



Annual Privatization Report 2014

Criminal Justice and Corrections

By Lauren Galik, Leonard Gilroy and Alexander Volokh

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A. 2013–14 Corrections Privatization Overview

By Leonard Gilroy

According to the most recent data compiled by the Bureau of Justice Statistics, 2012 marked the third consecutive year of overall decline in the total U.S. prison population, continuing the reversal of a decades-long trend of annual population increases.¹ The federal and state prison population fell to 1,570,397 at the end of 2012, down 1.7 percent from 1,598,968 in 2011. This decline was largely due to a decrease in the total state prison population of over 30,000 since 2011, a 2.2 percent decline. The federal prison population grew over the same time period by over 1,450 prisoners, a 0.7 percent increase. Overall, there was a net decrease in the total U.S. prison population of over 28,500 between the end of 2011 and the end of 2012. Over that same period, the total U.S. prison population housed in privately operated prisons increased by 4.6 percent, from 140,276 in 2011 to 146,120 in 2012.

At the federal and state level, the use of public-private partnerships in corrections has increased since 2000, as shown in Table 1. At the federal level, the total prison population rose from 145,416 in 2000 to 217,815 in 2012, an increase of 49.8 percent. By contrast, the number of federal prisoners housed in private facilities has risen by over 160 percent over that same period (from 15,524 in 2000 to 40,446 in 2012), illustrating federal agencies' growing preference to rely on PPPs for new prison capacity, as opposed to developing government-run facilities. Accordingly, the share of federal prisoners housed in private prisons increased from 10.7 percent in 2000 to 18.6 percent in 2012.

At the state level, the share of offenders held in private facilities has also increased since 2000. The total state prison population rose from 1,248,815 in 2000 to 1,352,582 in 2012, an 8.3 percent increase. The number of those state prisoners housed in private facilities rose from 75,291 to 105,674 over that same time period, a 40.4 percent increase. Overall, the share of state prisoners housed in private prisons increased slightly from 6.0 percent in 2000 to 7.8 percent in 2011.

Table 1: Federal and State Prison Population in Private Facilities (2000–2012)

| Year | Total Federal Prison Population | Federal Population in Private Facilities | % Federal Population in Private Facilities | Total State Prison Population | State Population in Private Facilities | % State Population in Private Facilities |
|------------------------------------|---------------------------------|--|--|-------------------------------|--|--|
| 2000 | 145,416 | 15,524 | 10.7% | 1,248,815 | 75,291 | 6.0% |
| 2005 | 187,618 | 27,046 | 14.4% | 1,338,292 | 80,894 | 6.0% |
| 2010 | 209,771 | 33,830 | 16.1% | 1,404,032 | 104,361 | 7.4% |
| 2011 | 216,362 | 38,546 | 17.8% | 1,382,606 | 101,730 | 7.4% |
| 2012 | 217,815 | 40,446 | 18.6% | 1,352,582 | 105,674 | 7.8% |
| Average annual % change, 2000–2010 | 3.3% | 7.1% | n/a | 1.1% | 3.0% | n/a |
| Average annual % change, 2010–2012 | 1.3% | 6.0% | n/a | -1.2% | 0.4% | n/a |
| Percent change, 2011–2012 | 0.7% | 4.9% | n/a | -2.2% | 3.9% | n/a |

Sources:

Total federal and state prison population data (2011, 2012): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2012*, December 2013, p. 39, <http://goo.gl/9j305J> (accessed May 4, 2014).

Total federal and state prison population data (2000–2010): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2011*, December 2012, p. 2, <http://goo.gl/DkPcDg> (accessed January 23, 2013).

Federal and state private prison population data (2011, 2012): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2012*, December 2013, p. 40, <http://goo.gl/9j305J> (accessed May 4, 2014).

Federal and state private prison population data (2000, 2010): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2011*, December 2012, p. 32, <http://goo.gl/DkPcDg> (accessed January 23, 2013).

Federal and state private prison population data (2005): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2010*, February 2012, p. 30, <http://goo.gl/73pVs> (accessed January 23, 2013).

Percent federal and state population in private facilities (and related percent changes): Authors' calculation.

Note: State-level private facility population totals differ from those reported by BJS due to its exclusion of California inmates held in contracted beds in out-of-state private facilities for 2010–2012. Data for each year were adjusted to include California inmates held in contracted out-of-state correctional facilities, as reported in the year-end (December) population reports published by the California Department of Corrections and Rehabilitation (<http://goo.gl/BMvN8A>).

Taken together, the total federal and state prison population increased by 12.6 percent from 2000 to 2012, rising from 1.39 million to 1.57 million (see Table 2 and Figure 1). By comparison, the federal and state inmate population housed in private facilities increased by 61 percent over the same time period and now accounts for 9.3 percent of the total prison population. While these data certainly reflect an increasing reliance on corrections PPPs by federal and state officials over the last decade, the vast majority of inmates—nearly 91 percent—continue to be housed in government-run prisons.

Table 2: Change in Private Prison Population (2000–2012)

| Year | Total Federal and State Prison Population | Federal and State Population in Private Facilities | % Federal and State Population in Private Facilities |
|------------------------------------|---|--|--|
| 2000 | 1,394,231 | 90,815 | 6.5% |
| 2005 | 1,525,910 | 107,940 | 7.1% |
| 2010 | 1,613,803 | 138,191 | 8.6% |
| 2011 | 1,598,968 | 140,276 | 8.8% |
| 2012 | 1,570,397 | 146,120 | 9.3% |
| Average annual % change, 2000–2010 | 1.3% | 3.8% | n/a |
| Average annual % change, 2010–2012 | -0.9% | 1.9% | n/a |
| Percent change, 2011–2012 | -1.8% | 4.2% | n/a |

Sources:

Total federal and state prison population data (2011, 2012): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2012*, December 2013, p. 39, <http://goo.gl/9J3o5J> (accessed May 4, 2014).

Total federal and state prison population data (2000–2010): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2011*, December 2012, p. 2, <http://goo.gl/DkPcDg> (accessed January 23, 2013).

Federal and state private prison population data (2011, 2012): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2012*, December 2013, p. 40, <http://goo.gl/9J3o5J> (accessed May 4, 2014).

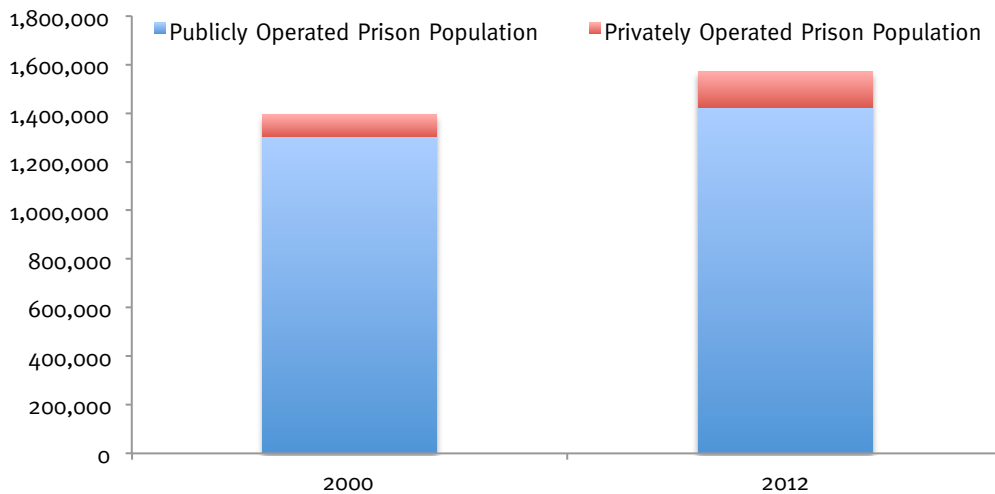
Federal and state private prison population data (2000, 2010): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2011*, December 2012, p. 32, <http://goo.gl/DkPcDg> (accessed January 23, 2013).

Federal and state private prison population data (2005): U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2010*, February 2012, p. 30, <http://goo.gl/73pVs> (accessed January 23, 2013).

Percent federal and state population in private facilities (and related percent changes): Author's calculation.

Note: State-level private facility population totals differ from those reported by BJS due to its exclusion of California inmates held in contracted beds in out-of-state private facilities for 2010–2012. Data for each year were adjusted to include California inmates held in contracted out-of-state correctional facilities, as reported in the year-end (December) population reports published by the California Department of Corrections and Rehabilitation (<http://goo.gl/BMvN8A>).

Figure 1: Proportion of Publicly vs. Privately Operated Prison Population (2000–2012)



Sources: 2012 data: U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2012*, December 2013, pp. 39–40, <http://goo.gl/9j305l> (accessed May 4, 2014). BJS data adjusted to include 8,900 California inmates held in contracted out-of-state correctional facilities, as reported in the December 2012 population report published by the California Department of Corrections and Rehabilitation (<http://goo.gl/k5PUR4>). 2000 data: U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2011*, December 2012, p. 32, <http://goo.gl/DkPcDg> (accessed January 23, 2013).

A total of 31 states held some inmates in privately operated prisons in 2012, though state usage of corrections PPPs varies considerably, as shown in Table 3. Some states have large proportions of their inmate populations in privately operated facilities—including New Mexico (44.6 percent), Montana (39.3 percent), Idaho (34.1 percent), Alaska (30.8 percent), Hawaii (28.1 percent) and Vermont (24.8 percent)—while other states make limited use of corrections PPPs, including Pennsylvania (2.4 percent), Alabama (1.7 percent), Kansas (0.9 percent), South Dakota (0.4 percent), Maryland (0.1 percent), Wisconsin (0.1 percent), North Carolina (0.1 percent), and South Carolina (0.1 percent).

In terms of absolute numbers, the states with the highest numbers of inmates held in privately operated prisons are Texas (18,617), Florida (11,701), California (9,508), Georgia (7,900), Arizona (6,435) and Oklahoma (6,423). These six states account for over half of the total number of state inmates held in privately operated prisons.

The number of inmates held in privately operated prisons held fairly steady in most states between 2011 and 2012, with the exception of Georgia and Ohio, which each added over 2,000 inmates to private facilities.

Table 3: Federal and State Prisoners in Private Facilities, by Jurisdiction, 2000–2012

| Jurisdiction | Inmates in Private Facilities (2000) | Inmates in Private Facilities (2010) | Inmates in Private Facilities (2011) | Inmates in Private Facilities (2012) | Percent of total jurisdictional population (2012) |
|----------------|--------------------------------------|--------------------------------------|--------------------------------------|--------------------------------------|---|
| Alabama | 0 | 1,024 | 545 | 538 | 1.7 |
| Alaska | 1,383 | 1,598 | 1,688 | 1,733 | 30.8 |
| Arizona | 1,430 | 5,356 | 6,457 | 6,435 | 16.1 |
| Arkansas | 1,540 | 0 | 0 | 0 | 0.0 |
| California * | 4,547 | 12,416 | 10,001 | 9,508 | 7.1 |
| Colorado | 2,099 | 4,498 | 4,303 | 3,939 | 19.3 |
| Connecticut | n/a | 883 | 855 | 817 | 4.7 |
| Delaware | 0 | 0 | 0 | 0 | 0.0 |
| Florida | 3,912 | 11,796 | 11,827 | 11,701 | 11.5 |
| Georgia | 3,746 | 5,233 | 5,615 | 7,900 | 14.2 |
| Hawaii | 1,187 | 1,931 | 1,767 | 1,636 | 28.1 |
| Idaho | 1,163 | 2,236 | 2,332 | 2,725 | 34.1 |
| Illinois | n/a | 0 | 0 | n/a | n/a |
| Indiana | 991 | 2,817 | 2,952 | 4,251 | 14.7 |
| Iowa | 0 | 0 | 0 | 0 | 0.0 |
| Kansas | n/a | 0 | 74 | 83 | 0.9 |
| Kentucky | 1,268 | 2,127 | 2,050 | 812 | 3.7 |
| Louisiana | 3,065 | 2,921 | 2,951 | 2,956 | 7.4 |
| Maine | 11 | 0 | 0 | 0 | 0.0 |
| Maryland | 127 | 70 | 78 | 27 | 0.1 |
| Massachusetts | n/a | 0 | 0 | 0 | 0.0 |
| Michigan | 449 | 0 | 0 | 0 | 0.0 |
| Minnesota | 0 | 0 | 0 | 0 | 0.0 |
| Mississippi | 3,230 | 5,241 | 4,669 | 4,334 | 19.4 |
| Missouri | 0 | 0 | 0 | 0 | 0.0 |
| Montana | 986 | 1,502 | 1,418 | 1,418 | 39.3 |
| Nebraska | 0 | 0 | 0 | 0 | 0.0 |
| Nevada | 508 | 0 | 0 | n/a | n/a |
| New Hampshire | 0 | 0 | 0 | 0 | 0.0 |
| New Jersey | 2,498 | 2,841 | 2,887 | 2,717 | 11.7 |
| New Mexico | 2,132 | 2,905 | 2,853 | 2,999 | 44.6 |
| New York | 0 | 0 | 0 | 0 | 0.0 |
| North Carolina | 330 | 208 | 30 | 30 | 0.1 |
| North Dakota | 96 | 0 | 0 | 0 | 0.0 |
| Ohio | 1,918 | 3,038 | 3,004 | 5,343 | 10.5 |
| Oklahoma | 6,931 | 6,019 | 6,026 | 6,423 | 25.5 |
| Oregon | 0 | 0 | 0 | 0 | 0.0 |
| Pennsylvania | 0 | 1,015 | 1,195 | 1,219 | 2.4 |
| Rhode Island | n/a | 0 | 0 | 0 | 0.0 |
| South Carolina | 13 | 17 | 20 | 16 | 0.1 |
| South Dakota | 45 | 5 | 11 | 15 | 0.4 |

Table 3: Federal and State Prisoners in Private Facilities, by Jurisdiction, 2000–2012

| Jurisdiction | Inmates in Private Facilities (2000) | Inmates in Private Facilities (2010) | Inmates in Private Facilities (2011) | Inmates in Private Facilities (2012) | Percent of total jurisdictional population (2012) |
|---------------|--------------------------------------|--------------------------------------|--------------------------------------|--------------------------------------|---|
| Tennessee | 3,510 | 5,120 | 5,147 | 5,165 | 18.2 |
| Texas | 17,432 | 19,155 | 18,603 | 18,617 | 11.2 |
| Utah | 208 | 0 | 0 | 0 | 0.0 |
| Vermont | 0 | 562 | 522 | 504 | 24.8 |
| Virginia | 1,571 | 1,560 | 1,569 | 1,559 | 4.2 |
| Washington | 0 | 0 | 0 | 0 | 0.0 |
| West Virginia | 0 | 0 | 0 | 0 | 0.0 |
| Wisconsin | 4,349 | 50 | 36 | 18 | 0.1 |
| Wyoming | 275 | 217 | 245 | 236 | 10.7 |
| State Total * | 75,291 | 104,361 | 101,730 | 105,674 | 7.8 |
| Federal Total | 15,524 | 33,830 | 38,546 | 40,446 | 18.6 |
| U.S. Total * | 90,815 | 138,191 | 140,276 | 146,120 | 9.3 |

Sources: 2011, 2012 data: U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2012*, December 2013, p. 40, <http://goo.gl/gJ305J> (accessed May 4, 2014). 2000, 2010 data: U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2011*, December 2012, p. 32, <http://goo.gl/DkPcDg> (accessed January 23, 2013).

* Totals differ from those reported by BJS due to its exclusion of California inmates held in contracted beds in out-of-state private facilities for 2010–2012. Data for each year were adjusted to include California inmates held in contracted out-of-state correctional facilities, as reported in the year-end (December) population reports published by the California Department of Corrections and Rehabilitation (<http://goo.gl/BMvN8A>).

Recent research from two Temple University Center for Competitive Government economists may help explain why corrections PPPs remain a popular tool used in nearly two-thirds of the states. A 2013 report by Temple economics professors Simon Hakim and Erwin Blackstone analyzed government data from nine states with higher numbers of inmates in privately operated prisons (Arizona, California, Florida, Kentucky, Mississippi, Ohio, Oklahoma, Tennessee and Texas) and Maine (which does not contract out prison operations), and their research estimates that the use of contracted prison operations brings long-run cost savings of 12 percent to 58 percent, with equal or better levels of performance than publicly operated prisons.² Notably, the research accounts for depreciation, pension obligations and retiree healthcare costs, which are factors often overlooked in comparative cost studies.

B. Federal Criminal Justice Reform Update

By Lauren Galik

In 2013, Attorney General Eric Holder announced that he was ordering a "fundamentally new approach" in how the federal government prosecutes many low-level drug offenders, reversing decades of tough-on-crime political rhetoric coming out of Washington, D.C.

On August 12, 2013, Holder issued a memorandum to federal prosecutors, instructing them to avoid charging offenses carrying mandatory minimum sentences for certain low-level, nonviolent offenders. Holder also instructed prosecutors to avoid seeking mandatory drug sentencing enhancements based on prior convictions when such severe punishment is not warranted.³

It's too soon to tell whether or not this will have any impact on reducing the number of low-level drug offenders sentenced to federal prison. Holder's memorandum is unenforceable in any tangible sense, since it has no legal authority over actions taken by prosecutors. Regardless, it shows that the federal government is at least recognizing that these draconian federal drug laws that have been on the books for decades need reform.

In 2014, the U.S. Sentencing Commission has taken promising first steps toward reforming the way in which drug offenders are sentenced at the federal level. On May 1, 2014, the U.S. Sentencing Commission sent Congress eight proposed amendments to the federal sentencing guidelines. The most major change proposed would lower all drug-sentencing guidelines by two levels. This would reduce federal drug sentences by 11 months, on average.

Congress has 180 days to consider the amendments the U.S. Sentencing Commission submitted. If no action is taken by Congress to stop them, the amendments will automatically become law November 1, 2014. The proposed changes would only affect those who are sentenced on or after that date. On July 18, the U.S. Sentencing Commission will vote on whether to make the new guidelines retroactive.

While the guidelines are only advisory for judges, they are followed in roughly 80 percent of federal cases. If the changes go into effect on November 1, they will likely affect the sentences of roughly 70 percent of drug defendants subject to the sentencing guidelines. If the guidelines are made retroactive, the U.S. Sentencing Commission has estimated that roughly 51,000 inmates could be eligible for shorter sentences. The average sentence reduction would be 23 months.

Beyond this, calls to revise mandatory minimum sentencing laws have surged in the past year, and proposals in Congress to restrict their impact have won bipartisan support. Currently, three major bills are being considered by Congress that, if passed, have the potential to affect thousands of offenders while saving billions of dollars over the next 10 years.

Below is a summary of the three federal sentencing reform bills currently being considered by Congress that would reform federal sentencing laws even beyond the U.S. Sentencing Commission's proposed amendments to the federal sentencing guidelines.

1. The Smarter Sentencing Act

On August 1, 2013 the Smarter Sentencing Act (SSA), S. 1410, was introduced in the U.S. Senate. Sponsored by U.S. Senators Richard Durbin (D-IL), Patrick Leahy (D-VT), and Mike Lee (R-UT), this bill proposes to make the most radical reforms to federal sentencing laws since the Fair Sentencing Act was passed in 2010. On January 30, 2014, the U.S. Senate Judiciary Committee voted 13–5 in support of this bill.

U.S. Senate leader Harry Reid recently announced he wants to bring SSA up for a vote in the Senate this summer. To become law, it must be passed in the full U.S. Senate, and then passed by the House Judiciary Committee, followed by the full U.S. House of Representatives.

If this bill becomes law, it would do three things:

- ***Reduce mandatory minimum drug sentences:*** If passed, this bill would reduce mandatory minimum sentences for certain federal drug crimes in half: from five-, 10-, and 20- years to two-, five- and 10-years. The bill does not specify whether or not these new sentences would be retroactive. The reduction of mandatory minimum drug sentences alone is projected to save \$2.485 billion over 10 years.⁴ It will also potentially affect as many as 15,295 people per year.⁵

- ***Expand the drug safety valve:*** The current drug safety valve allows judges to depart below the mandatory minimum sentence if a drug offender's criminal record puts him or her in the Criminal History Category I—meaning he has no more than one criminal history point—as determined by the U.S. Sentencing Guidelines. This bill would expand the drug safety valve, allowing it to apply to drug offenders whose criminal history falls within Criminal History Category II (maximum of three criminal history points). The expansion of the drug safety valve is projected to save roughly \$544 million over 10 years.⁶ It's also projected to affect roughly 2,180 people per year.⁷
- ***Make the Fair Sentencing Act of 2010 (FSA) retroactive:*** The FSA reduced the disparity between the amount of powder cocaine and crack cocaine needed to trigger five- and 10-year federal mandatory minimum sentences from a 100:1 weight ratio to an 18:1 weight ratio. The law also eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine. If the bill were enacted, it would make the FSA retroactive by allowing federal crack cocaine offenders who committed their offenses before the law was passed to make a motion to the court requesting application of the FSA to their cases. The Urban Institute estimates that if the Fair Sentencing Act of 2010 is applied retroactively, it would “conservatively lead to savings of \$229 million over 10 years,” and may potentially affect the sentences of over 3,000 inmates.⁸

On January 10, the Senate Judiciary Committee voted 13–5 to pass the bill. To pass this bill, it must next be considered and voted on by the full U.S. Senate. Then, the bill must go through the same process in the U.S. House of Representatives. First, the House Judiciary Committee must pass the bill, and then the full House of Representatives must consider and vote on the bill. It is unclear at this point if or when these actions will be taken.

2. The Recidivism Reduction and Public Safety Act

The Recidivism Reduction and Public Safety Act of 2013, S. 1675, was introduced to the U.S. Senate in 2013 and co-sponsored by Senators Sheldon Whitehouse (D-RI) and John Cornyn (R-TX).

On March 6, 2014 the U.S. Senate Judiciary Committee voted in favor of this bill. In order to become law, it must be passed in the full U.S. Senate, then passed by the House Judiciary Committee, followed by the full U.S. House of Representatives.

If this bill were to become law, it would enact several reforms. A few of the highlights are summarized below:

Raise “good time credit” limit: First, this bill would raise the limit on the number of days of “good time credit” federal prisoners can earn per year—from 47 to 54 days—for displaying good behavior and obeying prison rules. This bill would make the 54-day credit limit retroactive as well, meaning that prisoners who were not credited the full 54 days/year would receive an additional seven days for every year the credit was earned.⁹ This aspect of the bill alone is projected to save \$41 million over 10 years, if enacted.

Allow federal prisoners to earn credit for program participation: This bill would allow federal prisoners to earn up to 60 days per year off of their sentences for participation in recidivism reduction or recovery programs. This would be in addition to the 54 days inmates may earn in the form of “good time credits,” as well as the possible 12-month sentence reduction earned for completion of the Residential Drug Abuse Program (RDAP). However, the total number of combined credits prisoners earn cannot exceed more than 30 percent of their sentences. This aspect of the bill is projected to save \$45 million over 10 years, if enacted.¹⁰

Ensure enrollment in drug treatment: Though many who complete the in-prison component of Residential Drug Abuse Program are eligible for 12-months of credit off of their sentences, many inmates receive much less than that. For example, in FY 2012, the average credit that 4,776 inmates received was only 9.4 months. Had these inmates enrolled in the programming earlier, the Bureau of Prisons could have been releasing thousands of inmates much earlier.¹¹

This bill allows the Bureau of Prisons three years to ensure all prisoners in need of the Residential Drug Abuse Program are able to enter and finish the program in order to receive the full 12-month sentence reduction for participation. This aspect of the bill is estimated to save \$9.1 million over 10 years, if enacted.¹²

Develop a risk assessment tool: This bill would require the attorney general to create a risk assessment tool that would determine each prisoner’s risk of recidivism, as well as the programming requirements to reduce that risk, within six months of the bill’s enactment. The Bureau of Prisons would have six years to perform the risk assessment developed by the attorney general for all federal prisoners.

Expand reentry programs: This bill would require the creation of reentry “demonstration projects,” such as job placement assistance, halfway houses, drug and mental health treatment and testing, etc. in various jurisdictions, which would help prepare federal offenders for reentry and assist them with the process. Moreover, it would require an evaluation of the programs and a report to Congress after five years of enactment.

Recidivism reporting: Finally, this bill would require the U.S. Probation and Pretrial Services to collect recidivism data and report it to Congress.

3. The Justice Safety Valve Act of 2013

On March 20, 2013 the Justice Safety Valve Act of 2013 (S. 619)—sponsored by Senator Patrick Leahy (D-VT) and Senator Rand Paul (R-KY)—was introduced in the U.S. Senate. If passed, the bill would create a new, broader safety valve measure for federal mandatory minimum sentences, which would give judges authority to sentence offenders below a mandatory minimum if the sentence would not fulfill the goals of punishment.¹³

This bill has yet to be considered by the U.S. Senate Judiciary Committee, and it is unclear if or when it will be considered.

However, if the Justice Safety Valve Act were to become law, it has the potential to produce significant savings and affect thousands of offenders. For example, in FY 2010 about 10,600 people received mandatory minimum sentences, and almost 90 percent of these offenders were convicted of a drug offense. Even a limited application of the Justice Safety Valve Act would produce significant savings.

4. Conclusion

If these bills are passed and signed into law in 2014, it would be a huge step forward in scaling back the draconian mandatory minimum sentencing laws that have pervaded the federal criminal justice system for more than 30 years. Moreover, these bills would save taxpayers billions of dollars over the next decade or more.

C. State Corrections Privatization Update

By Leonard Gilroy

Recent developments in correctional public-private partnerships since 2013 by state include:

Arizona: All of Arizona’s private prison contracts contain provisions that allow the state to purchase the prison facility once the contract expires, and in 2013 the state took advantage of that for the first time when it purchased the Marana Community Correctional Treatment Facility—the state’s first private prison dating back to 1994—from long-time operator Management & Training Corporation for \$150,000.¹⁴ Despite the transfer in ownership, the company will continue operating the prison under a contract with the state.

In other Arizona news, a group of six Arizona county sheriffs, including Maricopa County Sheriff Joe Arpaio, are asking the state to consider sending state inmates to their county facilities instead of housing them in private prisons throughout the state. “The state should be supporting the counties and not try competing against them,” an Apache County sheriff’s deputy told the *Arizona Republic* in January 2014.¹⁵ However, Arizona Department of Corrections officials are skeptical of the counties’ abilities to offer the same level of education and rehabilitation programs that private prisons are providing. “A county sheriff’s office is not designed to be a mini Department of Corrections,” corrections department spokesman Doug Nick told the *Republic*.¹⁶ “They have mostly people who have not been convicted of a crime as they are going through a trial process.” Yuma County Sheriff Leon Wilmot echoed that sentiment, telling the *Republic* that “It’s a whole different beast when you are dealing with people who come from prison [...] We don’t have the programs the DOC does nor do we have the resources and time to do that.”¹⁷

California: California’s ongoing efforts to comply with a court-ordered mandate to reduce its prison population—which in recent years have prompted the state to house thousands of inmates in privately operated, out-of-state prisons—are summarized in Section F of this report. In recent developments on the privatization front:

- In granting the state a two-year extension on reducing its prison population to 137.5 percent of capacity, the three-judge panel overseeing the population reduction mandate ruled in February 2014 that the state may not increase the number of inmates held in out-of-state private prisons beyond the current level of approximately 8,900 inmates. It encouraged the state to seek ways to reduce the out-of-state private prison population, including using privately contracted beds in in-state community correctional facilities. The ruling continues a restriction on using out-of-state private prisons that the three-judge panel had issued the previous year as the state began seeking an extension on its deadline to reduce the prison population. Prior to the ruling, Gov. Jerry Brown and the state legislature passed a 2013 law allocating up to \$1 billion toward compliance with the population reduction mandate that explicitly authorized hundreds of millions of dollars in spending on the increased use of out-of-state private prisons, as well as leasing bed space from in-state private prisons and county jails.
- In April 2014, the California Department of Corrections and Rehabilitation (CDCR) signed a contract with The GEO Group to reactivate the company's 260-bed McFarland Female Community Reentry Facility to house female inmates nearing the end of their prison terms, providing them enhanced rehabilitation and recidivism reduction programs. The four-year contract includes a provision that would allow the agency to seek a doubling in bed capacity within the first year.¹⁸
- In October 2013, CDCR signed a new five-year contract with The GEO Group to house 700 state inmates at the company's Golden State Modified Community Correctional Facility in McFarland. The contract expands the facility's contract capacity by 100 beds relative to the state's previous contract to house inmates at that facility.
- In October 2013, the state entered into a three-year lease agreement with Corrections Corporation of America that will see the state take over the 2,300-bed California City Correctional Center. The agreement to lease the prison from the private operator for \$28.5 million per year while staffing it with state prison guards represents a first-of-its-kind public-private partnership. Former CCA guards will be required to complete eight weeks of additional training before becoming state-employed prison guards.¹⁹ CCA committed to investing \$10 million into facility upgrades as part of the contract, which required it to relocate federal detainees the company housed for the U.S. Marshals Service and Immigration and Customs Enforcement.²⁰
- In September 2013, CDCR signed two five-year contracts with The GEO Group to house 1,400 California inmates at two community corrections facilities owned by the company: the 700-bed Central Valley Modified

Community Correctional Facility in McFarland and 700-bed Desert View Modified Community Correctional Facility in Adelanto.

- In July 2013, CDCR renewed its contract with CCA to house over 8,000 inmates at the company-operated prisons in Arizona, Oklahoma and Mississippi.

In other California news, the Costa Mesa City Council voted in June 2013 to contract out the operation of the city's jail to G4S Security Solutions in a five-year contract expected to save a total of \$3 million.²¹ Before the vote, a superior court judge rejected a request by the Orange County Employees Association—a public employee union representing city workers—to issue a temporary restraining order preventing the contract from moving forward. The contract had already been delayed 18 months by an injunction sought by a separate union; the injunction was lifted earlier in the year. All existing jail officers and employees were guaranteed positions with the contractor. "The problem with government and with government employees, as good as they are, is they are pricing themselves out of the picture," Costa Mesa Mayor Jim Righeimer told *The Daily Pilot* in June.²²

Florida: In October 2013, the Florida Department of Management Services announced that The GEO Group had won the re-bidding for contracts to manage the 985-bed Bay Correctional Facility, the 985-bed Moore Haven Correctional Facility, and the 1,884-bed Graceville Correctional Facility. With these three contracts—previously operated by the Corrections Corporation of America under contracts that expired in February 2014—GEO now holds the contracts to five of the state's seven private prisons, accounting for 76 percent of the private beds contracted by the state.²³

In other news, Florida Department of Corrections officials announced in the summer of 2013 that the agency plans to expand the privatization of the state's 32 work release facilities. Nine work release facilities are already operated under contract at an average of \$29.29 per inmate per day, compared to \$42.24 per inmate per day in state facilities.²⁴ According to Corrections Secretary Michael Crews, state correctional officers "don't have the expertise in job placement" that the state's current community partners like Goodwill Industries-Suncoast do.²⁵

Hawaii: In the 2014 legislative session, both chambers of the Hawaii legislature passed a resolution (Senate Concurrent Resolution 120) requesting that the governor explore a potential public-private partnership agreement for the planning, design, construction and financing of a new system of correctional

facilities—including reentry centers, reporting centers, treatment centers, prisons, jails and halfway homes—to be owned and operated by the state and its counties. The state is struggling with aging, overcrowded facilities, and over 25 percent of state inmates are currently held in out-of-state private prisons on the mainland, prompting the push to develop new in-state capacity that could repatriate those inmates. Refurbishment of existing correctional facilities is one of the options contemplated in the resolution.

Idaho: The Idaho Department of Corrections (IDOC) is in the process of taking over operation of the Idaho Correctional Center—a private prison operated for over a decade by Corrections Corporation of America—after the company admitted in April 2013 that it had violated its contract by falsifying staffing reports over many months in 2012. The admission was the latest in a string of issues that have plagued the facility in recent years, including ongoing inmate lawsuits over rampant violence at the facility.

The company agreed to pay the state a \$1 million settlement in February 2014 absolving it of any civil liability related to the understaffing issue, dating back to the beginning of the contract in 1997.²⁶ “While the \$1 million payment does not reflect a specific number of hours, due to the complexity of the issue it was determined by IDOC officials to reasonably cover the State’s costs related to the staffing matter,” the department and company stated in a jointly issued statement.²⁷ “The agreement also fulfills CCA’s commitment to make taxpayers whole on the issue.”

However, at press time, both the Federal Bureau of Investigation and the Idaho State Police were conducting criminal investigations related to the company’s operation of the facility. Separately, a federal judge found the company in contempt of court over the falsified staffing reports, finding that they violated the terms of a 2010 legal settlement with prison inmates and the American Civil Liberties Union over rampant violence at the prison, which was found to in part trace its roots to understaffing.²⁸

Prior to deciding not to renew the contract to operate the Idaho Correctional Center and have the state take it over, corrections officials sought bids from other private prison operators. None ultimately decided to submit bids.

Kentucky: Citing a declining prison population and recent criminal justice reforms, Kentucky officials opted in July 2013 not to renew the state’s last remaining private prison contract with Corrections Corporation of America to house nearly 800 inmates in the Marion Adjustment Center.²⁹ The state chose

not to renew private prison contracts at two other facilities in 2010 and 2012. “Our decision wasn’t based on an opinion of private prisons,” Kentucky Justice Secretary J. Michael Brown told *The Courier-Journal* in September.³⁰ “CCA was a great partner. We could not have operated without that partnership while our (inmate) population was trending up.” The end of the contract closes an era in the state’s use of public-private partnerships in corrections, which began in 1985 with a contract to house inmates at the Marion Adjustment Center.

Michigan: In October 2013 the Michigan Department of Technology, Management and Budget announced that it had rejected two bids to house 968 male inmates in a privately operated prison since neither bid met the state’s 10 percent cost savings threshold under state law.³¹ Bidders were given two scenarios for bidding: either re-opening the state’s shuttered Standish prison or using a private prison elsewhere in Michigan. However, some legislators, including State Rep. Greg MacMaster, questioned the decision, citing the state’s requirement that bid prices include the long-term legacy costs (e.g., retiree benefits, etc.) from state employees whose jobs would be affected; these costs are going to be borne by the state in any scenario, according to MacMaster.³²

In other Michigan news, the state’s Civil Service Commission rejected a public employee union challenge to the state’s three-year, \$145 million contract with Aramark Correctional Services to provide food services throughout the state prison system.³³ Aramark took over the food service operation in December 2013, a move state officials expect will save between \$12 million and \$16 million per year. The transition to private operation has had some transition issues, with the state fining Aramark \$96,000 in penalties in March 2014 for incidents where workers fraternized with prisoners, for making unauthorized menu substitutions, and for not preparing the correct number of meals as specified in the contract.³⁴ State officials report that the company’s performance has steadily improved since imposing the penalties. “Over the past couple weeks, we’ve seen improvement,” Michigan Department of Corrections spokesman Russ Marlan told the *Detroit News* in April. “Our plans are to step up our monitoring and increase communication with the vendor.”³⁵

Mississippi: In May 2013 the American Civil Liberties Union and the Southern Poverty Law Center filed a federal lawsuit against the Mississippi Department of Corrections over alleged abuses and unsanitary physical conditions at the privately operated East Mississippi Correctional Facility, a prison housing mentally ill inmates.³⁶ The facility’s current operator, Management & Training Corp.—which was not named in the lawsuit—took over operations of the facility from The GEO Group in July 2012 and cites a number of recent

improvements, including an increase in inmate programming, more counselors and psychologists, a 74 percent reduction in assaults and a 60 percent reduction in use-of-force incidents.³⁷

New Hampshire: In April 2013 Gov. Maggie Hassan’s administration opted to reject four companies’ proposals the state solicited for three potential correctional facilities—a 1,500-bed male facility, a 200-bed female facility and a third co-ed prison—under the previous administration of former Gov. John Lynch. The four bidders—Corrections Corporation of America, the GEO Group, Management & Training Corp. and the NH Hunt Justice Group—each submitted bids for the male and co-ed prisons (but not the women’s prison), and an outside consultant hired by the state to evaluate the various proposals raised concerns about a lack of detail in the proposals, specifically with regard to staff compensation levels and how the operators would handle the strict requirements of court orders and consent decrees the state has been under for decades with regard to prison conditions and inmate quality of care.³⁸

Still, the consultant noted that several of the bidders had successful track records in getting prisons accredited in other states and in implementing comprehensive security protocols.³⁹ Gov. Hassan is on record as opposing the private operation of public prisons.

Separately, in May 2013 the New Hampshire Senate voted against a proposed bill (House Bill 443) that would have prohibited the state from privatizing the operation of state prisons, except in a fiscal emergency.⁴⁰ The bill had passed the House in March 2013.

Ohio: As reported in Reason Foundation’s *Annual Privatization Report 2013*, the Lake Erie Correctional Facility—a former state-owned prison sold to the Corrections Corporation of America (CCA) in 2011 for \$72.7 million, a first-of-its-kind sale—had a rocky transition to private operation in 2012, with separate reports issued by the Ohio Department of Rehabilitation and Correction and the state’s Correctional Institution Inspection Committee in early 2013 citing an increase in violence and noncompliance with some of the state’s prison operating standards, prompting CCA to replace the warden, discipline staff, pay penalties to the state and implement a corrective action plan.

A re-inspection of the prison by the Correctional Institution Inspection Committee in the fall of 2013 cited continuing issues with high levels of violence but overall found that the prison was “heading in a positive direction.”⁴¹ Areas of improvement included rehabilitation and reentry services,

better inmate educational attainment, improved staffing issues, and improved health services and records.⁴² Nonetheless, the report cited ongoing safety, security and discipline issues that merit further action.

Also, in April 2014, the Ohio Department of Rehabilitation and Correction fined prison food service contractor Aramark \$142,100 for missing staffing level targets this year at three state prisons.⁴³ The company has a \$110 million, two-year contract to provide food services to Ohio's prisons that launched in September 2013; the contract is expected to save the state \$14 million per year. "While the process is working well at some facilities, we are disappointed that the company has not been able to meet and maintain our standards on a consistent basis," an agency spokesman JoEllen Smith noted in a statement.⁴⁴

Oklahoma: In early 2014, the Oklahoma Department of Corrections (ODOC) issued a request for proposals seeking between 350 and 2,000 new medium-security private prison beds to help alleviate overcrowding at state prison facilities.⁴⁵ The department was still evaluating responses at press time; the hiring of new ODOC Director Robert Patton in February may have slowed down the procurement process. In May 2014, the Oklahoma legislature approved \$13 million in supplemental funding for ODOC to cover a shortfall this fiscal year, which the agency plans to direct toward private prison beds, state inmates held in county jails, and correctional healthcare services.⁴⁶

Pennsylvania: In February 2013, Pennsylvania Gov. Tom Corbett's administration announced plans to cancel all of the state's existing community corrections contracts and rebid them on a performance basis, with providers evaluated on—and paid according to—their performance at reducing the recidivism levels of the populations they manage. The goal of the initiative is to improve the ability of the 38 halfway houses currently used by the state to successfully transition parolees back into society; today, 60 percent of parolees are re-arrested after release from halfway houses, a figure higher than that for parolees released directly to the streets.⁴⁷ The revised contracts allow the state to cancel the agreement if a private halfway house operator's recidivism rate increases over two consecutive periods; conversely, contractors can receive bonuses up to one percent if recidivism rates decline.⁴⁸ State officials estimate that a 10 percent reduction in the one-year recidivism rate would translate into \$45 million in annual savings for the state.⁴⁹

Also, in February 2014 the Pennsylvania Department of Corrections announced that it had awarded a contract to GEO Reentry to develop and operate nine new reentry service centers across the state that offer evidence-based programming

designed to rehabilitate offenders and successfully prepare them for reentry to society. The services offered at these day reporting centers include case management, cognitive behavioral therapy, employment-readiness training services, adult basic education and GED preparation, life skills classes, drug and alcohol programming, and links to community service providers.⁵⁰

The reentry facilities are not residential halfway houses; offenders live in the community and are required to report in to the reentry facilities. If they fail to do so, they face stricter curfews, more frequent reporting or even incarceration.⁵¹ The centers are located in Allentown, Chambersburg, Ebensburg, Harrisburg, Lancaster, Philadelphia, Pittsburgh, Wilkes-Barre and York.

Tennessee: Corrections Corporation of America restarted construction of a new \$143 million private prison in Trousdale County that was started, then shuttered, in the aftermath of the Great Recession in 2009 after the Tennessee Department of Corrections indicated its interest in using the facility to address an increasing demand for new state prison beds.⁵²

Texas: Texas's ongoing state criminal justice reforms and emphasis on promoting rehabilitation over incarceration have created excess capacity in the system that allowed policymakers to pursue the closure of two privately operated prisons in its latest biennial budget. In June 2013, the Texas Department of Criminal Justice announced plans to cancel its contracts for the operation of a state jail in Dallas and a pre-parole facility in Mineral Wells, moves expected to save the state \$97 million in the current two-year budget.⁵³ The two facilities held approximately 4,300 total inmate beds. Lone Star State lawmakers also passed legislation directing the agency to explore the potential privatization of commissary services.⁵⁴

In other Texas corrections news, Kaufman County Sheriff David Byrnes ended a procurement seeking a private operator for the Kaufman County Jail in August 2013 after county commissioners removed a provision from the request for proposals guaranteeing the jobs and benefits of current jail staff.⁵⁵ Commissioners launched the procurement earlier in the year seeking ways to save \$1 million in the county budget.

Utah: Privatization is one of the options being considered in an emerging plan to relocate the Utah State Prison in Draper to a new location and redeveloping the valuable 690 acres of land the prison currently occupies. The Prison Relocation and Development Authority, created by the legislature in 2011 to determine the economic feasibility of relocating the prison, issued a consultant

report in January 2014 outlining four different relocation scenarios, and in 2013 the legislature created a Prison Land Management Authority to formally solicit proposals from private developers for the project. The legislation specifically allowed the Authority to solicit proposals that involve contracting out prison operations and management, in addition to the design and construction.

The state has already received interest from a range of private developers and prison operators interested in the \$600 million project, including Corrections Corporation of America, which offered to finance the entire project in return for a long-term contract to operate the new facility.⁵⁶ The current prison occupies prime land that could be worth an estimated \$130 million, according to state officials.⁵⁷

West Virginia: At press time, Gov. Earl Ray Tomblin's administration was still considering a proposal by Corrections Corporation of America to hold up to 400 West Virginia inmates in an out-of-state private prison in Kentucky.⁵⁸ CCA was the only bidder in a procurement seeking an alternative to the regional jails currently used to hold over 1,000 state inmates, and state officials launched the procurement to see if there was another option that would provide more programming and rehabilitation to inmates nearing parole. According to State Corrections Commissioner Jim Rubenstein, the regional jails currently used by the state do not offer the level of programming inmates need to qualify for parole, and private, out-of-state prisons offered one way for the state to immediately access such programming.⁵⁹ Officials view both the regional jails and out-of-state placement as a temporary strategy as the state ramps up its justice reinvestment initiatives designed to lower the state prison population and reduce recidivism.

D. FOCUS: Correctional Healthcare Privatization in the States

By Lauren Galik and Leonard Gilroy

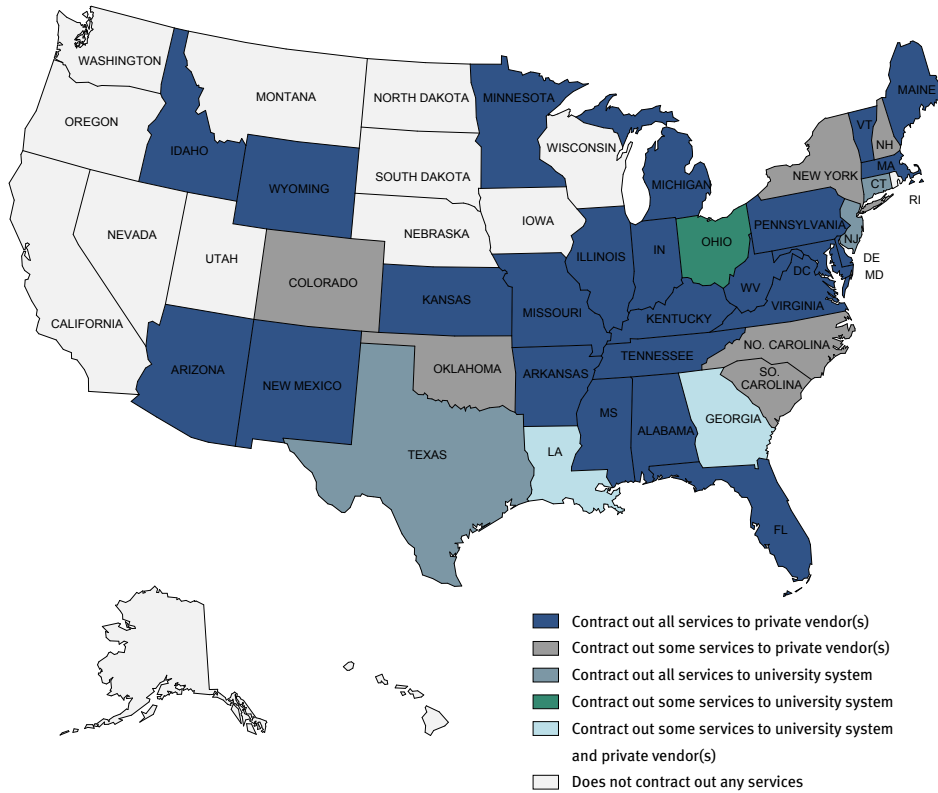
In recent decades, state governments have increasingly turned to the private sector to provide a variety of correctional healthcare services. This article provides an overview of the current correctional healthcare market, summarizing the various options states have pursued to provide their inmates with healthcare while incarcerated, as well as the rationale for doing so.

1. Market Overview

Currently, only 14 states have self-operated correctional healthcare systems, and 36 states contract out at least a portion of their correctional healthcare services to an outside vendor. Of the 36 states that have contracts, 24 have contracted out all correctional healthcare services to private companies, and six other states have contracted out some correctional health services to private firms. Three states have contracted out all correctional healthcare services to their respective state university health systems, and one state, Ohio, partners with its state university health system to provide some services. The remaining two states contract out some services to private vendors, and others to their respective university health system.

For those states that only contract out some correctional healthcare services, the type of services contracted out range from comprehensive services, such as mental healthcare, to specialized services such as dialysis, pharmaceutical or telehealth services, for example.

Figure 2: State-by-State Correctional Healthcare Models, 2014



Source: Author’s construct

2. Rationale for Contracting Out Correctional Healthcare

Public-private partnerships in correctional healthcare have many benefits, and states that have chosen to contract out their correctional healthcare services have done so for a variety of reasons, ranging from reducing costs, increasing accountability, improving performance, etc.

a. Cost Savings

According to a recent report by the Bureau of Justice Statistics, 42 of the 44 states it surveyed saw an increase in correctional medical expenditures between 2001 and 2008. Moreover, 35 of the 44 states surveyed had an increase in per capita medical costs between 2001 and 2008, with five states reporting increases of 100 percent or more.⁶⁰

On the other hand, states that have utilized public-private partnerships in correctional healthcare have seen enormous savings, as states are able to build cost savings into their public-private partnership contracts. In 2000, the National Institute of Corrections (NIC) found that states that contracted out their healthcare services saved \$2.22 per inmate per day on average compared to states that did not contract out correctional health services.⁶¹

Two recent contracting initiatives in Florida and Arizona are worth highlighting:

- *Florida:* Florida recently signed contracts with two vendors to provide comprehensive correctional healthcare services to all of its state prisoners. One vendor provides services to inmates in the northern and central part of the state; the other vendor provides services to inmates in the southern part of the state. The language stated in both contracts requires the Florida Department of Corrections to compensate one vendor at a rate of \$8.42 per inmate per day, and the other vendor at \$8.48 per inmate, per day.⁶² According to the Bureau of Justice Statistics, Florida spent \$12.93 per inmate per day in 2008, which would amount to \$14.05 in 2014 dollars (i.e., adjusted for inflation).⁶³ These contractually binding compensation requirements will allow Florida to save between \$5.63 and \$5.57 per inmate per day, or an average of \$2,044 per capita as compared to what it spent in 2008. These savings will benefit Florida taxpayers immediately and in the long run.
- *Arizona:* Arizona contracts out all of its correctional healthcare services to a private company, and it recently switched vendors in 2013. In its current contract, the per inmate per day capitation rate for professional medical services is set at \$10.10.⁶⁴ According to the Bureau of Justice Statistics, Arizona spent \$12.39 per inmate per day in 2008, which would amount to \$13.46 in 2014 dollars (i.e. adjusted for inflation).⁶⁵ These built-in, contractually binding compensation requirements will allow Arizona to save an estimated \$3.36 per inmate per day, or an average of \$1,226.40 per capita as compared to 2008.

b. Performance

A number of states have failed to provide adequate care to their institutional populations on their own, and as a result have been required by the courts to improve the quality of their inmate healthcare or face further repercussions. As such, some states have opted to contract out all or some of their correctional

healthcare with the sole purpose of improving the quality of inmate health to the level that satisfies the courts.

For example, the Delaware Department of Corrections has performance-based compensation built into its contract with the company that provides comprehensive healthcare services to its inmates. These payments may only be made when the vendor's performance goes beyond what the contract specifies.⁶⁶ In 2012, the Delaware Department of Corrections was released from its Amended Memorandum of Agreement (AMOA) on inmate medical and mental healthcare services with the United States Department of Justice, an agreement that lasted for six years.⁶⁷

Also, in December 2013, the Pennsylvania Department of Corrections awarded a five-year mental health services contract to incumbent provider MHM Services that was updated to significantly ratchet up performance expectations. The contract contains financial incentives to reduce the number of misconducts for mentally ill offenders, the number of inmates recommitted to prison mental health units, and the number of recommitments to prison residential treatment units. Conversely, MHM will face financial penalties if it fails to achieve targeted baseline results for those same metrics. Also, MHM will be required to monitor and maintain or exceed an established baseline medication compliance rate.

“No longer are we issuing contracts for just a service,” Pennsylvania Corrections Secretary John Wetzel noted in a press release. “From this point on, our contracts will focus on results. The new contract includes performance measures that will ensure taxpayers are getting what they pay for, including inmates who leave our system better than when they entered it.”

c. Accountability

Public-private partnerships bring accountability that isn't possible with government-provided services. For example, the terms of the contract, government monitoring, policymaker oversight, internal audits and compliance reviews, and obligations to corporate shareholders all ensure PPPs are held accountable.⁶⁸ With PPPs, states also have the ability to terminate contracts with companies whose performance is less than adequate, which is sometimes the case. This type of accountability is not possible when services are kept in-house.

Contracts with private providers specifically outline the responsibilities and expectations the provider must meet. For example, states may require that private providers achieve a specific percentage in savings over the term of the contract as a necessary condition for approval.⁶⁹

To ensure that the contracted health services meet national standards, states may require these providers to have their health services accredited by a national certification organization, such as the National Commission on Correctional Health Care (NCCHC) or The American Correctional Association (ACA), to ensure that facilities are meeting national health standards.⁷⁰ However, private providers also have the incentive to voluntarily acquire these accreditations in order to be competitive in the market for PPPs, whereas states themselves do not.

3. Conclusion

The correctional healthcare market seems to have shifted in favor of public-private partnerships, as a majority of states now contract out some or all of their correctional healthcare services. It appears likely that this trend will continue in 2014.

[Editor's note: This article is a summary of a forthcoming Reason Foundation policy brief on public-private partnerships in correctional healthcare to be released in the summer of 2014.]

E. State and Local Correctional Healthcare Privatization Update

By Lauren Galik and Leonard Gilroy

The following summarizes major developments in correctional healthcare privatization since 2013:

Pennsylvania: As discussed in the previous section, in late 2013 the Pennsylvania Department of Corrections awarded a new, five-year mental health services contract to incumbent provider MHM Services that breaks new ground in performance-based contracting in correctional healthcare, as it includes financial incentives to reduce the number of misconducts for mentally ill offenders, as well as the number of inmates recommitted to prison mental health units and prison residential treatment units. The contract also includes financial penalties if the provider fails to achieve targeted baseline results for those same metrics. Also, MHM will be required to monitor and maintain or exceed an established baseline medication compliance rate.

"Private contractors provide a significant amount of the substance abuse and mental health treatment, as well as other programs intended to reduce recidivism," noted Adam Gelb, who heads the Public Safety Performance Project at The Pew Charitable Trusts, which helped develop the performance incentives. "By creating direct financial rewards for better outcomes, Pennsylvania is encouraging these providers to use evidence-based practices that will boost public safety and ultimately cut costs to taxpayers."

Under the contract, MHM will continue to deliver psychiatric services for inmates, while state employees will continue to deliver psychology services. The corrections department had expressed interest in possibly expanding privatization to the psychology positions during the contract re-bidding process, but met resistance among state legislators that introduced legislation (House Bill 1011) in June 2013 that would ban the privatization of psychology functions.

Arizona: In January 2013, the Arizona Department of Corrections (ADC) terminated its contract with its former medical services contractor, Wexford Health Sources. According to the department's press release, the termination of

the contract was mutual, as both parties encountered “unforeseeable challenges.”⁷¹ The contract with Wexford went into effect on June 1, 2012 and was set to expire in 2017.⁷²

After terminating its contract with Wexford, ADC reached an agreement with Corizon to provide healthcare for all of its state-run prison facilities, beginning March 4, 2013. The contract with Corizon is for five years, with an initial three-year term and two one-year renewal opportunities.⁷³

Florida: On August 1, 2013, Corizon began providing correctional healthcare services at prisons in north and central Florida after the state won a two-year legal battle with three public employee unions that sought to prevent correctional healthcare privatization. The three unions that challenged the state represented over 1,700 state employees who feared being bumped from the state payroll if privatization prevailed. Following the decision, Corrections Secretary Mike Crews sent letters to employees notifying them that they have a right to job interviews with Corizon, stating that he anticipates that the company “will ultimately employ a majority of health services employees.”⁷⁴

In September, DOC officials told the Florida House budget subcommittee that most former state employees are being offered jobs with Corizon and Wexford Health Sources, the company that provides healthcare services for prisons in the southern part of the state.⁷⁵

The two comprehensive healthcare contracts are expected to bring significant savings to the state. Corizon’s contract is expected to save the state nearly \$90 million over the next two years.⁷⁶ Wexford’s contract is expected to save the state \$1 million a month.⁷⁷ Prison officials hope these savings will reduce the chronic budget deficit in the nation’s third-largest prison system.⁷⁸

Idaho: In October 2013, The Idaho Board of Correction awarded Corizon a new contract to continue providing medical and mental healthcare to the state’s prison inmates. The contract began January 1, 2014, and is expected to cost the state roughly \$40.9 million annually.⁷⁹ The contract will run for five years with two renewal options, each for an additional two years.⁸⁰ Three other companies submitted bids for the contract.⁸¹

The relationship between the Idaho Board of Correction and Corizon has been shaky in recent years. In 2012, a report commissioned as part of a federal court review found what was described as “cruel and unusual” care at the Idaho State Correctional Institution.⁸² In response, Corizon commissioned an independent

audit, which found that the healthcare system at the institution was “in substantial compliance with the NCCHC’s standards for health services.”⁸³

Indiana: The Indiana Department of Correction signed a new contract with Corizon, effective January 1, 2014. The contract, which was the result of a competitive procurement process, allows Corizon to continue to provide the state’s roughly 28,000 offenders comprehensive medical, dental, mental health and substance abuse services.⁸⁴

The agreement is for three years, with two three-year renewal opportunities. Corizon has held a long-term partnership with the state, and was the first company to provide outsourced healthcare services to the Indiana Department of Corrections.⁸⁵

Kansas: In 2013, the Kansas Department of Corrections signed a contract with Corizon to provide comprehensive healthcare services for adult and juvenile offenders in the state beginning in 2014. The contract is for 18 months, with four two-year term renewal opportunities.⁸⁶

From 2003 until 2013, the Kansas Department of Corrections contracted with Correct Care Solutions to provide these services. Under the contract with Corizon, the department will have an updated electronic medical record system that it has not previously had. It will also introduce telemedicine, which will help reduce the number of trips off-site.⁸⁷

Louisiana: In July 2013, the Louisiana Department of Corrections began contracting with US Telehealth to provide telemedicine services for its prisoners. Previously, the state contracted with the Louisiana State University (LSU) Health Care Services to provide these services. The state is expected to save nearly \$1 million by using US Telehealth instead of LSU Health Care Services Division.⁸⁸

The change is part of Governor Bobby Jindal’s push to privatize university-run hospitals and clinics, including reforming the way prisoners receive health services, which have thus far been provided through LSU.⁸⁹

Massachusetts: In 2013, the Massachusetts Department of Corrections signed a contract with Centurion to provide comprehensive healthcare services to offenders incarcerated in state correctional facilities. The contract became effective July 1, 2013.⁹⁰ Centurion is a joint venture between Centene and MHM

Services Inc. MHM Services Inc. has previously provided mental health services to inmates in the state.⁹¹

Minnesota: In 2013, Centurion won a bid for a two-year, \$67.5 million contract with the Minnesota Department of Corrections to provide healthcare services for all inmates in its state prisons. The contract became effective January 1, 2014.⁹² Corizon lost its contract with the state, which it held with the Minnesota Department of Corrections for the past 15 years, in the competitive bid process.⁹³

Tennessee: In March 2013, Tennessee’s Department of Corrections awarded Centurion a three-year, \$232 million contract to provide healthcare services for 20,000 inmates in 11 prisons throughout the state.⁹⁴ Centurion beat out Corizon, which had the existing contract. Corizon protested, but two state panels upheld the award to Centurion in June.⁹⁵ Centurion is a joint venture between Centene Corp., which specializes in managed care, and MHM Services Inc., which specializes in inmate mental healthcare.⁹⁶

Fresno County, California: In March 2014, Fresno County awarded a contract for comprehensive medical services in the Fresno County Jail to Corizon that is expected to save the county \$1.5 million in the first year and over \$5 million over the life of the three-year contract, which allows for two one-year extensions. Improving the quality of care and reducing costs are important aspects of the decision to contract, as the county is the subject of a lawsuit over the quality of mental healthcare.⁹⁷ Officials expect that most current county employees will transfer to the contractor or will accept different positions in county government. The contract—which covers medical, mental health, pharmacy and support services for approximately 3,600 patients—will begin in June 2014.

Santa Barbara County, California: Santa Barbara County Supervisors unanimously approved a contract with Corizon for medical services at the Santa Barbara County Jail, Santa Maria Juvenile Hall, and Los Prietos Boys Camp. Corizon has been providing services to the county since 2009.⁹⁸ The contract began July 1, 2013.

The board considered a proposed contract of \$10.8 million for two years, which would cover all medical, mental health and pharmaceutical services for the Sheriff’s and Probation Departments. All areas of the contract were unanimously approved except for the mental health portion. Currently, mental

health services are provided by Santa Barbara's Alcohol, Drug and Mental Health Services Department.⁹⁹

The mental health portion of the contract is being reviewed by the Juvenile Justice Coordinating Council before it is returned to the board for discussion. If Corizon were to take over mental health services for the Juvenile Hall and Boys camp, the county estimates it would save approximately \$300,000.¹⁰⁰

Tulare County, California: The Tulare County Board of Supervisors approved a three-year, \$9 million annual contract with Corizon to provide medical care for Tulare County jail inmates in mid-2013. The contract went into effect on July 1, 2013.¹⁰¹

Previously, medical care was provided by the Tulare County Health and Human Services Agency. Since AB109 went into effect in 2009, the county has seen a large increase in the number of inmates who require medical care outside of what the county can provide, according to the county's Health and Human Services Director.¹⁰² The contract with Corizon isn't expected to save the county money, but it is expected to result in better and more timely service, according to a county report.¹⁰³

Kent County, Michigan: Kent County extended its partnership with Corizon, Inc. in 2013. The contract, effective January 1, 2014, is for three years, with year-to-year renewal opportunities. Corizon will provide comprehensive medical, dental, psychiatric mental health and substance abuse services for the approximate 1,200 adults and juveniles at the Kent County Correctional Facility, Kent County Reentry Center, and Juvenile Detention Center.¹⁰⁴

Allegheny County, Pennsylvania: In 2013, Allegheny County officials hired Corizon to provide medical treatment to its jail inmates. The company replaced Allegheny Correctional Health Services (ACHS), a local nonprofit that provided the jail inmates with medical treatment for more than a decade. The county switched to Corizon to cut costs and improve the quality of care for inmates. Under ACHS, there were complaints of inadequate care.

The county predicts that it will save over \$1 million a year in direct costs with Corizon. The contract caps the county's first-year commitment to Corizon at \$11.5 million, with a possible 4.25 percent annual increase in later years. ACHS, however, did not operate under a cap.¹⁰⁵

Hays County, Texas: Last April, Hays County Commissioners voted to approve a \$1.135 million contract with Correct Care Services to provide medical services for the Hays County Jail. The contract is for 16 months.¹⁰⁶

According to Capt. Mark Cumberland, who oversees the jail, Correct Care Services was brought on to provide more efficient medical services, as well as “much needed” mental health professionals for the jail.¹⁰⁷

F. ANALYSIS: California's Ongoing Struggle to Reduce Its State Prison Population

By Lauren Galik

California is still grappling with how to reduce its prison population and comply with meeting the deadline of a court-ordered population cap, which in 2014 was extended an additional two years.

Since the United States Supreme Court upheld a federal court order requiring California to reduce its prison population to 137.5 percent of capacity in 2011, the deadline for when the state must comply with the order has been extended by federal courts several times. The most recent deadline extension was granted in February 2014. As things stand, the state has until February 2016 to reduce its prison population to 137.5 percent capacity.

Since the initial United States Supreme Court ruling, the state has only passed one significant reform aimed at reducing the prison population. That legislation, Assembly Bill 109 (AB 109), was enacted in 2011. As highlighted in Reason Foundation's *Annual Privatization Report 2011* and *Annual Privatization Report 2013*, AB 109 instituted a set of reforms (known as "realignment") designed to shift non-violent, non-serious and non-sex offenders from state prisons to local jails.

While realignment significantly reduced the state prison population in 2011 and 2012, the number of inmates in custody was higher at the end of 2013 than it was at the end of 2012.¹⁰⁸ Moreover, a 2013 report issued by the California Department of Corrections and Rehabilitation estimates that the prison population will increase by more than 10,000 inmates over the next six years, signaling that the state is in need of additional reforms if it is to successfully comply with the court-ordered population cap, as well as sustain a reduced prison population long-term.¹⁰⁹

Furthermore, an AP article published in March 2014 noted that several counties in California have been sending increased numbers of second-strike offenders to prison, further undermining realignment's efforts.¹¹⁰ California's three strikes law mandates inmates convicted of a second-strike offense—regardless of whether the current conviction is for a non-violent, non-serious or non-sex

crime—must serve the duration of their sentences in a state prison, not a county jail.

However, Governor Brown’s proposed 2014–2015 budget shows that he expects to increase the use of private prison contracts. Detailed expenditure records show that he plans to set aside roughly \$500 million for private prison contracts, which would take 17,700 inmates. This represents an increase of \$100 million and 4,700 inmates over the 2013–2014 fiscal year.¹¹¹ Indeed, in 2013 and early 2014, Brown signed contracts with two private prison companies to lease facilities within California.¹¹²

However, it’s unlikely that contracting with private prisons alone will solve Brown’s prison overcrowding crisis. Instead, it seems that contracting with private companies within the state may be a short-term fix, not a long-term solution. Yet, Brown has so far not pursued any other type of meaningful reform in 2013 or 2014.

Instead, Governor Brown vetoed legislation in 2013 that would have allowed prosecutors to use discretion in charging suspects arrested with drug possession with a misdemeanor rather than a felony. Offenders charged with misdemeanors would not be required to serve sentences in jail, therefore freeing up space and resources for more serious offenders.¹¹³

However, Governor Brown may be forced to institute changes in 2014 involuntarily, as the most recent February 2014 extension ruling came with a number of stipulations for the state to follow.

In exchange for the two-year extension, the court ruled Gov. Jerry Brown must institute additional prison reforms, including increasing the number of credits non-violent second-strike inmates are eligible to earn for good behavior or participation in rehabilitation programs, which would allow them to trim additional time off their sentences for the first time. It also expands parole eligibility for inmates who are medically incapacitated or have served at least 25 years in prison and are over the age of 60.

Moreover, the court ruled that the state may not increase the number of inmates housed in out-of-state prisons, private or otherwise. The court also ordered the state to explore ways to attempt to reduce the number of inmates housed in out-of-state facilities.

To ensure the state complies with these mandated reforms, the court appointed a compliance officer on April 9, 2014. The purpose of the compliance officer is to order inmate releases if the state misses any benchmarks laid out by the court.

It's too soon to tell what the impact of these mandated reforms will have on reducing the prison population, given that they may only affect a limited number of inmates. It does seem likely that these reforms, combined with an increase in the number of prisoners housed at in-state private prisons, will allow California to meet the court-ordered population cap in 2016, at the very least.

G. ANALYSIS: Reforming Louisiana's Determinate Sentencing Laws

By Lauren Galik

Currently, Louisiana has the highest incarceration rate in the nation, with 868 out of every 100,000 of its citizens in prison. Its prison population has nearly doubled over the past 20 years alone, from roughly 21,000 in 1992 to 40,170 at the end of 2012. The state has also seen its corrections expenditures increase by 315 million dollars over the same time period, from \$442.3 million (in 2011 dollars) in 1992 to \$757.4 million in 2011.

One of the major reasons for why this has happened is because Louisiana legislators have passed a number of determinate sentencing laws over the past several decades that were aimed at reducing crime and incapacitating certain types of offenders. However, these laws have been disproportionately applied to nonviolent crimes. Because of this, nonviolent offenders account for the majority of inmates and admissions to prison in the state.

At the end of 2012, 44.3 percent of inmates were serving sentences for nonviolent drug and property crimes, while only 41.5 percent of inmates were serving sentences for a violent crime. The remaining 14.2 percent of inmates were serving sentences for all other crimes.

There is little evidence that the laws have done anything to reduce Louisiana's violent crime rate, which remains considerably above both the national average and the rates in its neighboring states.

Louisiana's citizens could benefit from changes to the way in which convicted offenders are sentenced. As things stand, nonviolent offenders are routinely sentenced to long periods of imprisonment because of the state's determinate sentencing laws. These prisoners consume disproportionate amounts of Louisiana's scarce correctional resources, which could be better utilized to ensure violent criminals are more effectively kept behind bars.

Louisiana legislators have enacted some modest sentencing reforms over the years. A 2013 report by Lauren Galik and Julian Morris—published by Reason Foundation, the Pelican Institute for Public Policy, and Texas Public Policy Foundation—lays out several recommendations that would help Louisiana reduce its prison population while maintaining public safety.

Some of the recommendations include:

- Repealing or reducing mandatory minimum sentences for nonviolent offenses, so that judges may use discretion in order to craft an appropriate sentence based upon a defendant's role in the crime as well as other relevant factors.
- Enacting a safety valve measure that would give judges the discretion to depart below a mandatory minimum sentence when appropriate. This would not eliminate mandatory minimum sentences for nonviolent offenders, however.
- Amending the habitual offender law so that it applies only to those who have committed one or more violent or serious felonies.

Several states as well as the federal government have scaled back mandatory minimums in recent years and have had great success. For example, Rhode Island repealed mandatory minimum sentences for nonviolent drug offenses in 2009. Because of this, it was able to reduce its prison population by over nine percent in the first year alone, which has allowed the state to focus prison space and resources on those who have committed more serious offenses, while saving taxpayer dollars.

Moreover, repealing mandatory minimum sentences for drug offenses has not increased violent crime in the state. In fact, it has seen a decrease in its violent crime rate since then. Rhode Island is not alone: Maine instituted a safety valve in 2003, for example, and the state has consistently held the lowest violent crime rate in the country each year since then.

If state legislators enacted any or all of these recommended changes, violent criminals would continue to be punished for their crimes, while nonviolent offenders would face sentences that were more proportional to their offenses. Indeed, Louisiana would likely reduce its prison population and corrections expenditures significantly, which would enable it to invest more resources per prisoner, expand rehabilitation programs, reduce recidivism rates, and perhaps finally forfeit its dubious title, "highest incarceration rate in the nation."

The full Reason Foundation/Pelican Institute for Public Policy/Texas Public Policy Foundation report—Smart on Sentencing, Smart on Crime: Reforming Louisiana's Determinate Sentencing Laws—was released in October 2013 and is available at <http://reason.org/news/show/sentencing-reforms-louisiana>.

H. ANALYSIS: Criminal Justice Reforms Prompt Evolution in Private Sector Rehabilitation Offerings

By Leonard Gilroy

Detractors of private prisons often cite a supposed conflict between privatization and the growing trend toward criminal justice reforms and reduced prison populations. However, this mistaken view misses the forest for the trees, as the private sector continues to evolve in different ways in terms of how it provides the programs needed to help offenders effectively reintegrate into society.

First, there are the private prisons themselves. State departments of corrections, which hire private prison operators, often cite the private sector's long track record of providing more inmate education and rehabilitation programs than its government-run peers, typically as a contract requirement, as their reason for doing so.

It's difficult to quantify this claim, as comprehensive national data on prison programs are not collected. But a 2009 report by the Kentucky Legislative Research Commission compared the state's three contracted prisons with similar state-run facilities and found that each of the privately operated facilities offered more programming than state-run facilities. And in 2012, the Florida Chamber of Commerce compiled state data on educational, vocational and life skills programming in two privately operated facilities relative to over 20 state-run prisons and found that 80 percent of inmates at the two private facilities participated in personal improvement programs, while just over 20 percent did so in the state-run prisons.

The United Kingdom is taking this concept even further, having launched a pilot program in one of its privately operated prisons that offers a financial incentive to private operators that reduce the rate of re-offending by inmates once they're released.

It's also useful to look beyond the prison walls, as many of the sensible criminal justice reforms being pursued in various states today are aimed at promoting more effective and less costly alternatives to incarceration, such as community corrections and residential reentry programs.

The private for-profit and nonprofit sectors have long played a role in delivering services in these non-prison contexts, and we're likely to see that increase in the coming years. Some of the biggest private prison companies have begun to diversify their operations in recent years by acquiring companies in the community corrections and home detention services, for example. They have begun to step up as players in partnering with governments to deliver day reporting centers, which integrate educational, vocational and life skills training with community supervision and one-stop shop access to social services and housing assistance.

Last, one of the more exciting and promising developments in recent years has been the emergence of a concept called “social impact bonds,” in which private philanthropic organizations, social impact investors, nonprofits or other nongovernmental organizations finance and implement new recidivism reduction programs on behalf of governments under a pay-for-success contract model. As the model goes, the private financiers raise capital to support the work of nonprofits in providing educational, life skills and vocational programs to inmates nearing release from prison, and if the interventions are demonstrated to reduce instances of re-offending—and thereby save public funds from avoided prison costs—then the investors get repaid by governments. If recidivism rates do not fall sufficiently, then governments do not pay and investors risk their investments, which concentrates the focus on implementing evidence-based practices that deliver results.

A wide mix of financiers—including Goldman Sachs, Merrill Lynch, the Rockefeller Foundation, Bloomberg Philanthropies and the Kresge Foundation—are participating in the early recidivism-based social impact bond programs that have been launched in New York City, New York State and Massachusetts over the past two years, and more are set to come on line in coming years.

All of this goes to show that as states are rethinking their approach to criminal justice and are growing more averse to increasing the prison population, the private sector's role in corrections is also evolving rapidly. There is more breadth and depth than ever in what services private companies can provide to governments in terms of helping offenders transition back into society, giving lie to the notion that the private sector is only interested in an ever-expanding prison state. Rather, the marketplace, when motivated by performance-based contracts, is interested in seeking to capitalize on reducing incarceration levels, improving social outcomes and benefitting the governments responsible for ensuring the effective rehabilitation of offenders in the criminal justice system.

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I. ANALYSIS: Philosophical Objections to Private Prisons

By Alexander Volokh

This past November saw the fourth anniversary of an important date in privatization history. On November 19, 2009, in *Academic Center of Law and Business, Human Rights Division v. Minister of Finance*, the Israeli Supreme Court struck down a statute passed by the Knesset (the Israeli parliament) allowing for private prisons.

This opinion is interesting for Americans for a number of reasons. First, it held private prisons unconstitutional based on the most general of constitutional provisions, the rights to “liberty” and “dignity,” and based on very high-level political theory—rather than predictions about how the different sectors might violate inmates’ rights, which one would expect in the U.S. constitutional tradition. Second, the decision is part of an emerging series of recent rulings by foreign courts on private delegations of coercive power.¹¹⁴ Third, the Israeli Supreme Court enjoys substantial respect in comparative constitutional law circles worldwide, so there’s a possibility that similar reasoning will spread to other countries.

* * *

In 2004, the Knesset adopted the Prisons Ordinance Amendment Law (“Amendment 28”), which would have established a single prison operated and managed by a private corporation. Amendment 28 gave the private operator mostly the same powers that are held by the Israel Prison Service—with various exceptions, such as (among others) the authority to make transfer orders, extend an isolation period, and confiscate possessions. It also gave prison security guards the same powers as those of prison officers of the Israel Prison Service, also with some exceptions. The private operator and its employees were made subject to the same legal norms that apply to the officers of the Israel Prison Service, including the general body of administrative law. And the statute also provided for various monitoring mechanisms, which the Israeli Supreme Court characterized as “apparently more comprehensive than the supervisory mechanisms that exist in other countries where private prisons operate in a similar format.”

Amendment 28 was challenged as violating the Israeli constitution.

First, a word about the Israeli constitution. Israel, which had been governed under a British mandate since right after World War I, declared its independence in 1948. A constituent assembly convened in 1949 but failed to reach agreement on a constitution. Instead, the constituent assembly became a parliament (the Knesset) and adopted a plan to draft a number of piecemeal “Basic Laws” dealing with separate subjects. Thus, a number of Basic Laws were adopted between 1958 and 2001, dealing with the functioning of the Knesset, the economy, the military, the status of Jerusalem, the judiciary, and the like. At first, Basic Laws could be overridden by ordinary legislation, but in the 1990s, Chief Justice Aharon Barak staged a “constitutional revolution,” declaring that Basic Laws would function as a constitution and be supreme over ordinary legislation. This has been the constitutional regime in Israel for almost 20 years.

The Israeli Supreme Court ruled that Amendment 28 violated “the constitutional rights to personal liberty and human dignity of inmates who are supposed to serve their sentence in that prison.” These rights derive from the “Basic Law: Human Dignity and Liberty,” adopted in 1992. The Basic Law: Human Dignity and Liberty is extremely short; it fits on a single page. The main constitutional texts relevant to this case are the following: “One may not harm the life, body or dignity of a person,” and “A person’s liberty shall not be denied or restricted by imprisonment, arrest, extradition, or in any other way.” These rights aren’t absolute: the Basic Law also provides (in a “limitations clause”) that “[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.” (A terminological note: in Israeli constitutional law, one speaks of a rights violation that is nonetheless justified, whereas in U.S. constitutional law, one would instead say that a justified rights violation is no violation at all. Thus, incarceration itself is called a justified violation of liberty rights in Israeli but not in U.S. terminology. But this is just a difference in labeling.)

Before proceeding to examine the liberty and dignity claims, the Court clarified that it wasn’t going to strike down the law based on the concern that there would be more rights violations in the private sector. While these concerns were “not unfounded,” the Court stated that there was “no certainty that [the violations would] occur” and (citing me, among others) that the comparative figures, derived from the experience of privatization in other countries including the United States were unclear. Because these concerns related to future violations,

they probably weren't a sufficient reason for striking down a law before implementation. The Court therefore proceeded on the assumption that the protection of inmates' rights would be identical in the two sectors.

* * *

First, the Court analyzed the liberty right. In the Court's view, "the question whether the party denying the liberty is acting first and foremost in order to further the public interest . . . or whether that party is mainly motivated by a private interest is a critical question." Making inmates "subservient to a private enterprise that is motivated by economic considerations . . . is an independent violation [of the right to personal liberty] that is additional to the violation caused by the actual imprisonment under lock and key." In fact:

. . . the scope of the violation of a prison inmate's constitutional right to personal liberty, when the entity responsible for his imprisonment is a private corporation motivated by economic considerations of profit and loss, is inherently greater than the violation of the same right . . . when the entity . . . is a government authority that is not motivated by those considerations, even if the term of imprisonment . . . is identical and even if the violation of . . . human rights that actually takes place . . . is identical.

Throughout the opinion, the Court drew a strong distinction between the Israel Prison Service and the prison firm. The Israel Prison Service is a "bod[y] that answer[s] to," "receives its orders from," "is subordinate to," "acts through" and "by and on behalf of," and is a "competent organ[] of" the state or the government or the executive branch—which, in turn, is "the representative of the public." The prison firm, on the other hand, is "an interested capitalist" and "a private interest," "a party that is motivated first and foremost by economic considerations—considerations that are irrelevant to the realization of the purposes of the sentence, which are public purposes." Justice Arbel, in a separate opinion, similarly wrote that the private firm is "an outsider that is not a party to the social contract . . . and does not necessarily seek to realize its goals" and that its "main purpose is *by definition* the pursuit of profit."

But the Court's analysis suffers from at least two weaknesses. First, why can't a private firm receive its orders from, be subordinate to, act through, and be a competent organ of the state? And second, all employees, even public employees, "profit" from their employment, in that they don't work for free and presumably they're earning more than the bare minimum that was required to get them to accept the job. Why is a contractor's profit any different? In other

words, why are a corporation's purposes necessarily private while public employees' purposes aren't?

The Court's opinion does note a few tangible, non-question-begging differences between the Israel Prison Service and private firms, but these differences are hardly central to the argument. Nor do they succeed in distinguishing public and private prisons as a philosophical matter.

First, the opinion says, the head of the public agency is appointed by the government. But the private prison firm is also chosen by someone in the government. And most public employees, like private employees, aren't politically appointed or democratically elected. In any event, it's not clear what difference these various selection mechanisms make apart from the empirical question of how people behave in the different sectors.

Second, the public agency is "subject to the laws and norms that apply to anyone who acts through the organs of the state and also to the civil service ethos in the broad sense of this term," which "significantly reduc[es] the danger that the considerable power given to those bodies will be abused." Perhaps Justice Arbel was getting at something similar when she alluded to the private firm's not being "bound by the norms inherent" in the social contract, though it's hard to say. Certainly she stressed practical concerns like directness of supervision, though she didn't rely on them.

But this is an argument against unaccountability, not against privatization as such. One can imagine private prisons that are subject to the norms of state actors; certainly, the private prison in this case was subject to a lot of state-actor norms. Moreover, that the "civil service ethos" is a stronger force against abuse in the public sector than possible competitive or other market or contractual forces in the private sector is a contested empirical question, which is in tension with the majority's stated intention to not rest its decision on possible future violations.

Third, Justice Arbel notes that the private firm "is chosen and operates on the basis of its ability to maximize income and minimize expenditure." But prison firms needn't be chosen on a low-bid basis. And efficient management, at least in the sense of not spending more than one's budget, is valued in the public sector as well.

The Court's alternative holding was that private prisons violate the separate constitutional right to human dignity. The idea of private purposes again made an appearance there, but the flavor was slightly different:

There is . . . an inherent and natural concern that imprisoning inmates in a privately managed prison that is run with a private economic purpose de facto turns the prisoners into a means whereby the corporation . . . makes a financial profit. . . . [T]he very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings, and this violation of the human dignity of the inmates does not depend on the extent of the violation of human rights that actually occurs behind the prison walls.

The Court noted that this claim did not depend on the inmate's "subjective feelings"; being a means to a private firm's profit-making is "an objective violation of [one's] constitutional right to human dignity."

But the Court went further than a mere private purposes argument. Private prisons, it said, also violate human dignity because of "the social and symbolic significance of imprisonment in a privately managed prison." Because there is a "social consensus" that private prisons "express disrespect," the practice violates human dignity—"irrespective of the empirical data . . . (which may be the source of the symbolic significance), and irrespective of the specific intention of the party carrying out an act of that type in specific circumstances." Private imprisonment "expresses a divestment of a significant part of the state's responsibility for the fate of the inmates, by exposing them to a violation of their rights by a private profit-making enterprise."

This aspect of the Court's analysis can also be questioned. On the one hand, the idea of social consensus isn't totally irrelevant as such. To take a hypothetical: Suppose public and private provision are not only indistinguishable as to their tangible consequences (such as the extent of rights violations) but also indistinguishable morally under a proper philosophical analysis. But suppose that a large majority in society wrongly considers public provision to be legitimate and private provision to be illegitimate. The existence of this social consensus (though without foundation) may be a sufficient argument for public provision, since institutions believed to be legitimate might make members of society (in or out of prison) happier, which is a valid concern under a number of political-philosophy frameworks (utilitarianism, among others).

Still, this supposed social consensus shouldn't count for everything. In the first place, the existence of such a consensus was merely asserted, not proved. In the second place, the idea that privatization necessarily expresses a divestment of the state's responsibility is belied by the government's own view, which was that privatization could simultaneously improve conditions (for instance by relieving overcrowding) and reduce costs—a view that (whether or not it's correct) is espoused by many prison privatization advocates, including Reason Foundation. In the third place, the Court's holding implies a strong view that, in this area, *prison conditions don't matter*: regardless how well inmates will be treated under privatization relative to public provision, a social consensus otherwise is enough to establish a violation of the inmates' dignity. One wonders who—the government or the Court—is taking its “responsibility for the fate of the inmates” more seriously.

* * *

Recall that a law could still authorize a violation of constitutional rights if it were “befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.” Under the last clause, the Court applied a proportionality test and concluded that—taking the government's claims of quality improvement and cost savings at face value—the claimed benefits couldn't justify the damage to liberty and dignity (which are “in the ‘hard core’ of human rights”) resulting from the very existence of a for-profit prison.

The Court wasn't impressed by the various accountability mechanisms, reasoning that these were introduced not to improve the lot of prisoners as such, but rather to mitigate the profit-motivated abuses that would be introduced by privatization. On the other hand, the Court did stress that its conclusion was heavily influenced by the character of Israeli society and the social consensus regarding the role of the state and the social meaning of privatization; it noted that the same analysis might not apply in the U.S. and UK, which have a long history of private operation of prisons.

* * *

The Israeli opinion is interesting both for what it might portend in other countries and as an example of the sort of high-level political-theory reasoning about privatization that seems foreign to the U.S. constitutional tradition.

Prison litigation is important in the U.S., but always in terms of instrumental concerns like the constitutional rights of prisoners and the accountability of prison authorities. Private prisons are considered state actors in the U.S., so public and private prisoners have all the same constitutional rights. (Which isn't to say they always have the same remedies: see my *Annual Privatization Report 2013* article on the tort liability of federal private prisons.¹¹⁵) Thus, one can always claim that prisoners are suffering cruel and unusual punishment as a result of bad prison conditions, or aren't being afforded due process, or are being denied their First Amendment rights to freedom of speech or free exercise of religion; if conditions are worse at private prisons, then presumably private prisons will lose cases more often, but the public or private status of the prison typically doesn't enter into the argument directly.

How different our approach is from that of the Israeli court, which explicitly held, based on the most brief and general text, that private purposes and social meaning made prison privatization invalid, *regardless of the effect on inmates*. Though a philosophical discussion of the legitimacy of the privatization of force is always welcome, the Israeli court's approach relies heavily on conclusory assertions about public and private motives and purposes. The court doesn't seriously consider the deep similarity between public and private employees, who after all are just people under a contract of some sort with the government, both agreeing to do the state's bidding for money and neither necessarily sharing the public purposes that justify incarceration as a philosophical matter. The type of contract matters, but because different contracts have different incentives and lead to different actions, not because one kind is "the state acting" and the other kind isn't.¹¹⁶ As a result, the court's approach is interesting but ultimately disappointing.

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