

The Private Prison Debate: A Look into the Efficiency of Private Prisons vs. Public Prisons

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ABSTRACT. The resurgence of private prisons during the 1980s has caused a lot of debate. If a private firm can run a prison more efficiently than the government, the government should allow privatization. Factors such as cost, quality of service, competition and liability must be examined in order to determine whether a private prison is more efficient than a public prison.

I. Introduction

The government is in charge of providing defense for its citizens. Does this mean that it produces its own planes, bombs and guns? No. Private firms produce these items. The government is in charge of providing justice for its citizens. Does this mean that it has to build and run the prisons? If it is more efficient for a private firm to build and run prisons, the government should make contracts with private firms to provide these services.

The current prison system is in need of help. Overcrowding is a major problem. Something needs to be done and one possibility to save money and create more room for prisoners is to have the government contract-out the building and operating of the prisons.

There are many things to consider when deciding whether it would be more efficient for private firms to operate prisons. First, one must look at the constitutionality of the issue. While this is not an efficiency issue, it needs to be looked at in order to determine whether privately run prisons are possible. One also needs to determine if the government or the private sector can operate prisons at a lower cost. Quality of services needs to be studied and evaluated. Does the quality of service diminish when a private firm runs a prison? Another issue is whether competition exists in the current private prison market or if it eventually will. What about liability? Who is going to be held liable if a private prison is sued? Is the government ultimately liable for something it does not directly control? Only after looking at these issues can one attempt to argue that prison should or should not be privatized.

II. A Brief History of Private Prisons

The private sector has been involved in the prison system for a very long time. During the 1600s, England sent many of its felons to the American colonies. Merchants would transport the convicts in exchange for the privilege of selling them as indentured servants. In 1666, Raymond Stapleford agreed to build a prison in Maryland in exchange for 10,000 pounds of tobacco and the right to be keeper of the facility for life [Ammons et al., 1992, 4].

The government took over the private prisons during the eighteenth and early nineteenth centuries. After the Civil War, however, there was a resurgence of private prisons. This occurred mostly in the southern and western states. Some of these private prisons were prompted by crises. For example, the destruction of Georgia's Milledgeville penitentiary during the war led the state to send prisoners to private contractors. A similar method was used to relieve pressure on the state prison in Alabama [Ammons, et al., 1992, 4]. Some of the privatization, however, was not the result of any crisis. Mississippi gave a fourteen-year lease to a private firm to operate the state prison in 1866 and the Huntsville prison in Texas was once leased to a private entrepreneur. Also, Louisiana, Arkansas, Oklahoma, California, and Michigan all leased prisons to the private sector at one time [Ammons, et al., 1992, 4].

Inmates have often been involved with the private sector even if they were not in prisons operated by private firms. They have been engaged as laborers and craftsmen in private sector activities. Inmates were often involved in the shoemaking industry. Since the private businesses that used prison labor could get away with paying a lower wage, they were often able to provide many products at a lower cost than their competitors. Thus, many reform organizations and competing businesses fought the use of inmate labor. In 1905, President Theodore Roosevelt signed an executive order that prohibited the use of convict labor on federal projects. Congress passed the Hawes-Cooper Act in 1929 which permitted states to ban the importation of inmate-produced products from other states. Congress and a large number of state legislatures passed laws during the depression that further curtailed the use of inmates in private enterprise [Ammons, et al., 1992, 5].

The operation of prisons by the private sector became a viable option again during the 1980s and early 1990s for a number of reasons. First, there was a general sociopolitical climate that favored the reduction of

both taxes and the size of government. Second, there was the implementation of “get-tough” social control policies. These policies included the war on drugs and an increase in mandatory prison sentences. An unprecedented increase in federal and state prison populations was the result. In 1980 there were 315,974 prisoners and by 1992 there were 883,656, an 180% increase [Shichor and Sechrest, 1995, para. 6]. The abrupt increase in the prison population resulted in major prison overcrowding. Four-fifths of the states were put under court order to reduce prison overcrowding [Shichor and Sechrest, 1995, para. 6]. A third reason for the increase in privatization of prisons was the fact that many Americans were upset with the amount of government waste. They wanted to minimize the amount of government control because they believed that the private sector could do a better job than the public sector.

One of the first areas where the current wave of private prisons began was in the detention centers under the authority of the Immigration and Naturalization Service. In 1979, the Immigration and Naturalization Service did not have enough room in its facilities to hold all of the illegal aliens it was preparing to deport. The INS contracted with private firms to hold illegal immigrants until they had their hearing or were deported. By 1986, one-fourth of the Immigration and Naturalization Service detention facilities were in private hands. In that year the government paid an average per diem of \$26.25 to private operators and spent \$26.42 per diem for their own facilities [Press, 1990, 26]. Corrections Corporation of America and Wackenhut, two of the largest private prison firms, both got their start working with the Immigration and Naturalization Service.

One of the main reasons that the officials within the Immigration and Naturalization Service decided to go to private firms was because the contractors were able to create new detention facilities much more quickly than the federal government could. For example, Wackenhut was able to construct and open a 150 bed facility in only ninety days [McDonald, 1994, para. 4].

The Immigration and Naturalization Service was not the only public agency that used private firms to incarcerate prisoners. The private prison industry also established early sites within sectors of the adult and juvenile penal systems. The Federal Bureau of Prisons has been contracting with private firms since the late 1960s. The private firms were responsible for operating community treatment centers, which were halfway houses to which federal prisoners were transferred prior to being

paroled [McDonald, 1994, para. 5]. By the fall of 1986, the bureau had contracted for 330 community centers that housed over 3,000 inmates. These beds cost only \$31.00 a day compared to \$39.50 at the bureau's other institutions [Press, 1990, 26].

III. The Current Situation

In the early 1980s there was a movement to privatize many government services. President Reagan and many conservative political leaders wanted to reduce the size of the government. The controversy over prison privatization started soon after the increase in the number of private firms which began to build and manage prisons throughout the country.

Throughout the 1980s and early 1990s many prisons were built and managed by private firms. As of 1996, there were seventeen firms that had received contracts. Some either were or would soon be responsible for more inmates than all but the largest correctional systems. There were only six states that had larger inmate populations under their direct control than the Corrections Corporation of America [Thomas, 1996, 26]. By 1997, the private prison industry confined 64,000 adults in approximately 140 facilities. By 1998, the estimate of prisoners confined in private facilities had grown to 85,000 [Greene, 2000, para. 2].

The continued increase in the prison population does not seem to be slowing down. In 1996, the federal and state prisons held more than one million inmates, which did not include the estimated 500,000 in jails. The number of inmates was increasing at an estimated 1,500 per week. The increase represented a growth rate ten times that of the U.S. population in the past ten years [Brister, 1996, para. 1].

There was little dispute that the prison system's capacity was too small. The supply of prison beds was not even close to meeting the ever-increasing demand for those beds. The government was not able to build and operate enough prison facilities to house all of the inmates. As a result, the government allowed some private firms to build and manage their own prisons in order to help alleviate some of the overcrowding.

By 1997, there were more than twenty companies in the United States that operated private jails and prisons. As a group they had more than \$250 million in annual revenues and grew at four times the rate of state facilities [Lippke, 1997, para. 1]. Currently, there are 185 privatized facilities, 154 of which are in the United States, with a total prisoner capacity of 143,771 [Corrections Corporation of America, 2002, para. 17].

Corrections Corporation of America and Wackenhut Corrections Corporation are the two largest firms and they currently control a large portion of the private prison system.

Corrections Corporation of America was the first modern private corrections company in America and it is currently the largest. Corrections Corporation of America is based in Nashville and was founded in 1983 by the same investors who had earlier started Kentucky Fried Chicken. This corporation reported its first profit in the fourth quarter of 1989 [McCrie, 1993, 27]. Corrections Corporation of America now holds more than 55,000 inmates in its sixty-four jails and prisons in the United States. They operate in twenty-one states, the District of Columbia, and Puerto Rico. Only Texas, California, New York, Florida, and the Federal Bureau of Prisons operate larger correctional systems [Corrections Corporation of America, 2002, para. 1].

Wackenhut Corrections Corporation, based in Palm Beach Gardens, Florida, was founded as a division of The Wackenhut Corporation in 1984. It became a subsidiary in 1988 and a separately traded public company in 1994. Wackenhut Corrections Corporation's shares have been traded on the New York Stock Exchange since March of 1996. By the end of 2000, Wackenhut Corrections Corporation had received contracts to develop or manage fifty-five correctional facilities in The United States, England, Wales, Scotland, Puerto Rico, South Africa, New Zealand, Canada, and Australia. They hold more than 40,000 inmates [Wackenhut Corrections Corporation, 2002, para. 3-5].

The debate over prison privatization is an intense one. There have been a limited number of studies done to compare private and public prisons because the private prison industry is still in its embryonic stages. The studies that have been done to determine which is more efficient overall, or better in a specific area, have been subjected to debates of their own. Some studies were said to be incomplete while others were said to be biased. This debate is an interesting one.

IV. Constitutionality

One of the first issues raised regarding prison privatization was its constitutionality. Opponents of privatization argued that it may be unconstitutional for the government to contract with private firms to imprison felons. There have not been any direct challenges to private prisons brought to the courts.

One visible opponent to privatization has been the American Bar

Association. One spokesman stated, “there can be no doubt that an attempt to delegate total operational responsibility for a prison or jail would raise grave questions of constitutionality under both the federal Constitution and the constitutions of the fifty states” [American Bar Association, in McDonald, 1990a, 181]. Is there a possibility that private firms running prisons could be unconstitutional?

Most scholars who discussed the constitutionality of private prisons pointed out the 1936 United States Supreme Court case of *Carter v Carter Coal Company*. In this case the courts upheld, and have continued to uphold, the federal government’s delegation of broad powers to private actors. Private bail bondsmen’s powers to arrest and detain those for whom they have posted bond have been upheld consistently. The ability of private security firms to detain people has also been upheld.

The issue is more confusing at the state level. State laws do not prohibit private prisons, but state governments may, according to prevailing doctrine, take any action they wish to as long as it does not go against the United States Constitution. To clarify this legal question, some state legislatures have passed laws authorizing the delegation of correctional authority to private firms.

This part of the debate seems resolved since no lawsuit has yet succeeded in declaring private prisons unconstitutional. Most people have accepted it as a legal delegation of power by the government. The fact that private prisons have not been declared unconstitutional is a necessary condition for their use, but it is not sufficient. There are a number of other things which need to be considered and evaluated before one should declare that private prisons are the way to go.

V. Cost

One of the main issues in the private prison debate has been cost. There have been a few problems with comparing costs between private prisons and public prisons. One problem is that it is hard to find two prisons that are alike in enough ways to make them comparable. A more important problem has been inconsistencies in determining what counts as a cost in both the public and private sectors. In theory, comparing costs should be relatively straightforward and easy to accomplish. Yet cost comparisons have been very difficult according to Douglas McDonald who is a senior social scientist in the Law and Public Policy Division of Abt Associates Inc. in Cambridge, Massachusetts. There has been a difficulty in

determining precisely how private firms have financially structured their facilities and what counts as costs because the details are guarded as proprietary information. The government's expenditures are a matter of public record, but the actual costs of services are obscured by inadequate public accounting procedures and by the distribution of costs for services to more than one agency or account. McDonald states that the government has also been frequently deficient in the treatment of capital spending. For example, they have failed to count the value of all physical assets used up during any year of operation [1990b, 89]. While it is important to point out the problems with determining accurate costs, there have been a number of studies that seem to be reliable in determining which is cheaper. The arguments today are over how much cheaper one prison can be compared to another, rather than who can run a prison at a lower cost.

Cost has been cited as a major advantage of privatization, according to community officials in jurisdictions which house local prisoners. A number of officials have stated that privately managed prisons were apparently more efficient than public operations. A superior court judge in Beattyville, Kentucky, reported that the average cost to house a person in a public facility in the area is about \$40 per day, while the cost is only \$26 per day in a private facility [Ammons, et al, 1992, 38].

Charles Thomas, a Professor of Criminology and Director of the Private Corrections Project at the University of Florida in Gainesville, states in his testimony before Congress that the weakest challenge to correctional privatization comes from the people who say that contracting is unlikely to yield significant cost benefits. He says, "The very fact that a contract exists strongly suggests the contracting governmental entity was confident that cost savings would be achieved," [Thomas, 1995, para.20]. This makes sense. No rational member of government would make a contract to privatize, which is highly controversial, unless they thoroughly believed that costs would be persistently lower. He also states that it is generally acknowledged that private firms' fringe benefits are less generous than those of governments. He also points out how the private firm is not obliged to comply with costly bureaucratic requirements the government has imposed upon itself in such areas as employee selection, promotion, termination and the procurement of goods and services. Because of these things he says, "a reasonable person ought to be surprised only if he or she encountered a contracting initiative that failed to yield at least some cost savings," [Thomas, 1995, para.20].

Those who oppose privatization almost always refer to a study done by the General Accounting Office when disputing cost savings by private prisons. The study was done in 1996 and reviewed five studies done on cost comparisons between private and public prisons. The major finding of the study was that there was no definite answer to the question of whether private prisons were run at a lower cost. The GAO said that comparing a private prison to a hypothetical public prison was not realistic. The report stated, “we could not conclude whether privatization saved money,” [GAO, 1996, para. 23]. The study met intense criticism. Two of the states cited in the study, Tennessee and Louisiana, have issued their own studies that refute the General Accounting Office’s findings. Thomas said the study was “inaccurate, incomplete, misleading, and ineptly prepared” [Thomas, in Botkin, 1999, 99].

Charles Logan, Associate Professor of Sociology at the University of Connecticut, and Fred McGriff, County Auditor for Hamilton County, Tennessee, did a study that examined the cost savings that Hamilton County, Tennessee realized through the privatization of its 350 bed facility. The study was done for the National Institute of Justice and is based on data provided by McGriff. The actual cost paid to the Corrections Corporation of America for operating the prison between 1985-1988 was compared to estimates of what Hamilton County would have paid if it had continued to operate the prison itself. The study was said to be unique in its thoroughness because a county auditor is in a unique position to identify and estimate interagency and other indirect costs of a government run facility [Thomas and Logan, 1993, 230]. They found that contracting out prison management generated annual savings of at least four to eight percent and were more likely to be in the range of five to fifteen percent, compared to the estimated cost of direct county management [Calabrese, 1993, 177]. The estimates of costs to the public jail were conservative in the sense that they were designed to err in the direction of underestimating the costs of county operation.

Thomas did a report for the University of Florida at Gainesville’s Center for Studies in Criminology and Law. He looked at data available on forty-five privately managed correctional facilities. Of the ten facilities which were readily capable of cost comparison with a public facility, all ten evidenced cost savings ranging from 10.71 percent to 52.23 percent [Calabrese, 1993, 177].

Thomas and Logan mentioned a study done in Texas that further supports the claim that private prisons operate at a lower cost than public

prisons. This study was found in a 1991 report by the State Auditor's office. The cost of corrections has been lower in Texas than any other state historically, but the state found even greater cost reductions contracting out four 500 bed prisons to the Corrections Corporation of America and Wackenhut Corrections Corporation. The Texas Auditor's figures show that the two private companies have run their prisons at a cost of ten to fifteen percent below what it would cost the state of Texas to run those same prisons [Thomas and Logan, 1993, 231].

Many states that have authorized the use of private prisons have imposed stringent requirements to assure a lower cost. Tennessee will only permit a contract renewal if the state's evaluation shows the contractor to be providing at least the same quality of service as the state at a lower cost, or superior quality at essentially the same cost. Texas and Florida require private operators to meet all recognized standards and court orders and operate at least ten percent lower cost than the states' estimates of what its own cost would be to run the facility [Brister, 1996, para. 33].

Since labor is the largest part of a prison's budget, it is where a firm can possibly reduce costs. Dana Joel, the director of policy for state projects for the Citizens for a Sound Economy, reports that about eighty percent of all prison operating costs are salaries [Joel, 1993, 65].

One argument against private prisons is that the contractors will lower costs by reducing the number of key personnel. Joel argues that this argument is not sound. Some private providers have actually added staff because they recognized the need for more employees to handle the increase in prisoners. When Corrections Corporation of America earned the contract for a facility in Silverdale they increased the number of employees from fifty-eight to seventy-two [Joel, 1993, 65].

Opponents to privatization also say that the private sector will lower employee salaries. The opponents feel this in an important consequence because the workers will be worse off because of their reduced salaries. Taxpayers do not have any reason to consider this possibility a consequence since they are not hurt by decreases in salaries of prison employees. The decrease in salaries would lead to lower taxes. However, it is still important to consider since it is a main argument against the privatization of prisons. Do private firms lower salaries in order to cut costs? Private firms are not under the same pressures and demands from unionized civil service workers that the government is. However, the private employees' salaries remain competitive with the government's.

In fact, in some prisons the private employees are actually making more than the government workers they replaced. Corrections Corporation of America gave a seven percent pay increase and a \$500 bonus to the seventy out of seventy-five employees who stayed on when they assumed control of the Bay County Jail. Buckingham Security's employees received higher wages than the previous government workers. Most of Corrections Corporation of America's employees also make more than the government employees did and they also have the option to share in the company's profits by buying stock in the company [Joel, 1993, 65-66].

One way private firms can lower their costs in providing prisons is because they can more easily avoid some of the inefficiencies that governments impose upon themselves. One example given by McDonald is that private firms can build facilities that are specifically designed to require fewer persons to staff, whereas governments usually prefer to renovate buildings they already own. The government buildings result in inefficient design constraints. McDonald, like Joel, notes that labor costs represent approximately eighty percent of the total cost of a correctional facility over its lifetime. Thus, small efficiencies in staffing can result in huge savings in the long run [1990a, 193].

Another area where private firms lower their costs is in construction. Gary W. Bowman, Simon Hakim, and Paul Seidenstat, all professors of economics at Temple University, reported that because of the profit motive private firms can design and construct prisons at a lower cost than the government can. "The time-limited nature of contracts for managing prisons is a strong incentive to contain costs. Competition among private correction companies encourages utilization of the latest building methods and technological innovations" [Bowman et al., 1993, 6].

Bowman et al. cite a statistic given by Logan that the Corrections Corporation of America reports savings of twenty percent in construction costs over the government. They go on to state that public sector construction costs are \$58,000 per maximum security bed, \$46,000 per medium security bed, and \$26,000 per bed in a minimum security facility. The average construction period for the government is two and a half years. Corrections Corporation of America built a minimum security facility for the Immigration and Naturalization Service at a cost of \$14,000 per bed in only five and a half months. Under a contract with Hamilton County in Tennessee, Corrections Corporation of America made capital improvements that included major renovations and construction of one new dormitory for \$1.6 million at no cost to the county. Per diem

management charges, that were still lower than the operating costs of the county, covered the cost [Bowman, et al, 1993, 6]. Private firms also lower their costs by not restricting themselves to buying supplies locally. Public facilities are swayed by politics when making these decisions. Sheriffs, for example, have to please local businesses even if it may not be cheaper to do so. McDonald goes so far as to say, "...efficient administration and cost-efficiency may take a back seat to politics" [1990a, 193].

Proponents of privatization argue that private firms are better able to be innovative and adopt low-cost techniques and thus save the taxpayers money. Opponents argue that it is simply not possible to be innovative in running a prison because no matter who runs the prison the basic service is the same, feeding and sheltering prisoners. Thus, the number of possible alternatives is very limited. However, there is evidence to contradict what the opponents argue. Private firms do seem to be flexible and innovative in providing the basic services. Buckingham Security, Ltd operated the Butler County Jail in Pennsylvania and was able to lower utility costs by switching to fluorescent light bulbs instead of the usual incandescent bulbs, and by simply checking the showers to see if they were running. The firm also saved money by buying their supplies in bulk. The government had the same option when it ran the jail, but refused. The company renovated the facility and used the inmates to do the work, which led to additional savings to the county [Joel, 1993, 64].

Society is sometimes better off when government privatizes certain services just because more tax revenue will be collected. This benefit is found in the privatization of prisons. The payments of taxes, service charges, and other similar fees are other benefits that have been cited when prisons are privatized. In an interview done by Ammons et al one interviewee reported that the privatized correctional facility in his area "means 100 jobs or about \$3 million per year in payroll – it gets spent right here in our community. We also get \$38,000 per year in property tax from the facility" [Ammons, et al, 1992, 39]. While it would be incorrect to assume all \$3 million paid out in payroll would be spent in the local area alone, it is reasonable to assume that a good amount of that money is spent in the local area and that the multiplier effect would occur. This statement assumes that there would not be a public prison in the area providing income if the private prison were not there, which is a possibility because many private prisons are being built in areas that lack a public prison or that are in need of another one. The increased property

tax revenue is a benefit that would not be possible if there was a public prison or no prison at all.

Cost is one of the leading issues in the prison debate. If prisons are privatized, opponents have argued that there would not be any cost savings. They do not have any significant studies to support their position. On the other hand, many studies have shown that private prisons can be run at a lower cost than public prisons.

VI. Quality

Quality of service is one of the most controversial and interesting issues raised in the debate over private prisons. Is prison privatization better if both cost and quality are lower? No. Opponents of privatization argue that when a prison is privatized, the firm will cut quality of service to insure lower costs. Proponents argue that this does not happen.

Quality is a difficult thing to evaluate. To know what factors to consider when evaluating quality, one has to know what the mission of the prison is. Most people agree that the purpose of imprisonment is to punish offenders, in a fair and just way, through lengths of sentences that are proportionate to their crime. “The mission of a prison is to keep prisoners—to keep them in, keep them safe, keep them in line, keep them healthy, and keep them busy—and to do it with fairness, without undue suffering and as efficiently as possible” [Logan, 1992, 580]. Thus, one should evaluate quality of services on the basis of security, safety, order, care, activity, justice, conditions and management.

In 1992, Logan did one of the most important studies on evaluating quality of services in private and public prisons. He compared a private women’s prison in New Mexico with a state prison in New Mexico and a federal prison in West Virginia. He evaluated the quality on the basis of the eight dimensions mentioned above. He found that the private prison outperformed the public prisons on nearly all dimensions and often by a quite substantial margin. One exception was the dimension of care, which measured things like stress and illness, health and dental care, and counseling. The state prison outscored the private prison by a modest amount in the dimension of care. The private and federal prison received equal scores in the category of justice. The dimension of justice measured things like staff fairness, use of force, the grievance and discipline process and justice delays. He concluded that the private prison was superior overall to the state and federal prisons [Logan, 1992, 593].

Logan also conducted a staff survey and an inmate survey on the quality of the prisons. The staff survey supported the overall superior quality of the private prison. On the other hand the inmates revealed their preference for the state prison over the private prison. Much of the inmate's displeasure with the private prison was, according to their answers, related to the more prison-like atmosphere and tighter administrative regimen that they encountered there, in comparison to their former conditions at the state prison. On average, the staff said the overall security at the private prison was somewhat better than at the state prison. Thus, Logan concluded, "the stricter governance of inmates at the private prison may have been a factor in the more positive evaluations from staff, as well as the more negative evaluations from inmates" [Logan, 1992, 593].

Thomas did not seem to think there was much to be debated. He is one of a number of scholars who pointed out that there was not a lack of quality in the private prisons. Thomas believed one important piece of evidence was the simple fact that governments did renew their contracts [1995, para. 31]. If the government felt that money was not being saved or that contracting out hampered the quality of service, they would not renew contracts with private firms. As mentioned earlier, many states have put a stipulation in their contracts that imposes stringent requirements for contracting or renewal. Tennessee required that the private firm maintain at least the same quality of service while Texas and Florida required private firms to meet all court orders and recognized standards in order to receive or renew a contract [Ammons, et al, 1992, 23].

Thomas offered support for this claim by reviewing the history of contract renewals. Since the prison privatization movement began to take off in the mid-1980s only one facility has been closed for reasons related to inadequate contract performance and one contract has been switched from one private firm to another for similar reasons. Neither of the management firms involved in these situations is currently involved in the management of adult prisons. There was a contract that was not renewed because of cost considerations. However, the cost issue was linked to the terms of a property lease with a third party that was beyond the control of both the government and the private firm. Thus, Thomas concluded, "the best available data fail to reveal a single contract awarded to any firm now a part of the private corrections industry that has been terminated or not renewed for reasons related to the caliber of contract performance" [1995,

para. 32].

Another piece of evidence that Thomas pointed out deals with litigation. He said that a recent review of all circumstances of all privately managed jails and prisons in the United States failed to reveal a single facility that is operating under a consent decree or a court order as a consequence of suits brought against it by prisoner plaintiffs. It is important to note that about three-quarters of American jurisdictions have major facilities or systems operating under consent decrees or court orders and that similar intervention by the courts are not uncommon in local correctional systems. Thomas clarified that he was not saying there are no private firms under consent decrees or court orders, but he had not found any evidence that they entered into a consent decree or were placed under court order as a consequence of finding an unconstitutional jail or prison that they managed [1995, para. 33]. If a private prison were bad in terms of its quality it is assumed that prisoners would sue. No such suit that has been brought forth has been successful.

Quality of prisons has been debated and studied. Opponents argue that private firms reduce the quality of services in order to lower costs. They have not produced any studies to support their view. Proponents have done studies to lend support to their arguments.

VII. Competition

If the market for correctional services is a competitive one, the government will have several firms from which to choose. If these firms compete with one another in offering the lowest price for their services without reducing quality, there will be a tendency to control costs and ensure quality. The government would be able to pick the most efficient firm. If firms do not perform as expected they can be replaced with a new firm when the contract expires. The firms will be judged on their performance of their contracts and also on their performance compared to other firms. Is the private imprisonment industry a competitive one?

Critics claim that perfect competition does not exist among private providers because there are too few private firms. The industry is still in its youth and, while it may be argued that it is only an example of oligopolistic competition, it has not yet reached its saturation point according to Joel. He also says that start-up costs are relatively low, and firms can enter the market fairly freely [1993, 66]. Competition can exist among a limited number of firms while it cannot exist under a government monopoly.

Joel argues that competition can exist among the firms and the government by opening the bidding process to government agencies as well as the private firms [1993, 66]. No matter who is providing the correctional service, competition will cause it to be more efficient. Firms will be forced to compete and it also encourages the government to be more efficient.

The contracts allow the government to choose from a pool of providers. Most contracts are not long term as they expire in three to five years. At the end of the contract period the government can either renew or find a new provider. This encourages the private firm to provide the highest possible quality of performance at a low cost.

Some opponents claim that low-balling will happen. Low-balling is the practice of bidding below the market rate and then over time, as the government becomes dependent upon it, the firm raises the bid above the market rate to make up for lost revenue. The practice could occur in the absence of a pool of competing providers. The greater the competition the less likely the bidder is to low-ball because they know they could easily be replaced.

In the absence of competition the government should monitor costs to prevent low-balling.

If government plays its role competently - which is to say if government places balanced emphasis on both the cost and the quality of correctional services and thereby precludes the success of "low-ball" bids being successful - then the competition between the firms that comprise the private corrections industry will do much to undermine the financial viability of under performing firms that are in or that attempt to enter the industry [Thomas, 1995, para. 32].

Thomas is confident that low-balling can be avoided if the government is smart about how it chooses which private firm to run a prison.

Perfect competition does not exist in the corrections industry, which is still in its infancy. Competition does exist at some level and with appropriate government monitoring problems such as low-balling can be avoided.

VIII. Liability

Who is liable for incidents that happen when a private firm runs a prison? Does it really matter? Liability is an extremely important part of the private prison debate. The number of civil rights and abuse cases within the correctional systems is growing. In 1989, there were 18,389 prisoner civil rights suits filed in federal courts, while there were only 6,600 in 1975 [Joel, 1993, 69]. It does not matter who is running the prisons. No one is immune to these suits.

Some opponents of prison privatization have argued that the government remains liable even when they contract out prisons. They believe the government has the worst of all situations. They give up daily control over the jail, but ultimately remain responsible.

In the past, privatization proponents have countered that liability shifts to the private sector once the prison is privatized and that the government would be shielded. Proponents were proved wrong in the case of *Medina v. O'Neill*. The case involved a prison guard who was hired by a private firm that was under contract with the INS. The guard shot and killed an inmate. The federal district court decided that the private firm performed as an agent of the government, which provides a constitutionally mandated service. The government was ultimately responsible [Joel, 1993, 69].

Proponents of prison privatization have argued that since the government is ultimately liable, government officials will have an even greater incentive to carefully select skillful and prudent private operators. The private firms will have every incentive to run safe and secure prisons if they want to renew their contracts.

Joel states that almost all providers carry liability insurance to protect both potentially liable parties. For example, Corrections Corporation of America is required in its contract to have \$15 million in liability insurance for the Bay County Jail. The U.S. Corrections Corporation carries insurance to cover up to \$1.5 million per incident [1993, 70].

Indemnification clauses in contracts have proven to be even more effective at reducing the government's liability. Joel says that with an indemnification clause, the "private firm guarantees that it will shoulder the liability costs—including litigation costs, attorney fees, costs associated with the settlement of pending cases, and damage awards" [1993, 70].

Liability of the government for the actions of private prisons has been a controversial issue in the past. The liability has been found to rest with the government. Liability insurance and indemnification clauses,

however, have helped shift the liability to the private firm.

IX. Conclusion

The government has failed to meet the demand for prison space. Overcrowding is a huge problem in our current system. Even though the government is primarily responsible for the prison system, it does not have to continue to be. The government can provide justice without running the prisons, just as it provides defense without building the planes and bombs.

Private prisons seem to be more efficient than public prisons. Private prisons have not been proven to be unconstitutional. Private firms can provide prisons at a lower cost. Many studies have shown the savings that have been realized. Quality of service does not suffer and possibly is improved. Private firms do not cut service; they seem to be more innovative. Competition does exist to some extent and, with time, it may increase. Liability does fall on the government, but this can be limited by stipulations in contracts that shift the liability to the private firm.

It is too early to tell what will happen in the private prison industry. The private prison industry is only in its infant stages. One must note that the findings in this paper have only shown what has happened so far. In the future, the industry will likely grow and change. From the studies done so far, it seems that private prisons will continue to do well and that they are more efficient than public prisons.

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