

**Selected, Edited, and with Issue Framing Material by:**  
 Thomas J. Hickey, *State University of New York at Cobleskill*

## ISSUE

# Should Private "For-profit" Corporations Be Allowed to Run U.S. Prisons?

**YES:** Sasha Volokh, from "Don't End Federal Private Prisons," *The Washington Post* (2016)

**NO:** Bernard Chazelle, from "Letter to the Editor: The Case Against Private Prisons," *The Daily Princetonian* (2017)

### Learning Outcomes

After reading this issue, you will be able to:

- Compare the financial costs to society of permitting private corporations to run prisons.
- Discuss the potential negative effects of cost cutting in prisons run by private corporations.
- Discuss why the states and federal governments became involved in operating prison systems during the early twentieth century.
- Present a compelling legal argument against privatizing America's prisons.

### ISSUE SUMMARY

**Yes:** Sasha Volokh argues that if the federal government continues contracting with private prison firms, it could take the lead in this area and improve the quality of these facilities. This means that even if all the bad reports about private prisons are true, the best strategy may be "mend it, don't end it."

**No:** Professor Bernard Chazelle, in contrast, asserts that the private prison industry has spent millions of dollars lobbying for stricter criminal laws and that to do so just to "make a buck" is to dive headlong into a legal and moral abyss.

**S**hould private corporations be allowed to profit from the punishment of prison inmates? Is there something wrong morally with allowing a corporation's stockholders to profit from human misery? These are difficult questions that will become increasingly relevant as governmental administrators try to squeeze limited financial resources from tight state budgets. Moreover, the movement to privatize corrections in the United States appears to be consistent with conservative political principles sweeping our nation that emphasize a more restrictive view of government services. For example, in the last several years, the federal government has privatized some services at

our national parks. Local privatization initiatives have included basic social services, educational programs, water treatment, and trash collection.

Private prisons are not a new development. Privately run jails operated in England centuries ago. In the United States, early prisons in California and Texas were privately owned. The operation of U.S. prisons became a governmental responsibility during the twentieth century as a direct result of the squalid conditions existing in the privately owned penal facilities.

The contemporary privatization movement in American corrections has focused on providing a number of different types of services: inmate health care,

psychological services, food services, educational programs, maintenance, as well as traditional confinement and security. It is also noteworthy that many college students may have something in common with some of our nation's prison inmates: Sodexo Marriott Services provides food services for a number of state correctional systems as well as many colleges and universities.

On a theoretical level, an offender is sentenced to prison for committing an act that has somehow harmed society. Most persons would have little trouble with the proposition that society has a right to punish the person and that the government, as society's representative, should administer the appropriate sanctions. Privatization of correctional facilities, however, appears to be somewhat inconsistent with this basic proposition.

The Introduction to this volume discussed the contemporary state of American corrections. According to recent studies, the United States has the highest imprisonment rates in the world. The total number of people housed in American prisons has reached 2.1 million and is continuing to grow at an alarming rate. This has occurred at a time when the crime rate in this country is actually falling! A large number of these individuals are confined to prisons for nonviolent offenses, such as possession of illegal drugs, and the cost to house them is staggering—perhaps as much as \$15 billion for drug offenders alone.

Given the amount of money involved, is it surprising that private industry would become interested in providing correctional services? Is it an accident that conservative politicians, who receive campaign contributions

from the private prison corporations, would develop ever more draconian laws that will result in the incarceration of increasing numbers of nonviolent offenders? These are interesting questions that the authors of the articles in this issue would be likely to answer in a very different way.

Sasha Volokh asserts that if the federal government continues contracting with private prison firms, it could take the lead in this area and improve the quality of privately run prison facilities. This means that even if all the bad reports about private prisons are true, the best strategy may be "mend it, don't end it."

Bernard Chazelle, in contrast, maintains that private prison corporations have an obligation to maximize their profits for shareholders. Whereas society would love the end of crime, hence the elimination of prisons, private prison corporations can only seek more crime and longer sentences—not because they are bad but because they must be loyal to their shareholders.

What are the arguments on both sides of the private prison debate? Do you believe that saving money is a good enough reason to privatize U.S. prisons? Moreover, does the move toward the privatization of our correctional institutions distract us from addressing more fundamental questions about the morality of our contemporary penal system? Should American corrections focus on alternatives to incarceration, such as drug rehabilitation and job training programs for nonviolent offenders? As you read the articles in this issue, try to develop a sense of whether privatization is likely to become the dominant model for U.S. corrections in the twenty-first century.



Sasha Volokh

YES 

## Don't End Federal Private Prisons

Yesterday, the DOJ announced that it would gradually end its use of private prisons. You can read the memo by Deputy AG Sally Yates here. She writes: "I am directing that, as each contract [with a private prison corporation] reaches the end of its term, the Bureau [of Prisons] should either decline to renew that contract or substantially reduce its scope in a manner consistent with the law and the overall decline of the Bureau's inmate population."

Why? The Yates memo says: "Private prisons . . . compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office of Inspector General, they do not maintain the same level of safety and security. The rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource—and these services are essential to reducing recidivism and improving public safety."

This is unfortunate, for two reasons.

First, Yates seems to be exaggerating what empirical studies tell us about private versus public prison comparisons. They do save money (though how much is a matter of dispute). And they don't clearly provide worse quality; in fact, the best empirical studies don't give a strong edge to either sector. The best we can say about public versus private prison comparisons is a cautious "We don't really know, but the quality differences are probably pretty minor and don't strongly cut in either direction." The Inspector General's report doesn't give us strong reason to question that result.

Second, even if all the bad things people say about private prisons were true, why not pursue a "Mend it, don't end it" strategy? There's a new trend in corrections to develop good performance measures and make payments contingent on those performance measures. If the private sector hasn't performed spectacularly on quality dimensions to date, it's because good correctional quality hasn't been strongly incentivized so far. But the advent of

performance-based contracting has the potential to open up new vistas of quality improvements—and the federal system, if it abandons contracting, may miss out on these quality improvements.

\*\*\*\*\*

First, how many people does this affect? The Bureau of Justice Statistics report on Prisoners in 2014 reports (Table 9) that 19 percent of federal prisoners were held in private facilities—about 40,000 in 2013 and 2014. But that includes about 14,000 in nonsecure facilities and home confinement. The Yates memo says that in 2013, the number of private prison inmates was 30,000, or 15 percent of federal prisoners, and notes in a footnote that this doesn't include federal halfway houses (and that halfway houses aren't the focus of the memo). The IG report says federal private prisoners were 22,660 in 2015 or 12 percent of the total. Probably these numbers are all consistent, and the different is due to different years and slightly different definitions of who's covered. So this memo affects probably about roughly 25,000 people today.

Compare that to the state prison system. Private prisons represent much less of the state systems—about 7 percent—but the state systems are much bigger. Overall, there were about 90,000 private state prisoners in 2014. (The 7 percent is of course an aggregate: it's 0 percent in almost 20 states that don't use privatization at all, over 25 percent in just three states [MT, NM, and OK], and something in between [a median of about 10 percent] in others.) And these people are unaffected by the Yates memo, though maybe some states might be moved to follow the federal government's lead.

Also, this doesn't include immigrant detainees in ICE facilities—I haven't looked into those numbers closely, but it looks like those total numbers are comparable to the federal Bureau of Prisons numbers.

\*\*\*\*\*

Now, let's look at what empirical studies can tell us about the cost and quality. For a discussion at greater length, please see my Emory Law Journal article on Prison

Accountability and Performance Measures or this earlier post of mine (which this post quotes from liberally).

Costs are hard to compare between the public and private sectors because the two sectors do their accounting differently. One obvious difference is that private prison firms have to pay all their own payroll, benefits, legal expenses, and so on, while a lot of those costs in the public sector are borne by different agencies, not the Department of Corrections or Bureau of Prisons. Naive cost comparisons will typically be worthless, so one will need to do a sophisticated study that spells out all its accounting assumptions.

Perhaps the best example of competing, side-by-side cost studies comes from the evaluation of the federal facility in Taft, CA, operated by The GEO Group.

A Bureau of Prisons cost study by Julianne Nelson compared the costs of Taft in fiscal years 1999 through 2002 to those of three federal public facilities: Elkton, Forrest City, and Yazoo City. The Taft costs ranged from \$33.21 to \$38.62; the costs of the three public facilities ranged from \$34.84 to \$40.71. Taft was cheaper than all comparison facilities and in all years, by up to \$2.42 (about 6.6 percent)—except in fiscal year 2001, when the Taft facility was more expensive than the public Elkton facility by \$0.25 (about 0.7 percent). Sloppily averaging over all years and all comparison institutions, the savings was about 2.8 percent.

A National Institute of Justice study by Douglas McDonald and Kenneth Carlson found much higher cost savings. They calculated Taft costs ranging from \$33.25 to \$38.37, and public facility costs ranging from \$39.46 to \$46.38. Private-sector savings ranged from 9.0 percent to 18.4 percent. Again averaging over all years and all comparison institutions, the savings was about 15.0 percent: the two cost studies differ in their estimates of private-sector savings by a factor of about five.

Why such a difference? First, the Nelson study (but not the McDonald and Carlson study) adjusted expenditures to iron out Taft's economies of scale from handling about 300 more inmates each year than the public facilities. Second, the studies differed in what they included in overhead costs, with the Nelson study allocating a far higher overhead rate.

\*\*\*\*\*

Now, on to quality. Here, too, naive comparisons aren't much good because how much quality one should expect depends on many factors like the demographic composition of a particular prison—which is something that the IG report didn't control for.

Most damningly, many studies don't rely on actual performance measures, relying instead on facility audits that are largely process-based. Some supposed performance measures don't necessarily indicate good performance, especially when the prisons are compared based on a "laundry list" of available data items (for instance, staff satisfaction) whose relevance to good performance hasn't been theoretically established.

Let's consider the IG report itself. One of its evaluation categories is rates of assaults, both inmate-on-inmate and inmate-on-staff. That seems fine—I think we can all agree that assaults are bad—provided the measurement methods are comparable. But the report also says that "the contract prisons confiscated eight times as many contraband cell phones annually on an average as the BOP institutions." That's not the actual number of contraband cell phones—it's the number confiscated because of course we don't know the actual number. Well, I know a great way to get that number down: just stop looking hard for contraband phones. This is an inappropriate measure because it could indicate that there are a lot of phones or that enforcement is very vigorous; you can't use it as a basis for comparison between prisons unless you know, for instance, that the level of enforcement is similar. And yet, the IG report uses that as a basis to criticize private prisons. Similarly, the IG report found that the private prisons "fail[ed] to initiate discipline in over 50 percent of incidents." But whether you should initiate discipline in any given case is a matter of judgment, and I'm sure that, in another context, people would think that a bright-line insistence on initiating discipline 100 percent of the time is inflexible and overly punitive.

As an example of the problems with current quality metrics, consider the performance evaluations of the private federal Taft facility. As with the cost studies discussed above, we have two competing studies, the National Institute of Justice one by McDonald and Carlson and a Bureau of Prisons study by Scott Camp and Dawn Daggett—the companion paper to Julianne Nelson's cost paper.

The Bureau of Prisons has evaluated public prisons by the Key Indicators/Strategic Support System since 1989. Taft, alas, didn't use that system but instead used the system designed in the contract for awarding performance-related bonuses. Therefore, McDonald and Carlson could only compare Taft's performance with that of the public comparison prisons on a limited number of dimensions, and many of these dimensions—like accreditation of the facility, staffing levels, or frequency of seeing a doctor—aren't even outcomes. Taft had lower assault rates than the average of its comparison institutions, though they were

within the range of observed assault rates. No inmates or staff were killed. There were two escapes, which was higher than at public prisons. Drug use was also higher at Taft, as was the frequency of submitting grievances. On this very limited analysis, Taft seems neither clearly better nor clearly worse than its public counterparts.

The Camp and Daggett study, on the other hand, created performance measures from inmate misconduct data and concluded not only that Taft "had higher counts than expected for most forms of misconduct, including all types of misconduct considered together," but also that Taft "had the largest deviation of observed from expected values for most of the time period examined." Camp and Daggett's performance assessment was thus more pessimistic than McDonald and Carlson's.

According to Gerald Gaes, the strongest studies include one from Tennessee, which shows essentially no difference; one from Washington, which shows somewhat positive results; and three more recent studies of federal prisons by himself and coauthors, which found public prisons to be equivalent to private prisons on some measures, higher on others, and lower on yet others.

(I'll add that we similarly don't know well which sector does better on recidivism: for details, see my Emory Law Journal article or my earlier blog post.)

\*\*\*\*\*

Bottom line: I think Yates is exaggerating what we know about the cost and quality of public versus private prisons, and perhaps giving undue weight to the negative findings of the IG report, even though that report didn't control for inmate demographics, didn't fully use valid performance measures, and so on.

But here's what's possibly even more important: prisons have begun experimenting with performance measures and performance-based contracting. The United Kingdom has been a pioneer in this movement, but it's been used to a limited extent in the United States too. A small amount of the contract payment in the Taft case was performance-based. Also, there was a prison-privatization bill in Florida

that never became law; it was defeated for general anti-privatization reasons, but if it had passed, it would have implemented some performance-based contracting.

It might seem surprising, but private prisons have almost never been evaluated on their performance and compensated on that basis. Proprivatization people have often favored prison privatization on the grounds that the market (unlike, usually, government) has the advantage of greater flexibility to experiment and also has greater scope for incentives to work. Maybe that's usually true, but in the case of prisons, both of these elements have usually been false: private prisons have had limited scope for experimentation (the contracts have often reproduced the entire public-sector rulebook in excruciating detail) and have also had limited incentives (contract payments have rarely incorporated performance-based elements).

In light of that, maybe it's even surprising that private prisons have done as well as they have in the comparative studies. Be that as it may, the advent of performance-based contracting could open up possibilities for substantial quality improvements. This could work in the public sector too (bonus payments for public prison wardens?), but the private sector is probably better situated to take advantage of monetary incentives. So if the federal government stops contracting with private prison firms now, it may miss out on these potential quality improvements. Not only that: if the federal government continued contracting with private prison firms, it could itself take the lead in implementing performance-based contracting and thus be a driver in these quality gains.

This means that even if all the bad things about private prisons are true, the best strategy may be instead "Mend it, don't end it."

---

**SASHA VOLOKH** is an associate professor at Emory Law School. He has written numerous articles and commentaries on law and economics, privatization, antitrust, prisons, constitutional law, regulation, torts, and legal history.



Bernard Chazelle



## Letter to the Editor: The Case against Private Prisons

Mass incarceration is one of the great moral challenges of our time. With merely 4–4 percent of the world's population, the United States holds almost 25 percent of the world's prisoners, far more than any other country. Nearly nine times as high as Germany's, our incarceration rate is the highest on the planet (save for that of tiny Seychelles). While the destructive impact of mass incarceration is being felt across all poor communities, the racial dimension stands out: one in three black men can expect to go to prison at some point in his life, a fact of devastating consequence for the African-American family.

On the brighter side, over-incarceration is now widely recognized as a major crisis. From Bernie Sanders and Hillary Clinton to Newt Gingrich and the Koch brothers, cries for change are being heard all across the political spectrum. Should Princeton lend its voice to the rising chorus of indignation? To be sure, the university should foster a climate of engagement, but it is not its institutional mission to tackle social issues. It is its duty to honor its core values, however. For this reason, the university must send a clear message that investing in the incarceration industry is wrong. A pledge not to invest would resonate far and wide; as President Eisgruber '83 recently indicated, it would also be costless. Columbia has taken such a pledge, and the University of California has proceeded to divest. More will follow. Princeton should lead by example and offer a proactive model of ethical conduct "in the nation's service."

If I am right that for-profit imprisonment is immoral, then the crisis of mass incarceration makes it a matter of utmost urgency. But am I right? Isn't it merely an empirical question? Let the social scientists sort out the pros and cons of privatization so we can settle the issue rationally and be spared annoying opinion pieces such as this one. That was the Obama administration's model when it announced the government's plan to phase out its use of private prisons in light of their poor performance. Empirical evidence, of course, can be contested; and sure

enough, right on cue, Trump reversed Obama's decision. It hurts for a computer scientist to say it but, in this case, fact-finding is, as it were, a laudable quest to find the right answer to the wrong question.

The case against private prisons is not instrumental but rather categorical. Just as slavery would still be wrong if all masters were angels, private prisons would still be immoral if they delivered a superior product—as they might well do in some places such as Australia. Private prisons are immoral because they are premised on a violation of human dignity. This position formed the basis of the 2009 Israeli Supreme Court decision to ban the practice and has been argued at length by prominent scholars. It is, in my view, an indication of how assiduously we have learned to ignore the normative implications of liberal democracy that the case has seemed unable to speak for itself.

So let me speak for it. Liberal societies abide by the classic Weberian idea that the state should have the monopoly of force. We do not allow private judges or for-profit courts of law. Likewise, there is wide consensus that the decision to deprive someone of liberty is so grave and solemn that it should be the sole prerogative of entities institutionally representative of us, the People. Which is not to say that all prison business ought to be public. Some of it is outsourced out of necessity (e.g., electronic equipment); some of it for efficiency (e.g., dining, maintenance). But then, some will ask, why not go all the way and allow prisons to be administered for profit? If hospitals can be, why not penitentiaries? The answer tests on the unique moral status of criminal punishment in modern liberal democracies. Caring for people is categorically different from locking them up.

Public shaming is no longer part of the sentencing arsenal. At least in principle, state-sanctioned punishment seeks to respect human dignity. The reason is that a criminal sentence is not an act of vengeance but a leaf out of the social contract binding the individual and the state. To ascribe guilt is to acknowledge both the agency and the

Chazelle, Bernard, "Letter to the Editor: The Case against Private Prisons," May 3, 2017, *The Daily Princetonian*. Used by permission of *The Daily Princetonian*.

autonomy of the offender who, in return, recognizes the legitimacy of the state to inflict punishment. The identity of the punisher is thus key to its legitimacy: to punish is the exclusive authority of the state and may not be delegated, for to do so would sever the moral cord between the offender and the community.

If that idea strikes you as a tad too subtle for its own good, ask yourself why impracticality is not the reason we deny victims the right to execute the court's judgments. At least, one could argue, a victim has a participatory claim to see justice done. Yet to deny the victim that right seems to all of us (I hope) the proper thing to do. But then how can we turn around and grant that same right to a for-profit entity whose interests typically run counter to the public good? A private prison firm has a fiduciary duty to its shareholders but only contractual obligations to the state. Whereas society would love nothing more than the end of crime, hence the emptying of all prisons, carceral corporations can only seek more crime, more prisoners, and longer sentences—not because they are bad but because they are loyal to their owners.

This is no idle speculation: the private incarceration industry has spent millions of dollars lobbying for stricter criminal laws. Try to read without cringing this passage from the 2005 Annual Report of CCA, the nation's largest private prison firm: "the demand for our facilities and services could be adversely affected by the relaxation

of enforcement efforts, leniency in conviction, and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws." Some will counter that the private sector faces similar misalignments of incentives (e.g., health providers, insurers, tobacco firms), but that there is no conflict that the right mix of regulations and free-market magic can't put right. The comparison is a category error (the philosophical term for "not even wrong") because incarceration is *sui generis*.

The 13th Amendment reminds us that our society rejects slavery and involuntary servitude but does not put a blanket ban on them, reserving the right to use them as legal punishment. This is not to equate incarceration with slavery but to suggest what Wittgenstein called a "family resemblance," a troubling likeness that should inspire extreme caution. To imprison somebody is always to walk along the edge of a moral cliff. As Abu Ghraib reminds us, a wrong step easily takes us into the abyss. To lobby for longer prison sentences just to make a buck is to dive headlong into that abyss. Princeton must take a public stand against such moral dreck.

---

**BERNARD CHAZELLE** is the Eugene Higgins Professor of Computer Science at Princeton University. He can be reached at [chazelle@cs.princeton.edu](mailto:chazelle@cs.princeton.edu).

## EXPLORING THE ISSUE

### Should Private "For-Profit" Corporations Be Allowed to Run U.S. Prisons?



#### Critical Thinking and Reflection

1. What are the advantages and disadvantages of allowing private corporations to run prisons?
2. Discuss the impact of the "war on drugs" on the movement to privatize prisons.
3. Discuss whether you believe that privately run prisons can work if their primary responsibility is to maximize their returns to investors.
4. Do you believe that the decision "to deprive someone of liberty is so grave and solemn that it should be the sole prerogative of entities institutionally representative of The People"?
5. Do you believe that "for-profit" imprisonment is immoral?

#### Is There Common Ground?

The Introduction to this volume discussed George Santayana's often-repeated observation that those who fail to learn from history are doomed to repeat it. It is interesting to consider whether this principle applies compellingly to the contemporary privatization movement in U.S. corrections.

Privatized correctional institutions are nothing new. As Jeff Sinden observes, privately owned jails operated in England centuries ago. In the United States, early prisons in California and Texas were privately owned. Corrections became a governmental responsibility as a direct consequence of the problems with these privately owned facilities.

Privately held corporations have one basic responsibility: to generate a profit for their investors. Suppose you were the director of a privately owned prison or jail that houses 2,000 detainees per year. Your contract with the corporation provides that you are to receive an annual performance bonus based on the profit generated at your facility. Assume further that it costs \$12 per day to feed each inmate. If you could reduce the cost to \$10 per day, your institution would save \$1,460,000 in the following year. Would you be tempted to do so to improve the facility's bottom line and the prospects for your annual bonus? The same principle would apply to reducing the costs of medical care, clothing, security, education, drug and alcohol treatment, and job training.

The point is that the philosophy of correctional privatization may be fundamentally incompatible with what the ultimate goal of "corrections" should be: rehabilitating

a person and enabling him or her to return to the community as a productive member of society. Privatizing corrections may distract us as well from attempting to find more effective alternatives to incarceration for nonviolent offenders. In addition, if private industry has invested huge sums of money in corrections facilities, is it likely that unscrupulous politicians, who have been known to benefit from corporate campaign contributions, will simply continue to pass draconian measures that will generate more unwilling "clients"?

#### Additional Resources

- Martha Minow, "Public and Private Partnerships: Accounting for the New Religion," *Harvard Law Review* (vol. 116, no. 5, March 2003).
- Gerald G. Gaes, "Prison Privatization in Florida: Promise, Premise, and Performance," *Criminology & Public Policy* (vol. 4, no. 1, February 2005).
- William D. Bales, Laura E. Beddard, Susan T. Quinn, David Ensley, and Glen P. Holley, "Recidivism of Public and Private State Prison Inmates in Florida," *Criminology & Public Policy* (Vol. 4, no. 1, February 2005).
- Colin Fenwick, "Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law," *Human Rights Quarterly* (vol. 27, no. 1, February 2005).
- Sasha Abramsky, "Incarceration, Inc.," *The Nation* (vol. 279, no. 3, July 19-26, 2004).