared with proximity to Arizona, will lower prisoner transportation and monitoring costs.
- Proximity to Anchorage ensures the State's lowest personnel and contractual services costs.
- Requiring the operating contract to be re-bid after five years ensures that the State receives the best value.
- Establishes a government owned, privately managed cost comparison to State-owned and managed prisons that will stimulate State cost containment.
- Adds value to the \$90 million Anton Anderson Tunnel (Whittier's railroad-vehicle tunnel).
- Proximity to Anchorage and local deep-water port ensures lower construction material costs.
- Returns Arizona prisoners closer to Alaska support systems. Provides enhanced opportunity for rehabilitation of all Alaska prisoners returned from Arizona.
- Supports Governor Murkowski's plan of increased infrastructure development within the state in order to stimulate economic development.
- A new facility will be designed to be operationally efficient, reducing long-term operating costs.

BENEFITS TO THE ANCHORAGE AREA

- Purchase of materials, goods and services associated with Construction of a 1200 bed prison will boost the economy.
- Creates at least 325 Davis-Bacon construction jobs for 1.25 years.
- Adds at least 228 indirect construction related jobs for 1.25 years.
- Increase of 300 direct, permanent prison jobs for Whittier and Anchorage-area residents.
- Adds a minimum of 200 permanent indirect jobs to the Anchorage/Whittier area.
- Alaska will no longer be supporting Arizona's economy. The Whittier Plan returns at least \$18 million per year to the Alaska economy, with an economic multiplier effect that benefits all Alaskans.
- Provides an anchor tenant industry to an Alaskan community with limited opportunity for economic development.



HB 55: A Government / Private Sector Partnership

The Whittier Advantage

Community Support

- Whittier conducted an exhaustive public process gathering 80% registered voter approval (through public hearings and public petition process) before passing enabling ordinances and procuring prison development services.

State Procurement Process Satisfied

- Whittier retained the law firm of Perkins Coie to design and administer a competitive Request for Proposals, patterned after the State procurement process. The process was independently reviewed by procurement expert, and former Assistant Attorney General, Susan Burke, who testified before the Legislature that the process satisfied State competitive bid requirements.

Proximity to Anchorage

- The location, 40 miles from Anchorage, ensures lowest cost and most abundant personnel pool.
- Abundant staff housing is available in South Anchorage, Bird Creek, Indian, Girdwood (15 minute commute) and Whittier.
- Proximity to Anchorage ensures optimal access to least costly and most abundant health care, counseling, job training, facility maintenance and other resources and services necessary for safe, and effective prison management.

Site Already Identified

- The City of Whittier has identified a prison site at the head of Passage Canal that is owned by the Alaska Railroad Corporation and is leased by the City. The site is served by a reliable utility grid, including Chugach Electric and Enstar Natural Gas. Domestic and emergency water needs are abundant on-site resources.
- Preliminary assessments find the site environmentally clean and without risk of avalanche or flood danger.

Financing

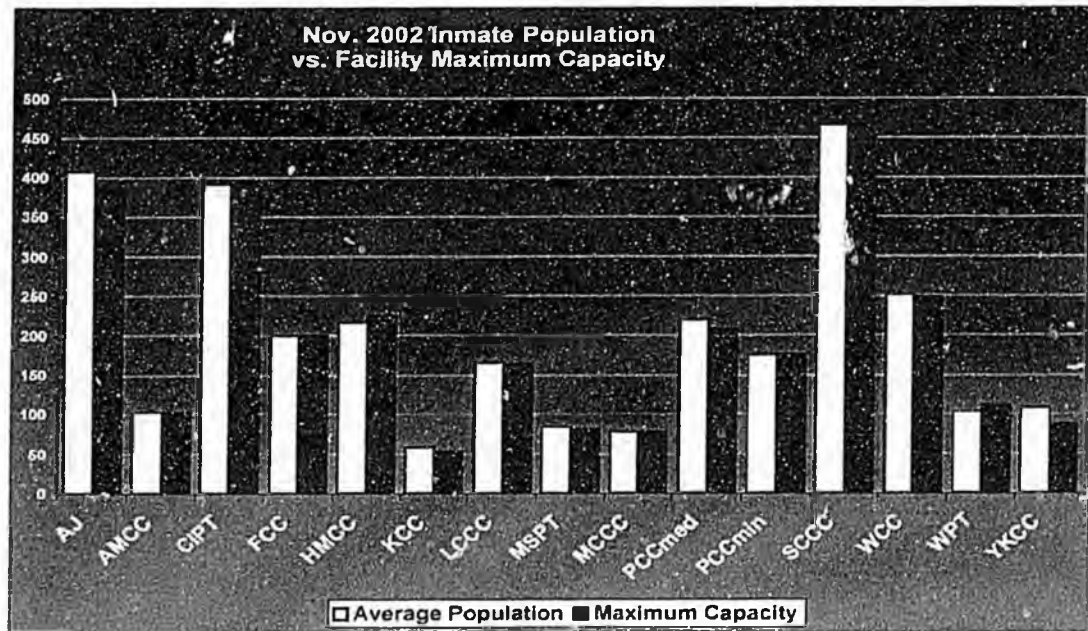
Under the Whittier plan, the City will finance construction through the sale of tax-exempt revenue bonds. The bonds will be secured by an intergovernmental agreement between the City and the State to lease prison beds for a period of twenty-five years. At the end of that time, the title of the prison could transfer to the State. The operating contract for the Whittier prison will be put out to competitive bid after the first five-year term. This approach protects the State and ensures that Alaska receives the most cost-effective services. The capital costs for the Whittier prison will be paid as a portion of the daily per-bed rate from the leased beds. *There will be no direct capital cost to the state.*

Financing costs for construction will be paid through the per-diem rate established by contract. This protects the State from construction cost over runs.

HB 55: A Government / Private Sector Partnership

Action Is Needed

Even with 700 prisoners housed in Arizona and the addition of 284 beds at the new Anchorage Jail, Alaska's 15 Corrections Facilities are operating at or above maximum capacity. Maximum capacity includes all of the beds currently available. When a prison or jail is operating over maximum capacity, it means that inmates are being housed in locations not intended for that purpose. This could include putting three prisoners in a cell intended for two, placing cots in the gym or even using infirmary beds. The chart below shows that in November of 2002, the average inmate population exceeded maximum capacity in eight facilities. Two facilities exceeded emergency capacity. Four of the facilities were full and only three facilities had any beds available (25 total). The Department of Corrections' projections show that the inmate population will increase by 200 prisoners per year. The Legislature must act soon to mitigate the anticipated overcrowding.

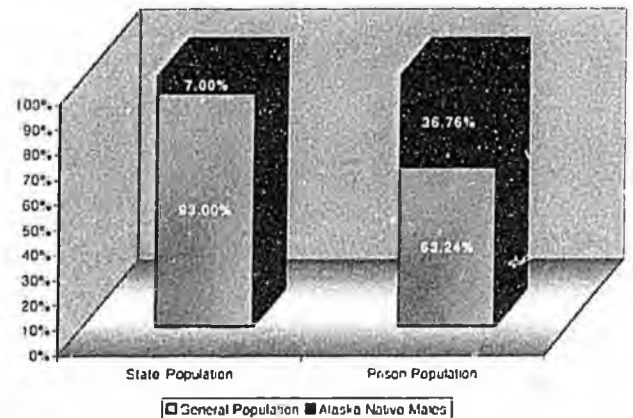


Alaska Native Concerns

Male Alaska Natives make up only seven percent of the general population in Alaska, yet a staggering thirty-seven percent of Alaska's prison population is Alaskan Native men. Over three hundred Alaskan Native prisoners (many from the most remote regions of the State) are housed in Arizona, far from the support systems necessary for rehabilitation.

The majority of Alaskan Native offenders do not have criminal personalities and do not respond to conventional correctional programs. The centerpiece of the Whittier Prison Plan is Cornell Companies' commitment to exceed the minimum program standards of the State by developing new programs specifically designed to reduce the recidivism rate of Alaskan Native Offenders.

State and Prison Population Comparison
Alaska Native Male Inmates vs. Overall Population



HB 55: A Government / Private Sector Partnership

The Operator

Cornell Companies of Alaska will operate the Whittier prison for the first five-year term of the contract with the State. Cornell currently employs more than 300 Alaskans at community correctional centers located in Anchorage, Fairbanks, Nome and Bethel. The firm is also one of the top three private corrections companies in the United States, and the only company that offers a continuum of juvenile and adult correctional services.

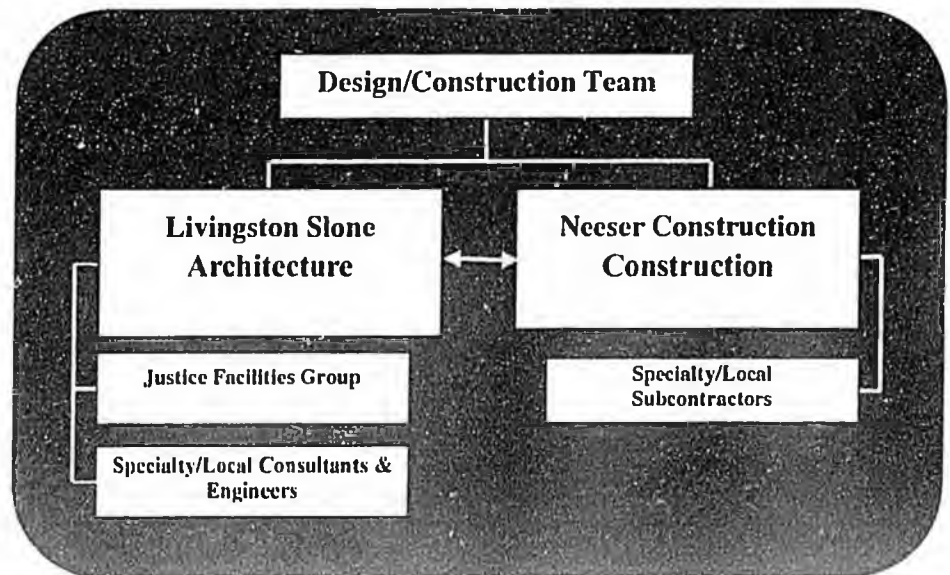
At present, Cornell operates 72 facilities, in 13 states and the District of Columbia, and has a service capacity of 15,000 prison, jail, pre-release and treatment beds. Cornell understands the need for a cost-effective corrections solution for Alaska and they will work with the City and State managers to ensure that the Whittier prison meets the State's needs.

Cornell's Seven Key Principles

1. *People Security*
2. *Program Security*
3. *Accountability/Responsibility/High Expectations*
4. *Role Modeling*
5. *Teamwork/Communication*
6. *Dignity and Respect*
7. *Cleanliness/Environment of Care*

Design/Builder

The design and construction team for the Whittier Prison is Livingston Slone Inc., and Neeser Construction, Inc. Both firms are long-time Alaska companies and both are dedicated to assisting the State in finding more cost-effective solutions for correctional facilities. Each firm has participated in the design and construction of many of Alaska's largest public projects, including the new Anchorage Jail, the Elmendorf Mall and the Alaska SeaLife Center.



HB 55: A Government / Private Sector Partnership

Notes

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SENATOR CON BUNDE

District P

VICE-CHAIR: SENATE FINANCE COMMITTEE
CHAIR: SENATE LABOR & COMMERCE COMMITTEE
MEMBER: LEGISLATIVE BUDGET & AUDIT COMMITTEE

SPONSOR STATEMENT

SB 99, "Correctional Facilities"

Senate Bill 99 authorizes the Department of Corrections to enter into an 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.

All of Alaska's prisons are currently operating at or over capacity. Over 600 Alaskan prisoners are housed in Arizona. The prisoner population is, unfortunately, projected to rise. Prison overcrowding exposes inmates and staff to the risk of serious injury and death, which exposes the State to civil liability, as well as to judicial intervention into the management prerogatives of the executive branch. Alaska needs a new prison.

Given the current fiscal challenges the State faces, a private prison offers the best value for scarce dollars. In addition to being the only economically viable choice, building a prison will bring great benefit to the State, both economically and socially. A private prison makes economic sense by procuring in-state prison beds at significantly less cost than State-operated beds. By returning Alaskan prisoners closer to the family and community support systems necessary for effective rehabilitation, the cycle of recidivism is more likely to be reduced.

SB 99 will not only save money in the short term. It will provide investment for future economic growth here in Alaska by creating 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 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.

By locating the prison in Whittier, that community will have an anchor industry to generate vital economic benefits for an economically disadvantaged rural community. Additionally, reduced tolls and expanded hours of operation will be justified for the Anton Anderson tunnel, spurring further economic growth through tourism.

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

SB 99 makes sense for Alaska's economy and her citizens. I urge your support.

Title 29. MUNICIPAL GOVERNMENT
Chapter 29.35. MUNICIPAL POWERS AND DUTIES

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.

Title 29. MUNICIPAL GOVERNMENT

Chapter 29.47. MUNICIPAL DEBT

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.

Actually...

Subject: Actually...

Date: Tue, 11 Mar 2003 12:04:28 -0600

From: "Frank Smith" <fsmith@kanokla.net>

To: "Katrina Matheny" <Katrina_Matheny@legis.state.ak.us>

Dear Ms. Matheny,

There is something you can do. I had a recently published chapter in a book which might interest Senator Stevens. I'll include it as text below since that could tie you to links, and I'll also attach it in Acrobat format, if you could print it out for the Senator. It's about 16 pages. Also, I note that the state general legislative webpage has not yet caught up to Sen. Stevens new status, though the AK Republican webpage has. fs

Incarceration of Native Americans and Private Prisons

Frank Smith

Introduction

There are currently slightly over two million inmates in local, state and federal jails and prisons. Of these, some 1.6 percent are Native Americans and Hawaiian Natives; in Federal institutions, Native Americans constitute 2 percent of the population, since the U.S. government is involved in criminal justice enforcement on reservations. Because approximately 6 percent of all U.S. inmates are held in private prisons, the total number of Native Americans in these for-profit prisons is comparatively rather small. For that reason, this article presents a picture of the conditions in which Native Americans are held given that limited experience.

Historical Perspective

In order to achieve an informed understanding of the current situation with regard to Native Americans in prison, it is necessary to place it within a larger historical and sociological context. While most residents of the US have the notion their country was founded on the principles of justice and freedom, closer examination reveals that perception is not accurate, particularly in the case of Native Americans.¹

The more progressive of our founding fathers whom we remember so fondly as protectors of these ideals include Thomas Paine and Thomas Jefferson. Paine consistently referred to Indians as "savages", and used them as a negative comparative stereotype. Jefferson considered his contemporary Indians to be hindrances to colonial progress. The US only granted Natives citizenship in 1924, five years after women and 59 years after Black males were allowed to vote.

African Americans have undoubtedly been pervasively discriminated against in US history--their dehumanization was even embodied in the Constitution. Schoolchildren learn of the more egregious Supreme Court-approved violations of the rights of Blacks such as the Dred Scott decision or Plessy v. Feurgeson,² and that the Civil War was fought in part over slavery. They may have read the Emancipation Proclamation and even the Thirteenth to Fifteenth Amendments to the Constitution. The sordid history in America of slave owning, in the north and south, of lynching, of Jim Crow, is discussed in most schools. The role of such historic figures as Frederick Douglas or Sojourner Truth is widely recognized. Martin Luther King Jr., is certainly better known than many mediocre presidents. Selma, Alabama, and Little Rock, Arkansas are familiar mileposts, as is Brown v. Board of Education. Students may even understand the meaning of racial profiling, of the immense disparity between sentencing for crack cocaine, more prevalent in inner-city neighborhoods, and powdered cocaine, more favored by wealthier

suburbanites.

They may possibly be aware that a Black adolescent has perhaps a 50 times greater chance of being placed in an adult penal institution than a white youth who has been charged with exactly the same crime,³ and that perhaps one of three young Black men has been subjected to some criminal sanction, such as probation, parole, jail or prison.

Yet how many Americans, young or old, fully understand that this same disenfranchisement; this same disproportionate treatment by the criminal justice system, has affected Native Americans since the Articles of Confederation were signed? How many realize that broken treaties have been the order of the day for over two hundred years? Do they know that the early settlement of this nation involved pushing indigenous peoples into ever smaller, less habitable reservations?

How many school children are taught the cruel facts behind the genocidal removal of the inhabitants of the post-Revolutionary Southeast? There is hardly a Native American tribe that does not have a history of broken treaties and persecution. What this long, troubled relationship between European Americans and Natives constitutes is deliberate disregard for and discrimination against Native culture. Theft of lands, exiles, dispossessions, and a prevailing condemnatory and paternalistic attitude provide the background for the problems of Native Americans in prisons, both public and private, today. It particularly pervades the conditions of confinement of Indians in private prisons.

Criminal Justice and Injustice

There are four especially salient issues regarding Native Americans and the criminal justice system. First is disproportionate incarceration: a much higher percentage of Native Americans are imprisoned, per capita, than any other ethnicity except African Americans. Second is disrespect by the government for traditions, including an institutional "color-blindness" which often fails to recognize the effects of prejudice and often disregards cultural beliefs and practices. Third: lack of access to spirituality and to home communities. Lastly, there is a higher percentage of alcohol-related behavior resulting in imprisonment. Let's examine how each of these factors operates, particularly in the context of private prisons.

Disproportionate Incarceration

There are approximately 26,000 Native Americans in US jails and prisons who have been sent there at a rate 38 percent higher than the general population.⁴ However, if Blacks, who constitute about half of all prisoners are excluded from the calculation, it is clear that this disproportion is far more egregious, when compared to non-Black ethnicities.⁵ In Alaska, for instance, if Natives do not already form a plurality in prison, they soon will, as Native incarceration rates are rising rapidly while white and Hispanic rates have remained relatively flat, and the incarceration of Black people has actually dropped in recent years. Natives are only 16 percent of the general population in that state, though they make up 40 percent of adult inmates. Between 1996 and 2000 in Alaska, the total of incarcerated white males rose just 6 percent, while the total number of Native males rose 23 percent. White female totals went up by 26 percent, but Native female inmates skyrocketed by 41 percent in just those four years.⁶ An examination of state-by-state totals shows remarkable disproportion in ethnic representation. In Arizona, where many reservations are policed by tribal authorities and hearings held in tribal courts, the rate of Indian incarceration appears not significantly higher than non-Natives.⁷

In other states, however, such is clearly not the case.⁸ In South Dakota, where 10 percent of the state population is Indian, male and female Natives make up 23 percent and 35 percent respectively, of all inmates. In Wyoming, Indians make up 2 percent of the state population but 7 percent of

prisoners. In Montana, though only 6.8 percent of residents are Native, they are 18.8 percent of men and 29.6 percent of women prisoners. Still more worrisome is the fact that in the last decade, the general prison population there less than doubled, but total numbers of Indian women went up from 17 to 81, an increase of 376 percent.

An extensive search of the literature revealed no information about why rates of incarceration for women are rising far faster than for men, nor why rates for Native women are vastly outpacing those for whites. Native Hawaiians constitute almost 40 percent of prisoners in and from that state.

Similar disparities prevail among juveniles.⁹ In Minnesota, 12 percent of the juvenile population is non-white, but they represent 46 percent of commitments to public facilities and 59 percent of secure placements. Minorities were 23 percent of juvenile arrests, but 70 percent of transfers to adult courts. In South Dakota, Native juvenile residential placements are at 27 percent. In Montana, 18 percent of all youthful inmates are Native. Alaska is at 36 percent and in 1997 (all) minority youth represented 47 percent of commitments to public facilities, and 57 percent of secure detention placements.¹⁰

Nancy Schafer of the University of Alaska's Justice Center reports, "It seems that Alaska Natives tend to accumulate extensive referral histories in rural areas for behaviors which would be ignored or dealt with informally by urban police. The history of prior referrals is a significant factor in adjudications for residential placement."¹¹ Alaska has reluctantly used private out-of-state "treatment" facilities for those youths who were not thought suitable for juvenile correctional institutions, but for whom no in-state alternative was thought to exist. It has had consistently poor outcomes involving the care and recidivism of such children.

Because the per diem rates in some private facilities for minors run over \$250 per day, these children represent significant "profit centers" to the private providers. Nationwide, many of these operations have been extremely troubled to the point where children have died in their custody from abuse and neglect at the hands of poorly trained and paid staff. Prisons have been taken back from substandard private operators. Official oversight of the conditions of confinement is often minimal, as states' prisoners are heavily subsidized by parents' insurance and by Medicaid payments—sending states are less likely to assess their "bang for the buck," and the geographic distance from the sending authority may be substantial.

This disproportionality has a powerful effect when one looks at the states that "transport" their prisoners. Montana, for instance, shipped large numbers of inmates to private prisons in Texas, and afterwards to Arizona after conditions in the Bobby Ross Group prison became explosive. Hawaii shipped its convicts to the same prison, but after racial altercations and poor treatment, the prisoners "voted with their matches" and twice burned down those Lone Star state facilities. After two deaths in the spring of 2001, a Hawaiian state audit team found that the CCA Florence prison essentially was being run by its inmates. Although the guards received far better wages than most private prison staff, due to prevailing wage standards in the community, they still lacked the experience and training to deal with problem prisoners. Chastened by these experiences, Hawaii has now removed most to Oklahoma, yet it is contemplating allowing another private operator to build on the Big Island near Hilo.

Institutional "Color-blindness"

In a US Senate debate over the Juvenile Justice Bill, the gulf between those who are empathetic to the inherent racism of the system and those who are not became crystal clear. Utah's Senator Orrin Hatch, trying to eliminate a standing requirement for tabulation of the ethnic disparity in juvenile justice in a system he saw as "color blind," is quoted in the Los Angeles Times as declaring, "I haven't heard one shred of information that proves

there is discrimination here." Minnesota Senator Paul Wellstone responded, I cannot believe that I have heard on the floor of the Senate an argument that race is not the critical consideration. When we get to the question of which kids are arrested and which kids are not, you don't think that has anything to do with race today in America? When we get to the question of sentencing, you don't think that has anything to do with race? You are sleepwalking through history.¹²

Black youth self-report committing violent crimes about 50 percent more than do whites. But they are four times more likely to be arrested, and seven times more likely to be locked up for violent crimes as their white counterparts. White youths seem to mature out of violent behavior in their early twenties. But if Black youth have similar employment levels, their rate of violence declines also. No similar study has been done with regard to Native American violent crime patterns; however this chapter's analysis may shed some light on conditions that contribute to the high rate of Indian incarceration.

According to the 2000 US Commission on Civil Rights report on South Dakota there is "85 percent unemployment on the reservations compared to 2.7 percent unemployment for the non-Native population." "On any given day," it states, "an estimated one in 25 American Indians 18 years old and older is under the jurisdiction of the nation's criminal justice system."¹³ This is 2.5 times higher than the rate for whites.

It is no wonder Natives have marginal faith in the criminal justice system, which they feel clearly discriminates against them. The Commission asked "why South Dakota incarcerates more than twice the number of criminals as its neighboring state and why Native Americans comprise 4 times the prison population compared to their percentage in the State's total population."¹⁴ Racial profiling begins early, and suspects are much more likely to be charged. Ruth Steinberger reports¹⁵ that of 41 incidents where Montana juveniles were pepper sprayed, "40 targeted Indian youth." She details accounts of the decision to place Native inmates in administrative segregation (ad-seg). It appears that the due process rights of Natives are disregarded and commitments of Natives to ad-seg and maximum units are frequently whimsical. Steinberger writes: Statistics show that from initial contact with police to length of sentence, the differences disproportionately punish Native Americans, ultimately affecting families and communities as well. While the origins of the problems are complex, and it is impossible to highlight one particular fault, statistics reveal that the sum of those problems place Indians into confinement far earlier, and for less serious crimes than other Americans. Additionally, indications are that being denied parole opportunities may increase the sentences served by Indians even further.¹⁶ She also quotes numerous anecdotal reports of whites being given slaps on the wrist for offenses against Indians, as well as nationwide figures for granting of parole that are similar to those found on the State of Alaska's Department of Corrections website. There, it appears that Natives get parole at half the rate of whites, but have their paroles violated twice as often.¹⁷ A public institution usually has a parole or probation officer to facilitate an inmate's transition back to "outside" life. Privates rarely provide such support. Robert Guilfoyle, a Seneca who is a tribal consultant states: "The median (age) of a prisoner in the US is 34, yet the median age of an American Indian prisoner is slightly under 20 years of age."¹⁸ Moreover, Scott Crichton of the Montana American Civil Liberties Union has said, "People who claim that racism is not an issue in Montana, have their heads in the clouds. Racism here is real and it is profound, it's demonstrated in the prison system at each stage of the processing, from profiling and arrests and public defense to probation."¹⁹

While visibility in small towns is a factor in more frequent law enforcement referrals, Indians who are not "institutionalized" frequently tend to take blame for offenses on initial questioning, more so those who are less "assimilated" than those who are not. University of Alaska researcher Phyllis Morrow, who did an exhaustive study of Yup'ik in the state court

system, found that both defendants and witnesses feel coerced, and expectations are quite different between them and whites.²⁰ This commonly results in acceptance of guilt, facilitating prosecution and eliminating plea bargaining chips for defendants. Carey Vicente, former chief judge of the Jicarilla Apache Tribe, wrote, "Among the Apaches the telling of truth is extremely important. . . The implications of such values in current legal process have been that few criminal cases are contested."²¹ A former South Dakota correctional counselor who is Indian reported that his institution criticized him for starting the healing process with getting an inmate's acceptance of guilt for crimes.

Of the dozens of individuals consulted for this article about the issues facing Native people with regard to the criminal justice system, perhaps a third independently mentioned substance abuse. Inadequate legal representation, was frequently mentioned, and most interestingly, the propensity for Natives not only to confess, but to supply considerable details of the crimes for which they were being questioned.²²

But private prisons, with their poorly trained, high turnover staff, fail to recognize the need for an environment that values and enhances the use of tradition in rehabilitation. In fact, the process of institutionalization, which proceeds from confinement which is disengaged from culture, interferes with the traditional function of honesty in the healing process.

Religious and Cultural Issues and Rehabilitation

Native American inmates often face significant cultural discrimination. Healing in their communities of origin requires utilizing traditional resources. Besides accepting responsibility for their crimes, offenders need to engage themselves in providing restitution to their victims, and in cleansing themselves of the behavior and attitudes that caused them to hurt others. This may involve receiving counsel from elders and spiritual guides, and participating in healing circles.

There often exist clashes between this culturally-based rehabilitative process and prison administration and rules. Although traditional healing is seen as a powerful deterrent to recidivism, Native inmates have been forbidden the use of sweat lodges and prisons have enforced grooming codes prohibiting long hair.

Inmates have been made to prove their Native ancestry in order to participate in cultural activities, though this is not required of those of other ethnicities. The possession or use of materials central to the religious process such as cedar, sage and sweetgrass may not be allowed. In Montana, a Christian choir was allowed into a correctional facility without being searched, yet guards are alleged to have strip-searched a medicine man who had come to provide counsel to inmates. Guards examined the contents of guides' medicine pouches. Steinberger quotes Montana Lakota prisoner Manuel Redwoman as saying that the former prison chaplain claimed to be able to conduct traditional ceremonies, and tried to deny access to traditional items involved in worship. Redwoman remarked that while inmates were allowed to have four books on Christian or Muslim spirituality, only one was allowed on Native traditions.²³ Again, with private prisons, there is even less oversight concerning the conditions of confinement and adherence to law regarding prisoners' rights than in the public sector, so expectations of such protections are minimized. In many states there are no statutes governing the conduct of such institutions.

Cultural restoration has shown real and necessary restorative qualities for Indian prisoners. The world outside their villages and reservations is often a very foreign place, as the Yup'ik study cited above shows. Most of white Americans can't really understand and empathize with a people who have been dispossessed of their lands. Generations in the US and Canada were exiled without legitimate cause and punished for speaking their languages when they were forced to attend distant residential schools. Children who used to

learn from their respected elders are now suffering the forced assimilation into the broader Western society. Television sets fill their dwellings with sitcoms, cartoons, exploding cars and game shows. Reservation and village Indians encounter a separate reality, a culture as foreign to them as if they were Laotian Hmong refugees, transplanted to America. This cultural intrusion dissolves the glue that holds their communities together.

The patent discrimination against inmates who desire to engage in traditional practices resulted in the 1993 passage of the Native American Free Exercise of Religion Act, authored by Hawaii Senator Daniel Inouye, a perennial champion of Indian issues. Six co-sponsors included Wellstone and Ben Nighthorse Campbell of Colorado, the only Native American Senator. The act ostensibly provided parity for Indian inmate religious observances, including access to spiritual leaders, materials used in ceremonies, food for religious diets, outdoor secure sweat lodges and teepees. It allowed inmates to wear long hair if the practice was part of their traditional beliefs. When signing the bill, President Clinton stated:

The agenda for restoration of religious freedom in America will not be complete until traditional Native American religious practices have received the protection they deserve. My Administration has been and will continue to work actively with Native Americans and the Congress on legislation to address these concerns.²⁴

Though these are noble sentiments, it can be presumed they will be honored more in the breach than the observance. The initiative for the passage of the Act, ironically, was the US Supreme Court (5-4) decision in *Oregon v. Smith* 25 which allowed a state to discriminate against non-criminal Indian employees who had infrequently taken a small amount of peyote in a religious ceremony. The Court thus ignored its own precedent of the "compelling interest" standard.

Earlier Congressional action in the 1978 American Indian Religious Freedom Act was unfortunately deemed to be policy rather than law in the 1988 decision *Lyng v. Northwest Indian Cemetery Association*.²⁶ Justice Blackmun, in dissent in *Smith*, commented that the state had never offered any evidence that peyote was harmful. The same "compelling interest" did not prohibit the Catholic Church's use of sacramental wine in masses during Prohibition, of course. Anthropologists feel that the spiritual use of peyote may date back thousands of years and stylized representations of the cactus appear in traditional southwestern art. In 1997, the Supreme Court once again overturned an act of Congress in deciding the obscure zoning case of *City of Boerne, Texas v. Flores*, when it found the Religious Freedom Restoration Act to be unconstitutional on Fourteenth Amendment grounds.²⁷ Dozens of liberal to conservative, religious and secular organizations had joined in an amicus brief, to no avail.

Compounding the denial of access to meaningful spiritual opportunities is the related issue of proximity to home communities. Ironically, Cornell Corrections made this argument in advocating for the return of Native inmates to Alaska from their competitor's facility in Arizona. Natives are closely bound to their communities of origin. To achieve their rehabilitation potential they need to maintain those connections to their extended families and support systems. Far too often they are incarcerated hundreds, if not thousands of miles from their homes and families. With the rise of private prisons, this situation has become particularly exacerbated as multinational corporations locate in the areas with the lowest taxes and wages. Prisoners of all ethnicities have been transported up to thousands of miles, such as Native Hawaiian prisoners who are now being held in Oklahoma after disastrous experiences in Arizona and Texas. Washington, DC prisoners have been held in another private prison in Florence also, as were more than 800 Alaskan prisoners, including over 300 Alaska Natives.²⁸ Dozens of these Natives have communicated their intense displeasure with their treatment in for-profit prisons. Inmate Harold Kankanton, the first chief of the Wildwood Prison Native Culture Club in Kenai, Alaska, having served five years in the

Arizona private prison, stated, "All they do is warehouse you. They don't have a clue." Other Native inmates nodded in agreement. He remarked about private prison corporations, "They're using us as a pawn."²⁹

During a recent attempt by Cornell Corrections to build a private prison adjacent to Wildwood, far from their Alaskan families' homes, many inmates wrote with specific complaints. They counterbalanced representations by a local tribal association that tried to get financially involved in the "Rent-A-Pen" business. Inmate Council President Michael Tebo listed a long series of complaints about treatment of himself and his fellow inmates in the care of the private companies and questioned the sincerity of the financially shaky local Native Corporation since it would have profited handsomely if the proposed prison were built on its land.³⁰ An earlier proposed venture with another Alaska Native corporation ended in disaster, partly because the remote prison site was relatively inaccessible to most families of inmates.

A private prison inmate's family member from Ketchikan, in Southeast Alaska, received documents that had been smuggled out of one of the Florence, Arizona Correctional Corporation of America prisons. They detailed outrageous punishments of Natives seeking respect for and observance of cultural rites and traditions.

After a Cornell private prison was proposed for his own town, he turned them over to the local newspaper. Postings to the Native American Prisoner Support website by and about Alaska prisoners being held in CCA echoed similar complaints. Indeed, since Alaskan "bush" natives often rely on four wheelers, boats and snow machines for home transportation, they were usually unable to visit a prison only 11 miles from Anchorage. There was no useful public transportation to the prison. Even though family members sometimes got to Anchorage for medical treatments and conferences, they often did not possess driver's licenses, insurance and credit cards necessary to rent a vehicle to visit their loved ones. In the lower 48, things are much the same: in South Dakota, Belva Black Lance noted that the prison was 350 miles from prisoners' homes. She said, "What this problem is doing is destroying our families. Children are the ones who lose the most."³² A study of California inmates three decades ago showed that inmates who received visits from three or more people in the last three months of their incarceration recidivated at one-sixth the rate of those who received no visits.³¹ But incarceration in distant state, private and federal penitentiaries ruptures the bonds particularly needed to prevent the return of Native inmates to prison. More significantly, the states most heavily reliant upon private prisons to fill the gap between prison population and available in-state bed space are those transporting convicts the farthest, such as Alaska and Hawaii. Montana has brought its prisoners home by allowing the construction of a private prison within its borders. Wisconsin has just recently initiated attempts to return its prisoners, who are also disproportionately Native, back within its borders, by buying an empty, speculative prison.

Native communities have tended to seek and discover solutions for alcohol related problems in what, in contemporary times, tend to be fairly unique ways.

These interventions find little respect within a for-profit prison environment more interested in cutting expenses than in outcomes.

Native Justice Traditions

Traditionally, justice in the Native community has been of a reconciliatory rather than a retributive nature. Admissions of guilt are sought in order to resolve the offense, for the sake of the community, offenders and victims alike. If a tribal member's behavior was intolerable to the community of origin, and elder counseling, community shaming or other methods were not able to control the difficulty, exile was used as a last resort, and "meant severe hardship".³³ In Alaska, "blue ticketing" was the process of forcing

an offender to leave his village.³⁴ But this was a last resort, the worst of punishments in a subsistence and cooperative society, and incarceration was a wholly foreign concept.

In 1996, an Alaska Justice Center survey reported: "Many of the villages surveyed were found to have established their own policies and methods for dealing with most crime and social control problems in the communities. Despite the importance of these extralegal local practices to villages, in general they seem to go unrecognized or ignored by justice system employees who are assigned to serve communities. Most respondents indicated a preference for having crime and social control problems handled by people in the community with support from the troopers. Eight times as many people identified tribal courts as identified state courts as the most effective group to stop drug and alcohol abuse."³⁵

Ada Pecos Melton, former Director of the American Indian and Native Justice Programs at the US Department of Justice, expressed her concept of Eurocentric justice: "The American paradigm is based on a retributive philosophy that is hierarchical, adversarial, punitive and guided by codified laws and written rules, procedures and guidelines. (D)ecision making (is) limited to a few. It holds that because the victim has suffered, the criminal should as well. Punishment is used to appease the victim, to satisfy society's desire for revenge."³⁶

By contrast, she writes, "The indigenous paradigm is based on a holistic philosophy and a world view of the aboriginal inhabitants of North America. These systems are guided by the unwritten customary laws, traditions, and practices learned primarily by example and through the oral teachings of tribal elders. The holistic philosophy is a circle of justice that connects everyone involved with a problem or conflict on a continuum, with everyone focused on the same center. The continuum represents the entire process, from disclosure of problems, to discussion and resolution, to making amends and restoring relationships."³⁷

The website RestorativeJustice.org chronicles the history of "Circles," and their adaptation to the criminal justice system in the last two decades. Their initial use in 1991 was by "Judge Barry Stuart of the [Canadian] Yukon Territorial Court, (who) introduced the sentencing circle as a means of sharing the justice process with the community." A grass roots effort to find solutions to alcohol problems in the Alkali Lake community guided a similar process in the Hollow Water First Nations Community in 1984-86. "In the safety of those circles, many began to disclose experiences with sexual abuse. This led to the development of healing circles as a way of dealing with the harm created by the offender, of healing the victim and of restoring the community." Circles have been developed most extensively in the Yukon, Saskatchewan, and Manitoba. In the US, Navajo peacemaking courts have also used circles. The initial use of circles in mainstream criminal justice was in 1996 in Minnesota. Everyone present, the victim, the victim's family, the offender's family, and community representatives are given a voice in the proceedings. Participation in the circle is voluntary. The victim must agree to attend without any form of coercion. The offender accepts his/her guilt in the matter and agrees to be referred to the circle. Especially for the native communities, it is important for the offender to have deep roots in the community. "After the healing circles, a sentencing circle determines the kind of response expected of the offender, although it may also contain commitments by the justice, community, and family members involved."

Referring to the healing circles process of the Mille Lacs Circle Sentencing Project, Kay Pranis of the Minnesota Department of Corrections observes, "Circles call people to more conscious awareness of our connections, our shared fate, our humanity, our spirituality. Awareness of connections is the foundation of authentic community."³⁸ It is simply inconceivable that private prison staff could facilitate such an intensely respectful process.

Treatment involving both traditional indigenous interventions and those accepted in more conventional substance abuse programs are integrated into the community healing process. One program, named for Alaska's first tribal judge, the late Gunaanasti Bill Brady, a Tlingit from Sitka, Alaska, is described as, ".a five week intensive residential program for adults with alcohol and/or drug problems. A holistic model that combines biological, psychological, social and internal spiritual elements is used for treatment, allowing the Center to address other major problems clients might have such as depression, low self esteem, victimization issues and family problems."39

Alaska's Department of Juvenile Justice funded a pilot project involving miscreant juveniles appearing before councils of respected elders who decided on non-institutional resolution of offenses. This approach appears to be appropriate throughout North America. For instance, Navajo Nation Chief Justice Robert Yazzie wrote, "Navajo wise persons are called naat' aanii. Others call them an elder. They help plan decisions through guidance, but they don't make the decisions." Elsewhere he states, "Indians don't store their laws in books; they keep it in their minds and hearts. Everyone knows the law" and "Navajos believe that is wrong to use coercion on each other, so the legal process requires consensus."40

American Indian traditional responses to crime have found advocates from as far away as Belgium and Great Britain. These interventions require a bond formed with a proximate support system outside the walls, which is not found in the case of private institutions. Andrew Coyle, a former governor (warden) of a British prison, advocates that such methods include:

. Creating more awareness amongst convicted prisoners of the impact of crime on victims and programs of direct mediation between victims and offenders.

. Remodeling the way disputes are settled within the prison and incorporating restorative principles into grievance and disciplinary procedures.

. Building a new relationship with the community outside the prison to emphasize the need for prisoners to be reconciled with the wider society and received back into it.41

Governmental and ad hoc Resistance to Native Community Initiatives

Unfortunately, though Congress and the Department of Justice have encouraged the development of community empowerment, alternatives to incarceration, and tribal courts, the funding to ensure their viability has been largely limited to rhetoric. Though many grants facilitating measures that might decelerate the swelling of the Native American incarcerated population have been approved, obligations of the government to support tribal courts themselves have been wanting. Judge Vicente writes, "Congress passed the Indian Tribal Justice Act in 1993," but "[a]lthough it authorized up to \$58 million to reinforce the funding of tribal courts to this day [in 1995] it remains unimplemented and unfunded."42 He points out that the 1953 Public Law 280 (Ch. 505, 67 Stat. 588-90) has caused tribal authority to suffer except in limited instances and the Indian Reorganization Act of 1934 (the Wheeler-Howard Act) overlaid structures that involved corporate or western organizations and frequently damaged traditional institutions.

Because of a Native cultural ethic which emphasizes cooperation, and which has antipathy for interpersonal confrontation, it has been difficult for indigenous communities like Barrow, Alaska, to mount resistance to these sorts of injustices and expressions of the dominance of majority culture. In the South Dakota Civil Rights Commission hearings, Elaine Holy Eagle said, "Native Americans, particularly 'full bloods,' are taught to respect authority, and out of this respect, they do not stand up for their rights."43 For this reason, Natives are particularly vulnerable to exploitation in a unfamiliar environment such as a private prison in a distant state.

Judge Vicenti explains the dichotomy: "America, in its attempts to correct what it perceives as a rampant injustice in Indian America, creates a greater injustice by forcing its culture upon Indian peoples."

Summary

Native Americans have had a long and dismal history of negative interaction with the Euro-American legal system. The oppression that they have collectively experienced, the imposition upon them of an alien ideology, the clash of cultures, and their product, an intrinsic distrust of that criminal justice process, have helped cause disproportionate numbers of Indians to be incarcerated. If this process is to be reversed, respect for different traditions must be fostered. Traditional means of healing community trauma and discord need to be utilized and sovereign tribal powers need to be expanded. Most importantly, prisoners should be kept as close as possible to their families and support systems, and given access to those aspects of their culture that help keep them from endlessly recycling through the criminal justice system. Shipping them wholesale to faraway private penitentiaries that have no vested interest in rehabilitation and eventual return to inmates' home communities is a prescription for disaster.

Endnotes

1. The terms "Indian," "Native American," "indigenous, and "First Nation" in this chapter will be used interchangeably. It will not differentiate between Alaskan Indians and Aleuts. Native Hawaiians will be included; their situation is much the same as with Indians and Native Alaskans, and other US and Canadian indigenous peoples.

2. Dred Scott 60 US 393, 15L ed 691(1856) held that even if a slave was transported to a state or territory where slavery was illegal, it did not affect the slaveholder's property rights in the slave., 163 US 536 (1896) gave an imprimatur to the "separate but equal" doctrine, legitimizing segregation Plessy v. Ferguson, 163 U.S. 537 (1896) with a veneer of supposed equality of services. Brown v. Board of Education 347 US 483 (1954) finally forced desegregation by striking down Plessy as it applied to schools.

A good study guide may be found at:

<http://www.yale.edu/ynhti/curriculum/units/1982/3/82.03.06.x.html>.

3. Jason Ziedenberg, et al, Building Blocks for Youth: "Drugs and Disparity: The Racial Impact of Illinois' Practice of Transferring Young Drug Offenders to Adult Court." April 2001
<http://www.buildingblocksforyouth.org/illinois/>

4. The Foundation for National Progress website posts current helpful charts showing incarceration rates for Black, white and other ethnicities on a state-by-state basis, obtained from Department of Justice and individual state statistics. <http://www.motherjones.com/prisons/atlas.html>. Also see Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, "American Indians and Crime." Greenfield & Smith, Feb. '99, NCJ 173386.

5. It is also difficult to calculate the precise amount of the differential incarceration. Since many Natives are held in federal prisons, they may not be properly counted as coming from their sentencing state. This could also reduce the amount of the disparity that is found in state prison populations. Additionally, Hispanics are often inconsistently counted as whites, and Indians as Hispanics - the practice varying from state to state. If Blacks are eliminated from the prison population, and they constitute half of all prisoners, then the 26,000 Native Americans of the remaining million prisoners are 2.6% of the non- Black prisoners, though only .9% of U.S. population. U.S. Census Bureau.

6. From the Alaska Dept. of Corrections website:
<<http://www.correct.state.ak.us>>.
7. Foundation for National Progress,
<<http://www.motherjones.com/prisons/atlas.html>>.
8. Id.
9. The following numbers do not reflect a higher rate of Native adolescent referrals to adult courts, beyond the juvenile system, so the situation is likely worse than it appears to be.
10. Office of Juvenile Justice and Delinquency Prevention: Census of Juveniles in Residential Placement Databook, Race/Ethnicity by State, (1997): <<http://www.buildingblocksforyouth.org/statebystate/>>.
11. N.E Shafer. A Comparison by Race of Juvenile referrals in Alaska: Phase II Report, Anchorage Justice Center, University of Alaska Anchorage, (1998) May:

<<http://www.uaa.alaska.edu/just/reports/press/press10.html>>.
12. Common Dreams Newswire (2000) March 21:
<<http://www.commondreams.org/pressreleases/may99/052199a.htm>>.
13. Native Americans in South Dakota: An Erosion of Confidence in the Justice System. <<http://www.usccr.gov/sdsac/ch2.htm>>.
14. Rural Ethnic Institute, Western Dakota's Pilot Project of the Evolving Roles of Tribal People in Nation States, (1997) December: 28.
15. Ruth Steinberger, Native Times.com. "Incarcerated Indians, Part I," 4-5, <<http://www.okit.com/Justice4parts/justicel.html>>. This four-part series speaks to the problem far more clearly than thousands of pages of government and academic reports. The reporter accurately describes the process that tips the balance of the scales of justice against Indians at every stage. >From the initial decision to question suspects, to custody level decisions behind the walls and wires, Indians fare far more poorly than non-Native peers.
16. Id., 4-5.
17. <<http://www.correct.state.ak.us>>. An Eskimo, for instance, can go back to prison simply as a result of a urinalysis containing a tiny trace of marijuana, though most of the people in his or her village smoke it, and such smoking is not associated with criminal conduct. Indeed, it was legal for any Alaskan to smoke marijuana until 1991.
18. Ruth Steinberger, "Incarcerated Indians," supra note 14 at 4-5.
19. Ruth Steinberger, "Lakota Man's rights Denied in State Penitentiary," <<http://www.okit.com/news/2001/dec/lakotarights.html>>.
20. A Sociolinguistic Mismatch: Central Alaskan Yup'iks and the Legal System, Phyllis Morrow,

<<http://www.uaa.alaska.edu/just/forum/f102su93/asocio.html>>. See also Yup'ik Eskimo Agents and American Legal Agencies: Perspectives on Compliance and Resistance, Phyllis Morrow, University of Alaska, Fairbanks. J Roy. Antrop. Inst. (N.S.) 2, 405-423.
21. Native Americans in South Dakota: An Erosion of Confidence in the Justice System: <<http://www.usccr.gov/sdsac/ch2.htm>>.

22. People who were consulted included researchers, judges, attorneys, former prisoners, police and village public safety officers, probation officers and former correctional officers. Most of these persons were either Native themselves, or were empathetic to and had worked closely with Native communities. Most people also identified that Miranda warnings - notifications of the right to refuse to incriminate oneself - have minimal useful effect in Native communities; extension of civil liberties there is a mixed bag.

23. Ruth Steinberger, "Administrative Segregation common for Indian Prisoners in Montana," We have many voices:
<http://www.turtletrack.org/ManyVoices/Issue_20/Prison_1027.htm>.

24. White House press conference, April 29, 1994.

25. 494 US 872 (1990)

26. At issue in Lyng was the construction of a paved two lane road, meant to facilitate access for timber harvesting, in proximity to a traditional California North Coast Indian sacred site. An excellent explanation of these Supreme Court cases, including Lyng, is at:
<<http://sorrel.humboldt.edu/~jael/emenLyng.html>>.

27.
<<http://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/062697a.htm>>.

28. Some of these prisoners are from the arctic, a polar opposite climate. Many never adapt to the baking desert.

29. Tom Kizzia, "KNA says rehabilitation utmost in prison pitch: inmates scoff," Anchorage Daily News 26 September 2001.

30. From an undated letter to the Kenai Borough Assembly in the summer of 2001.

31. Norman Holt, Donald Miller, California Department of Corrections. January, 1972. Report #46: Explorations in Inmate-Family Relationships.
<<http://www.fcnetwork.org/reading/holt-miller/holtmillersum.html>>.

32. Ruth Steinberger, "Incarcerated Indians," supra note 14 at 4-5.

33. Guilfoyle.

<<http://nativenet.uthscsa.edu/pipermail/nn-dialogue/2001-pril/000047.html>>.

34. <http://www.uaa.alaska.edu/just/forum/fl24wi96/a_village.html> and also "Elders Court works to save troubled village teens," Anchorage Daily News, 26 December 2001.

35. <<http://www.uaa.alaska.edu/just/reports/press/press02.html>>.

36. Ada Pecos Melton, "Indigenous Justice systems and Tribal Society," Tribal Court Clearinghouse: 1,
<<http://www.tribal-institute.org/articles/melton1.htm>>.

37. Id., 2.

38. The exemplary protocol developed by Hollow Water, an Anishnaabe community, is remarkably thoughtful and professional, and mandates long-term involvement in the treatment process. Organizational staff understands that the healing process is necessarily lodged within a wide circle in the community and there is no magical "quick fix," especially in cases of sexual abuse. At the core of the process are the traditional cycles of ceremonies. It also recognizes that women are leading the healing movement.

Actually...


39. Its umbrella agency, Southeast Alaska Regional Health Consortium (SAHRC), also sponsors Raven's Way, a program for juveniles. SARHC notes, "[i]n 1998, of all court referrals of Native youth in the state, 55 percent were for the offense of possession and/or consumption of alcohol." <http://www.ojp.usdoj.gov/americanative/promise.pdf>.

40. Healing as Justice: The American Experience: http://www.usask.ca/nativelaw/jah_yazzie.html.

41. Restorative Justice in the Prison Setting: Andrew Coyle, as presented to a conference of the International Prison Chaplains Association, Driebergen, The Netherlands, 13 May 2001.

42. From Tribal Court Clearinghouse: The Reemergence of Tribal Society and Traditional Justice Systems: <http://www.tribal-institute.org/articles/vicent11.htm>. See also list of tribal law articles at <http://www.lawlink.nsw.gov.au/ajac.nsf/pages/usa>

43. Native Americans in South Dakota: An Erosion of Confidence in the Justice System: <http://www.usccr.gov/sdsac/ch2.htm>.

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