

CHANGING THE TERMS OF THE DEBATE OVER PRIVATE PRISONS

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Chairmen Gibbons and Katzenbach and members of the Commission, thank you for the opportunity to speak to you today about private prisons.

I am a Professor of Law at the UCLA School of Law, where I teach criminal law, legal ethics, and a course called Prison Law and Policy. This academic year, I am a fellow at the Radcliffe Institute for Advanced Study in Cambridge, Massachusetts, where I am conducting a study of the constitutional prohibition on cruel and unusual punishment as applied to prison conditions. My primary research interest lies in unearthing and examining the normative foundations of American criminal justice policy— that is, how we as a society justify what we do to convicted criminal offenders in the name of punishment.

I have been thinking about for-profit private prisons in this light for some time.¹ The main point I want to make today is that the way the debate has generally been framed— as a choice, or even a competition, between public and private prisons— is the wrong way to think about the issue. This comparative lens only leads us to exaggerate the differences between the two systems, when in fact— heretical though this may sound— in terms of day-to-day structure and functioning, private prisons operate pretty much like public prisons.

The real question is not whether the management structure of our penal facilities should be public or private. It is instead why *all* our prisons, public and private alike, fall so far short of satisfying our obligations to those we incarcerate. Once we get beyond the comparative frame, a focus on private prisons can shed considerable light on this question, by throwing into sharp relief many problematic aspects of the penal system as a whole which we currently take for granted, and thus no longer really see.

What does the study of private prisons tell us that might shed light on the dynamics of violence and abuse in American prisons? My work in this area suggests that the danger posed by the state's use of private prisons to the possibility of safe and humane prison conditions stems from three identifiable practices:

- (1) the delegation to prison officials of considerable discretion and power over a largely vulnerable and dependent inmate population, without either adequate strategies for sustaining corrections officials or adequate accountability mechanisms for preventing

¹My article, "State Punishment and Private Prisons," will be published in the December 2005 issue of the *Duke Law Journal*.

- prisoner abuse;
- (2) the contracting out to for-profit entities for the provision of prison services directly affecting the health, safety, and well-being of prisoners, in order to save states money on the cost of corrections; and
 - (3) the unquestioned acceptance of the idea that sentencing policy is appropriately shaped through advocacy by interest groups with a strong financial interest in increased incarceration rates and longer prison sentences.

These practices are not exclusive to private prisons. To the contrary, each is a standard feature of the prison system in general. We should thus expect the dangers they pose to extend equally to public prisons. And if this is so, the lessons that emerge from studying private prisons will have direct application to the penal system more broadly.

In what follows, I support this view by offering a brief account of how private prisons work, one which focuses particularly on the structure of private prison contracts. Given that the contractual structure of private prisons is what most distinguishes private prisons from publicly-run facilities, one might expect the subsequent analysis to reflect the comparative approach, emphasizing differences over similarities. Instead, what we find are lessons with direct application to the prison system in general. These lessons may be briefly summarized as follows: each of the practices enumerated above creates dynamics likely to compromise the possibility of safe and humane prison conditions. A meaningful commitment to this possibility thus requires that these practices be curtailed, or at the very least that they be engaged in warily, with attention to the ways that (1) inadequate accountability mechanisms; (2) contracting out to for-profit entities for the provision of crucial prison services to save money on the cost of corrections; and (3) allowing sentencing policy to be influenced by interest groups with a financial interest in increased incarceration can, if we are not careful, create or exacerbate the conditions for prisoner abuse.

Private Prisons: Pressures, Temptations, Consequences

Private prison contracts award contractors a set payment per inmate per day in exchange for assuming responsibility for running the facility and providing for inmates' needs. As Richard Harding puts it, on these arrangements, "the state remains the ultimate paymaster and the opportunity for private profit is found only in the ability of the contractor to deliver the agreed services at a cost below the negotiated sum."² These contracts present a difficult challenge for contractors seeking to profit from the arrangement. All sides agree that prison contractors must not allow either the quality of conditions of confinement or inmate safety to drop below existing levels.³

²RICHARD HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 2 (1997).

³Even staunch advocates of private prisons have insisted that "concern with cost savings should not outweigh considerations of quality." CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 120 (1990). There is some ambiguity in the literature as to whether private prisons should also deliver *better* quality and *greater*

Yet if the state is to reduce the cost of its prisons through contracting out, the contract price must be less than the total cost the state would otherwise incur in operating the facility.⁴ And if the private providers are likewise to make money on the venture, they must spend less to run the prisons than the contract price provides. For such arrangements to be remunerative for both parties, therefore, private prisons must be run at a considerably lower cost than the state would otherwise incur in running the same facilities. The contractor thus has an incentive to reduce overhead costs as much as possible.

How might this contract structure affect the conditions of confinement? To put it crudely, the less money spent on meeting inmate needs, the more money goes into the contractor's pocket. And because labor costs represent the largest item on any prison's balance sheet, the most obvious place for a prison contractor to cut costs is on staffing and training prison guards.⁵ But if contractors cut costs in this area, prisoner safety is likely to be compromised. Guarding inmates requires constant interaction in a tense atmosphere with people who are bored, frustrated, resentful, and possibly dangerous. To protect inmates from harm and to ensure their own personal safety under these conditions, prison guards require training, experience, good judgment, and presence of mind. But guards who are overworked and under-trained, or who are working in prisons that are understaffed, are at a disadvantage in such a volatile environment, and will thus be less effective at maintaining safe and secure prison conditions. Money-saving strategies that include hiring fewer guards, paying them less, and cutting back on their training thus increase the threat to inmates of physical and sexual assault, among other abuses.

Private prison employees are not covered by the civil service protections that public prison guards enjoy, and are unlikely to be unionized. They are thus vulnerable to cuts in their salaries, benefits, and training should contractors choose to make them. But even still, it might be argued that the temptation prison contractors face to cut labor costs is effectively checked through the combined effects of several tools of governmental regulation and oversight, which create incentives for contractors to invest in their labor force notwithstanding the lure of cutting labor costs. However, a careful look at the regulatory mechanisms that are supposed to create such counter-incentives – the threat of legal liability for constitutional violations; the requirement of accreditation by the American Correctional Association (“ACA”); contractually required monitoring of private

safety in order to justify the move to privatization. But there is nevertheless discernable agreement, in theory at least, that they must be at least as good as the public sector on these measures.

⁴Indeed, some states make such cost savings a condition of contracting, writing the requirement right into the statutes. The Tennessee statute, for example, provides that no contract bid may be accepted unless “the proposer’s annual cost . . . is at least five percent (5%) less than the likely full cost to the state of providing the same services. . . .” TENN. CODE. ANN. § 41-24-104(c)(1)(E) (2004); *see also* FLA. STAT. 957.07 (2004) (providing that the [Corrections Privatization] Commission may not enter into a contract . . . unless it determines that the contract will result in cost savings to the state of at least seven percent over the public provision of a similar facility”) (quoted in Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 271 (2001)).

⁵As one industry observer explained it early on, because such a high percentage “of a prison's budget goes to staffing and training,” private providers “must reduce expenditures in these areas if they are going to make a profit.” Douglas W. Dunham, Note, *Inmates’ Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1498 n.158 (1986) (quoting Richard Ford, Director of Jail Operations, Nat’l Sheriffs’ Ass’n).

prison facilities; and the threat of replacement by competing contractors – reveals that none actually operates effectively in this regard. In terms of the courts, the constitutional rights of prisoners have been interpreted extremely narrowly, and even assuming prisoners could demonstrate constitutional violations, procedural restrictions imposed in the last decade on prisoner suits brought in the federal courts can make it very difficult for prisoners even to get a hearing.⁶ The prospect of prisoners’ recovery against private prison guards is thus too attenuated to be likely to push contractors to invest adequately in labor. The ACA accreditation process occurs too infrequently, and is too focused on written policies over actual practices, to represent a real incentive to greater contractor investment in labor. Likely because effective monitoring is expensive, the monitoring and oversight of private prisons by state officials, intended to motivate contractual compliance, is in practice extremely limited. And the small number of viable contractors, combined with the cost to the state of switching providers, means that the threat of replacement by competitors does little to promote sufficient investment in staffing and training.⁷

Given these limitations, prison contractors, seeking to increase their margins, may be expected to under-invest in staffing and training in the ways predicted above. And indeed, this is precisely what these contractors have done. Private prison employees do tend to be less qualified (because less well remunerated) and less well-trained than their public sector counterparts. And as a result, as a careful reading of the available data confirms, private prisons on the whole show greater levels of violence even than public prisons.⁸

Viewed from a comparativist perspective, the foregoing would be read as a vindication of public prisons as against private ones. But this conclusion would be absurd. For as the members of the Commission well know by now, public prisons too can be violent, dangerous, inhumane places. Instead, this analysis suggests two different conclusions, both of which point to practices

⁶True, unlike public prison guards, private prison guards are not entitled to qualified immunity from constitutional claims brought under § 1983. See *Richardson v. McKnight*, 521 U.S. 399, 412 (1997). But this doctrinal advantage is unlikely to make much difference to private prison inmates. Such prisoners will only benefit from *Richardson* where judges find the violation of a constitutional right that had not heretofore been “clearly established.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Only in such cases could a prison guard plausibly claim qualified immunity, and thus only in such cases would *Richardson*’s abrogation of this defense for private prison guards effect a substantive change to the result. If, however, courts are to find that prisoners have constitutional rights not already clearly established, judges must expand the set of prisoners’ constitutional rights already recognized. And at present, there is little reason to expect federal judges to be willing to do so. Only during the late 1960s and 1970s did the Supreme Court seem willing to extend prisoners’ constitutional protections. And even during that brief period, the extent of this willingness was limited. The decades since, moreover, have seen a reinstatement of the “hands-off” attitude that predated the prisoners’ rights movement. This recent retrenchment has been marked by a series of decisions paring back on the rights articulated during the period of reform and creating new and substantial hurdles to the success of prisoners’ constitutional claims. And these conditions are unlikely to change while public attitudes to incarcerated offenders remain as they are. Thus the denial to private prison guards of the defense of qualified immunity is unlikely to benefit sufficient numbers of inmate plaintiffs to act as a meaningful check on the excesses of private contractors.

⁷I support these claims more fully in *State Punishment and Private Prisons* 55 DUKE L.J. 31-44 (forthcoming 2005).

⁸See *id.* at 45-47.

likely to compromise the humanity of conditions of confinement in all penal facilities, whether public or private. First, a considerable risk to inmates' health, safety, and well-being is created *whenever* corrections officials are accorded extensive discretion and power over prisoners in the absence of adequate accountability mechanisms for preventing prisoner abuse. And unfortunately, the regulatory tools that exist to check prisoner abuse in the public sphere are scarcely more effective than those that apply to the private prison context. (Indeed, in the case of the courts and ACA accreditation, they are identical.) We therefore urgently need to strengthen all these tools to ensure that they perform their intended function.

Second, there is a danger to the health, safety, and well-being of prisoners whenever the state, in an effort to save money on the cost of corrections, contracts out the provision of essential prison services to companies aiming to make a profit from the venture. This caution extends not just to contracts for running whole prisons, but also to the contracting out of discrete prison services like food service, medical and dental care, psychiatric care, rehabilitative programming, and inmate classification. As has just been seen, absent effective checks, we can expect for-profit contractors to cut costs even at the expense of inmates. Creating disincentives to this behavior is therefore crucial. But ensuring meaningful oversight and accountability costs money, and anytime the states contract out in order to reduce their prison budgets, state officials are going to be reluctant to spend what it takes to ensure prisoners' ongoing security and well-being. This set of dynamics means that contracting out even discrete prison services to for-profit contractors when the state's goal is cost-cutting is a recipe for seriously compromised conditions of confinement.⁹

What this means is that we should be wary of contracting with *any* entities that promise to reduce the cost to the state of providing essential services to prisoners in exchange for the chance to make a profit for themselves. Certainly, experiences with prison health management companies bear out this caution. To take just one example, in 2003 alone, Correctional Medical Services ("CMS") took in over \$500 million contracting with prisons in 30 states to provide medical care for inmates. Although the company is extremely secretive about its practices,¹⁰ investigations into company practices have revealed a litany of stories of inmates who died or suffered serious long-term disability because of treatment delayed or denied¹¹; of staff—doctors and nurses—being hired despite their having been suspended from the practice of medicine or otherwise disciplined by the Medical Board issuing their licenses¹²; and of policies deliberately designed to minimize the amount

⁹All our prisons – “public” as well as private – contract out a range of necessary services to private for-profit contractors in order to save money on the cost of corrections. The alternative to private prisons is thus not wholly “public” prisons, but rather prisons in which state-employed prison administrators contract out discrete services to for-profit providers who, in their spheres, are subject to the same pressures and temptations as private prison providers.

¹⁰See W.I.S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, HARPER'S, Aug. 2003, at 43.

¹¹See, e.g., William Allen & Kim Bell, *Death, Neglect, and the Bottom Line*, ST. LOUIS POST-DISPATCH, Sept. 27, 1998, at G1.

¹²See Andrew Skolnick, *Prison Deaths Spotlight How Boards Handle Impaired, Disciplined Physicians*, J. AM. MED. ASS'N, Oct. 28, 1998, at 1387 (detailing CMS's hiring practices, which include hiring medical personnel whose licenses have been suspended or revoked by state medical boards); *id.* (explaining

of medical care ultimately provided to prisoners in need of treatment.¹³

Meeting inmates' needs and ensuring their safety is expensive, and requires a certain minimum investment. The example of private prisons teaches us that if a proposal for contracting out necessary prison services offers drastic or even noteworthy cuts in state expenditures and also anticipates a financial benefit for the contractor, the proposal must be closely scrutinized. And we ought also to scrutinize carefully any independent efforts on the part of state officials to make publicly-run prisons financially self-sustaining or to run them at a profit. State corrections officials are scarcely immune from pressures to reduce the cost of running the prisons. And depending on the approach, these efforts too could well pose a risk of serious harm to inmates.

Private Prisons and the Integrity of Sentencing Policy

Opponents of private prisons raise a further concern, one not directly arising from the operation of private prisons themselves, but rather from the possible political activity of the emergent private prison industry. This concern is that the state's use of private prisons could create a powerful interest group with a financial interest in increased incarceration and the political power to influence sentencing policy in this direction, regardless of whether the ensuing punishments would be justifiable in terms of legitimate punitive purposes. The premise of this concern – one to which all citizens may be expected to subscribe – is that prison sentences are illegitimate to the extent that they are imposed only in order that other members of society might benefit financially. And the worry is that, should the private prison industry, which stands to gain financially from increased incarceration, enjoy undue influence over the direction of sentencing policy, we could not be sure that the sentences ultimately imposed were legitimate and not merely a way to secure healthy returns for the private prison business.

Put in these stark terms, this concern may seem far-fetched. But interestingly, what one finds in the private prison literature is not a denial that the state's use of private prisons could create this dynamic; instead, one finds the assertion that, even were a private prison lobby empowered to affect prison sentences in the way just described, it would hardly be unique. To the contrary, we

that some states allow the reinstatement of medical licenses restricting the holder to "practice in a penal institution").

¹³One former CMS employee, who served for five years as a supervising nurse for CMS, recounted a host of such policies including those made to reduce the number of doctors' visits:

Appointments were made for weeks or months down the road, knowing that the inmate would not be there anymore. Or we would make appointments for days that we knew the inmate was going to be in court. They don't keep the trial dates in the medical file, but you just call the booking desk up front and ask them when the trial date is. Then you make their next appointment for that date. We were told to tell them, there was a canned phrase, "Don't worry, you have an appointment. We just can't tell you when it is because of security reasons." So you would be consoling someone, knowing full well that they weren't going to get to see anybody. You just put them right back at the bottom of the list again.

Hylton, *supra* note10, at 53.

are told,¹⁴ such a lobby would enter a politicized arena in which powerful interest groups *already* work to influence criminal justice policies in ways consistent with the financial interests of their members.

That this is so is incontrovertible. Perhaps most notorious in this regard is the California Correctional and Peace Officers' Union ("CCPOA"), which represents all of California's prison guards. One of the most powerful lobby groups in California,¹⁵ CCPOA consistently supports state legislation providing for enhanced sentencing, seemingly regardless of the legitimacy of the punishments thereby imposed.¹⁶ But it is not just prison guards who view harsher sentencing policies through the lens of financial advantage. Even legislators have come to view prison policy as a means to feather their own nests and those of their constituents, and routinely jockey to have new prisons built in their districts as a means of economic development. Of course, once the prisons have been built, sustaining the financial position of the communities that won them requires maintaining or even increasing incarceration levels. Legislators know this, as do their constituents. There is thus the possibility that sentencing policy is shaped with this set of interests in mind, and that some voters, in advocating legislation that is "tough on crime," are more concerned with their pocketbooks than with ensuring that only those who deserve to be incarcerated are sentenced to prison time.

The fact, however, that this same dynamic is not exclusive to private prisons is hardly a reason for unconcern. To the contrary, it is all the more reason to question the legitimacy of existing sentencing policy.

Why is this an issue for this Commission? To a great extent, the current state of conditions in America's prisons is traceable to extreme overcrowding, a situation stemming from the unprecedented increase in America's prison population over the past two decades. And this increase is itself traceable to major policy shifts in national sentencing policy. Mandatory minimums for drug offenders; three strikes and you're out (particularly the California version, strongly supported by CCPOA); "truth in sentencing"; the decline of indeterminate sentencing and the abolition of parole: all these policies and trends have combined to yield today's phenomenon of mass incarceration.

Would the same policies have been enacted were the development of sentencing policy free

¹⁴See, e.g., Logan, *supra* note 3, at 152-59.

¹⁵See, e.g., Dan Morain & Jenifer Warren, *Battle Looms over Prison Spending in State Budget*, L.A. TIMES, Jan. 22, 2003, at 1 (noting that the "26,000-member prison guards union . . . is among the biggest campaign donors in California, giving \$3.4 million to [California Governor Gray] Davis directly and indirectly since his first run for governor in 1998, including more than \$1 million last year alone").

¹⁶For example, in 1999, the California legislature approved a bill to establish a \$1 million pilot program that would provide alternative sentencing for some nonviolent parole offenders. CCPOA, however, was opposed. The union presumably expressed this opposition to Governor Gray Davis, for despite the widespread bipartisan support the measure enjoyed, Governor Davis—who had received \$2.3 million in contributions from CCPOA during his previous election campaign, vetoed it. See Judith Tannenbaum, *Prison's a Growth Industry*, S.F. CHRONICLE, Sept 27, 1999, at A25.

from the influence of parties viewing incarceration as a strategy for economic development or wealth generation? It is impossible to say. But the fact that we cannot definitively answer this question in the affirmative should give us pause. Whatever we might think of an interest group model of politics, in which individual groups seek to influence policies in ways that further their economic interests, this model is out of place when the issue is criminal punishment. Incarceration is among the most severe and intrusive manifestations of power the state exercises against its own citizens. When the state incarcerates, it strips offenders of their liberty and dignity and consigns them for extended periods to conditions of severe regimentation and physical vulnerability. And the more individuals incarcerated, the more compromised those conditions are likely to be. It is therefore imperative that punishments be imposed parsimoniously and only for legitimate reasons.

The interest group model of politics is deeply entrenched in American political life. It is thus hard even to know what to do with the idea that the use of this model might be inappropriate in the context of criminal sentencing, at least to the extent that advocates seek financial gain rather than punishment for legitimate reasons. My own view is that, in this regard, the Commission could make a major contribution simply by raising the issue, and questioning the notion that sentencing policy is appropriately shaped according to this standard model. Prisons are big business in the United States today, and the more prisons, the bigger the business. This fact alone should make us skeptical of the mass incarceration that currently defines the American penal system – and of the political processes by which this phenomenon came about.

Conclusion

The debate over private prisons has largely been framed as a choice between public prisons and private ones. I have suggested that this is the wrong way to think about the issue. Exploring the problems with private prisons does not vindicate the public system. It instead raises questions about a range of penal practices operative in the prison system in general, practices that we have long taken for granted and thus no longer question. The challenge is to get past the false opposition between public and private. Only then will we recognize the way the study of private prisons operates as a “miner’s canary,” warning us that not just the structure of private prisons but also that of our punishment practices in general may need serious reconsideration.¹⁷

¹⁷See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002).