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## Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom

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# MANAGING A CORRECTIONAL MARKETPLACE: PRISON PRIVATIZATION IN THE UNITED STATES AND THE UNITED KINGDOM

*David E. Pozen*\*

## I. INTRODUCTION

With two of the largest prison populations per capita in the Western world, the United States and the United Kingdom<sup>1</sup> are also global leaders in the privatization of their prison systems. At year-end 2001, privately operated prisons held over 6.5 percent of America's state and federal adult correctional facility population, representing more than 90,000 offenders.<sup>2</sup> And in June 2001, privately operated prisons held almost 9.4 percent of Britain's total adult correctional facility population, representing more than 6,000 offenders.<sup>3</sup> Scotland, Holland, Australia, New Zealand, South Africa,

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<sup>1</sup> "United Kingdom" and "Britain" as used in this paper refer to England and Wales, which maintain a common prison system. Scotland and Northern Ireland have separate prison systems, and are not considered here.

<sup>2</sup> Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, U.S. Department of Justice, *Prisoners in 2001*, BUREAU OF JUSTICE STATISTICS BULL. 1, 8 (Table 9) (July 2002), available at <http://www.ojb.usdoj.gov/bjs/pub/pdf/p01.pdf> (last visited Nov. 5, 2003).

<sup>3</sup> Calculated from HOME OFFICE FOR THE UNITED KINGDOM, PRISON STATISTICS: ENGLAND AND WALES 2001 35 (Table 1.18) (2003) and HM Prison Service, Privately Managed Prisons, at <http://www.hmprisonservice.gov.uk/corporate/dynpage.asp?Page=123> (last visited Nov. 5, 2003). Note that Blakenhurst was still privately operated in June 2001. HM Prison Service, *Prison Service to Run Manchester and Blakenhurst Prisons*, Jan. 12, 2001, at n.2, available at <http://www.hmprisonservice.gov.uk/news/newstext.asp?197> (last visited Nov. 5, 2003). Australia has the greatest proportion of its prisoners in private prisons (about 20 percent), but this represents fewer individuals in such prisons (about 4,000) than in the United States or the United Kingdom. The bulk of the literature on correctional privatization has focused on the United States and the United Kingdom, and the leading corporate operators of prisons have generally come from these two countries, particularly from the United States. See COMPETITION COMMISSION, GROUP 4 FALCK A/S AND THE WACKENHUT CORPORATION: A REPORT ON THE MERGER SITUATION 3.131-3.148 (2002), available at [http://www.competition-commission.org.uk/rep\\_pub/reports/2002/471group4.htm#full](http://www.competition-commission.org.uk/rep_pub/reports/2002/471group4.htm#full) (last visited Nov. 5, 2003).

and Canada have also recently witnessed the advent of private prisons, while the Republic of Ireland, Latvia, Serbia, Malaysia, the Philippines, South Korea, Taiwan, Thailand, Tanzania, Costa Rica, Jamaica, Panama, and several South American countries are all purportedly giving active consideration to the idea.<sup>4</sup> In less than two decades, private prisons have become a significant component of penal theory and administration around the world.

Privatization of prisons can take a variety of forms, spanning from no facility ownership and partial operational administration to total facility ownership and total operational administration by the private contractor. In all existing privatization schemes, the state retains full responsibility for allocating punishment in the sentencing phase, but it delegates the responsibility for delivering imprisonment services to a nongovernmental entity. In theory, "private prisons" could encompass those run by private nonprofit organizations as well as private for-profit ones, but in both the United States and the United Kingdom there are at present no secure correctional facilities for adults run by nonprofits.<sup>5</sup> The debate over private prisons has focused on cases in which for-profit corporations assume complete managerial control over a prison.

It has been quite a debate: since their beginnings in the mid-1980s and the early 1990s, respectively, the prison privatization movements of the United States and the United Kingdom have provoked several rounds of congressional and parliamentary hearings and hundreds of articles discussing their philosophical, organizational, economic, and legal implications.<sup>6</sup> Yet while there

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<sup>4</sup> Richard Harding, *Private Prisons*, in 28 CRIME AND JUSTICE: A REVIEW OF RESEARCH 265, 268-69 (Michael H. Tonry ed., 2001).

<sup>5</sup> In the juvenile sector, by contrast, nonprofit organizations have "played a long and distinguished role in operating [correctional] facilities" in the United States and, to a lesser extent, in the United Kingdom. DOUGLAS C. McDONALD ET AL., ABT ASSOCIATES INC., PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE 5 (1998), available at <http://www.abtassociates.com/reports/priv-report.pdf> (last visited Nov. 5, 2003) (describing nonprofits' role in American juvenile correctional administration); see also MICK RYAN & TONY WARD, PRIVATIZATION AND THE PENAL SYSTEM: THE AMERICAN EXPERIENCE AND THE DEBATE IN BRITAIN 64-67 (1989) (describing nonprofits' role in British juvenile correctional administration). By 1990, almost 90 percent of U.S. states had at least one contract with a private nonprofit corporation to operate a juvenile correctional facility. Robert B. Levinson & William J. Taylor, *ACA Studies Privatization in Juvenile Corrections*, 53 CORRECTIONS TODAY 242, 248 (1991).

<sup>6</sup> Notable scholarly contributions on prison privatization in the United States include: CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS (1990); McDONALD ET AL., *supra* note 5; IRA P. ROBBINS, AMERICAN BAR ASSOCIATION, THE LEGAL DIMENSIONS OF PRIVATE

remains a contingent of vocal critics of private prisons in both countries today, the debate over privatization has lost much of its early ardor and prominence as the industry has reached a level of maturity over the course of the past decade. After the initial flurry of academic and popular commentary on American private prisons in the 1980s, public discussion had largely died down by 1990.<sup>7</sup> Pushed back seven years or so, the literature in Britain experienced a similar recession of interest in the topic. As the number and variety of privately operated prisons have steadily increased, they have come to be seen by many in the United States and the United Kingdom as a natural part of the correctional system. Inaugurated under conservative administrations, private prisons were able to withstand the election of the center-left governments of Bill Clinton and Tony Blair, even though in the latter case the Labour Party had gone on record in the mid-1990s promising that all private prisons would be returned to the public sector once their present contracts expired.<sup>8</sup>

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INCARCERATION (1988); MARTIN P. SELLERS, *THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS* (1993); DAVID SHICHOR, *PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS* (1995); Christine Bowditch & Ronald S. Everett, *Private Prisons: Problems within the Solution*, 4 JUST. Q. 441 (1987); Samuel J. Brakel, "Privatization" in *Corrections: Radical Prison Chic or Mainstream Americana?*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1 (1988); John J. DiIulio, Jr., *What's Wrong with Private Prisons*, 92 PUB. INT. 66 (1988); Brian E. Evans, *Private Prisons*, 36 EMORY L.J. 253 (1987); Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649 (1987); Connie Mayer, *Legal Issues Surrounding Private Operation of Prisons*, 22 CRIM. L. BULL. 309 (1986); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813 (1987); Emanuel S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889 (1987); Mary R. Woolley, *Prisons for Profit: Policy Considerations for Government Officials*, 90 DICK. L. REV. 307 (1985). Notable contributions on privatization in the United Kingdom include: RYAN & WARD, *supra* note 5; Shaheen Borna, *Free Enterprise Goes to Prison*, 26 BRIT. J. CRIMINOLOGY 321 (1986); J. Robert Lilly & Paul Knepper, *An International Perspective on Privatisation of Corrections*, 31 HOWARD J. CRIM. JUST. 174 (1992); J. Robert Lilly & Paul Knepper, *The Corrections-Commercial Complex*, 39 CRIME & DELINQ. 150 (1993); Paul Moyle, *Separating the Allocation of Punishment from Its Administration: Theoretical and Empirical Observations*, 41 BRIT. J. CRIMINOLOGY 77 (2001); Robert G. Porter, *The Privatisation of Prisons in the United States: A Policy That Britain Should Not Emulate*, 29 HOWARD J. CRIM. JUST. 65 (1990); Andrew Rutherford, *British Penal Policy and the Idea of Prison Privatization*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 42 (Douglas C. McDonald ed., 1990); Mick Ryan, *Evaluating and Responding to Private Prisons in the United Kingdom*, 21 INT. J. SOC. L. 319 (1993); Mick Ryan & Tony Ward, *Privatization and the Penal System: Britain Misinterprets the American Experience*, 14 CRIM. JUST. REV. 1 (1989); Richard Sparks, *Can Prisons Be Legitimate?: Penal Politics, Privatization, and the Timeliness of an Old Idea*, 34 BRIT. J. CRIMINOLOGY 14 (1994); Robert P. Weiss, *Private Prisons and the State*, in PRIVATIZING CRIMINAL JUSTICE 24 (Roger Matthews ed., 1989).

<sup>7</sup> Douglas C. McDonald, *Public Imprisonment by Private Means: The Re-emergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia*, 34 BRIT. J. CRIMINOLOGY 29, 31 (1994).

<sup>8</sup> In a March 1995 speech to a prisoners' aid society, Labour's shadow Home Secretary Jack Straw declared that he regarded "the privatisation of the prison service as morally repugnant"

Labour's ultimate acceptance of private prisons provides an indication of how entrenched they have become; when Labour took power in 1997, Richard Harding observed at the time, private prisons were already "a proven option in the UK and . . . integral to the overall system."<sup>9</sup>

However, even as prison privatization has entered the criminological mainstream and the controversy has largely faded from the public eye, nothing resembling consensus has emerged regarding the desirability or even the performance of private prisons. Critics remain adamant that allowing people to profit from punishment is unacceptable on moral or symbolic grounds; they fear the practical consequences of privatization on the quality of prison regimes; and they decry the formation of a "prison-industrial complex" potentially undermining correctional administration and corrupting correctional policy. At the same time, privatization supporters are convinced of its fiscal benefits; they insist private prisons are more accountable and better managed than public prisons; and they think privatization brings much-needed innovation and competitive pressure to a traditionally inefficient, union-heavy industry.

At the cusp of this second phase of prison privatization—in which the terms of the debate have shifted from whether we should allow private prisons to how we can best manage them—it is important to assess the efficacy and effects of the privatization schemes currently in existence. After a decade of steady growth in the United States and the United Kingdom, privately operated prisons can no longer be seen as just an experiment. Policymakers in these countries (and beyond) need to evaluate the successes and failures of their approaches to privatization in light of the alternative administrative models that have been utilized. It is unfortunate, therefore, that in the vast literature on prison privatization there have been "few explicitly comparative works"<sup>10</sup> thus far. A comparative

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and that, "[a]t the expiration of their contracts, a Labour government will bring these [existing private] prisons into proper public control and run them directly as public services." Alan Travis, *Straw Vow to Nationalise 'Repugnant' Private Jails*, THE GUARDIAN, (Manchester), Mar. 8, 1995, at 6.

<sup>9</sup> RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 9 (1997).

<sup>10</sup> Lilly & Knepper, *An International Perspective*, *supra* note 6, at 174. Lilly and Knepper mention only RYAN & WARD, *supra* note 5; Roger Matthews, *Privatization in Perspective*, in PRIVATIZING CRIMINAL JUSTICE 1 (Roger Matthews ed., 1989); and Ryan & Ward, *Privatization and the Penal System*, *supra* note 6. The comparative work of Matthews and Ryan and Ward was

understanding of the history, evolution, and present status of private prisons in the United States and the United Kingdom can help reinvigorate the debate over their appropriate role in a correctional system, and it can help facilitate more informed regulation of all prisons, private and public.

## II. PRIVATE SECTOR INVOLVEMENT IN AMERICAN AND BRITISH CORRECTIONS, THEN AND NOW

Although privatization may appear to be a relatively modern trend in the American and British penal systems, both countries have a long history of private sector involvement in prison management.<sup>11</sup> At various points throughout the nineteenth century, state governments in the United States contracted out the operation of their correctional facilities to private entrepreneurs, who would then utilize convict labor for profit. In 1825, Kentucky became the first state to employ a private contractor to manage its entire correctional facility system, and by the end of the Civil War the majority of southern states had followed suit. In the latter stages of the 1800s, however, private prisons came under attack from a broad coalition of workers who argued against convict labor as unfair competition and from reformers who protested the poor conditions of confinement in private facilities. By the beginning of the twentieth century, the government had assumed responsibility for imprisonment and most other criminal justice functions, and private entrepreneurs no longer managed any adult correctional facilities.

In the United Kingdom, there was a significant private sector role in corrections in the eighteenth century, but the state took over the management of all prisons in the early nineteenth century. Most local authorities then owned and ran the prisons within their jurisdictions until the 1877 Prisons Act centralized the administration of English and Welsh prisons under the London-based Prison Commission, which was absorbed in 1963 as part of the Home

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later augmented by Harding, *Private Prisons*, *supra* note 4 and McDonald, *Public Imprisonment by Private Means*, *supra* note 7.

<sup>11</sup> See generally BLAKE MCKELVEY, *AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS* (1977); Borna, *supra* note 6; John G. DiPiano, *Private Prisons: Can They Work? Panopticon in the Twenty-first Century*, 21 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 171 (1995).

Office.<sup>12</sup> Despite Jeremy Bentham's persistent advocacy from 1787 to 1811 for privately run prisons he called Panopticons, he was ultimately unable to persuade the governments of Pitt and Younger to implement his scheme. Since the decisive rejection of Bentham's plan by a parliamentary select committee in 1811, the United Kingdom has, by and large, subscribed to a model of public management "involving some unsalaried people of reputed probity (e.g., visiting magistrates) and a large proportion of publicly salaried staff. This came about because it was assumed that the state alone was competent to prevent neglect and cruelty and to create and maintain reformatory systems of prison discipline."<sup>13</sup>

Privatization reemerged in prison management when American municipal and state governments began to contract with private firms to run county jails and state prisons in the mid-1980s. After the demise of privately operated prisons at the end of the nineteenth century, federal and state governments in the United States had continued to employ private companies to provide a variety of specific services to correctional facilities such as food production, educational programs, vocational training, and counseling.<sup>14</sup> Since the 1960s, the Federal Bureau of Prisons had been contracting with private firms to run community treatment centers and halfway houses to which federal prisoners were transferred prior to parole, and since 1979 the Immigration and Naturalization Service had been contracting with private firms to run detention centers for suspected illegal immigrants. These developments, in low-security environments at the fringes of the U.S. penal system, "provoked little controversy or even notice."<sup>15</sup> The return to the full-fledged management of correctional facilities by private firms, however, aroused an immediate reaction. Congress held hearings on prison privatization in 1986, and almost every criminal justice professional association took a stand on the issue. Despite the protests of many, privatization in the United States has continued apace since then, with the capacity of private secure adult correctional facilities

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<sup>12</sup> The Home Office managed British prisons directly from 1963 until 1993, when the modern Prison Service was instituted.

<sup>13</sup> Bill Forsythe, *Privatization and British Prisons—Past and Future*, 73 PRISON SERVICE J. 35, 36 (1989).

<sup>14</sup> CAMILLE G. CAMP & GEORGE M. CAMP, U.S. DEPARTMENT OF JUSTICE, PRIVATE SECTOR INVOLVEMENT IN PRISON SERVICES AND OPERATIONS 6 (1984).

<sup>15</sup> McDonald, *Public Imprisonment by Private Means*, *supra* note 7, at 30.

increasing 856 percent between 1991 and 1998.<sup>16</sup> By the end of 1999, fourteen corporations were operating over 150 private correctional facilities for adults in the United States,<sup>17</sup> earning combined annual revenues in excess of a billion dollars.

The (re-)privatization of prisons came slightly later to the United Kingdom, officially beginning in 1991 when Group 4 Remand Services Limited (now Group 4 Prison Services Limited) won the contract to run the new Wolds remand prison, which opened in 1992. Proposals for private prisons had first surfaced in the United Kingdom in 1984 and 1985,<sup>18</sup> though like its American counterpart the British government had been contracting with private firms for the detention of suspected illegal immigrants since 1970. After a visit to private prisons in the United States, the Home Affairs Committee of the House of Commons recommended in March 1987 an experiment with the private management and construction of custodial institutions.<sup>19</sup> This report was followed by a Home Office Green Paper<sup>20</sup> and a government-commissioned consulting study<sup>21</sup> that both recommended contracting with private firms to design, construct, and operate remand prisons, and another Green Paper<sup>22</sup> in 1990 that adopted most of the consultants' recommendations. The Criminal Justice Act 1991 provided enabling legislation for prison privatization, granting the Home Office the power to contract out the management of new prisons for unsentenced (remand) inmates. This act was extended in 1992 to encompass sentenced prisoners as well,<sup>23</sup> and again in 1993 to enable the contracting out of

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<sup>16</sup> GAYLENE STYVE ARMSTRONG, PRIVATE VS. PUBLIC OPERATION OF JUVENILE CORRECTIONAL FACILITIES 2 (2001).

<sup>17</sup> Charles W. Thomas, *Private Adult Correctional Facility Census: A "Real-Time" Statistical Profile, December 31, 1999* (1999), at <http://www.crim.ufl.edu/pcp/census/1999/> (last visited Nov. 5, 2003).

<sup>18</sup> ADAM SMITH INSTITUTE, *THE OMEGA FILE: JUSTICE POLICY* (1984); SEAN MCCONVILLE & ERYL HALL-WILLIAMS, *TAWNEY SOCIETY, CRIME AND PUNISHMENT: A RADICAL RETHINK* (1985).

<sup>19</sup> HOME AFFAIRS COMMITTEE OF THE HOUSE OF COMMONS, *FOURTH REPORT: CONTRACT PROVISION OF PRISONS* (1987).

<sup>20</sup> HOME OFFICE FOR THE UNITED KINGDOM, *PRIVATE SECTOR INVOLVEMENT IN THE REMAND SYSTEM* (1988).

<sup>21</sup> DELOITTE, HASKINS & SELLS, *A REPORT TO THE HOME OFFICE ON THE PRACTICALITY OF PRIVATE SECTOR INVOLVEMENT IN THE REMAND SYSTEM* (1989).

<sup>22</sup> HOME OFFICE FOR THE UNITED KINGDOM, *CRIME, JUSTICE AND PROTECTING THE PUBLIC* (1990).

<sup>23</sup> Criminal Justice Act 1991 (Contracted Out Prisons) Order 1992.



existing prisons.<sup>24</sup> By April 1994 there were three private prisons holding inmates in the United Kingdom, at Wolds, Blakenhurst, and Doncaster. Following these initial three “management only” private prisons, the Prison Service moved to a so-called DCMF (Design, Construct, Manage, and Finance) model of privatization, with all new private prisons built and operated by contractors under the Private Finance Initiative. Today there are nine private prisons out of 138 total<sup>25</sup> in the United Kingdom, and the Prison Service is currently receiving bids for two more.<sup>26</sup>

The British prison system, overseen by the Home Office and carried out by the Prison Service, is run entirely by central government and financed out of general taxation. The United States, by contrast, has a three-tier system of prison administration: the Federal Bureau of Prisons oversees federal prisons, each state (and the District of Columbia) oversees its own prisons, and most of the 3,000 or so counties and some cities run their own local jails.<sup>27</sup> The American correctional system, in addition to being much larger than the British system, thus features a much greater degree of diversity and fragmentation.<sup>28</sup> In the United States, 12.3 percent of federal prisoners and 5.8 percent of state prisoners were being held in privately operated facilities at the end of 2001.<sup>29</sup> Private state prisons are concentrated in the South and the West, where organized labor is weak and fiscal conservatism strong, with Texas holding the most inmates in such facilities by far (16,331 in 2001), followed by Oklahoma (6,658), Georgia (4,561), California (4,452), and Florida (3,995).<sup>30</sup> At midyear 1999, 2.3 percent of jail inmates in the United

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<sup>24</sup> Criminal Justice Act 1991 (Contracted Out Prisons) Order 1993.

<sup>25</sup> This figure does not include the Immigration Removal Centre Haslar.

<sup>26</sup> HM Prison Service, *Privately Managed Prisons*, *supra* note 3.

<sup>27</sup> Jails in the United States hold people awaiting trial or sentencing or serving a sentence of typically less than one year. Most jails are under the control of independently elected sheriffs. JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, CENSUS OF JAILS, 1999 5 (2001).

<sup>28</sup> Beyond adult corrections, the American prison system also exhibits more diversity and fragmentation—and more privatization—in its treatment of juvenile offenders. In October 1999, 1,794 of the 3,712 residential juvenile correctional facilities in the United States were privately operated. Melissa Sickmund, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, *Juvenile Offenders in Residential Placement: 1997-1999*, 7 JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES 1, 1 (Mar. 2002).

<sup>29</sup> Harrison & Beck, *supra* note 2, at 8 (Table 9).

<sup>30</sup> *Id.* at 8 (Table 9).

States, or 13,814 individuals, were also being held in privately operated facilities.<sup>31</sup>

### III. WHY PRIVATIZATION?

The prison privatization movements of the United States and the United Kingdom were driven by a common set of factors—concerns over rapidly rising incarcerated populations and their associated costs, problems with prison overcrowding and perceptions of a crisis in corrections, and the government’s ideological preference for encouraging free enterprise and diminishing the role of unionized labor—but the relative weight of these factors varied between the two countries. In the United States, strains to the prison system created by the growth of the inmate population were more severe, and the desire of public officials to save money and expand capacity more quickly through privatization was stronger. In the United Kingdom, the New Right’s broad commitment to privatizing government services and its desire to undermine the Prison Officers’ Association were key additional factors in stimulating private prisons. Lobbying by U.S.-based correctional corporations may have helped open up the British market for private prisons to some extent, but there is no evidence that these efforts shaped policymaking, as the Home Office undertook prison privatization in a highly cautious, controlled manner over many years.<sup>32</sup>

More broadly, although the United Kingdom’s privatization movement paralleled and drew on the United States’ movement in a number of significant ways, it remained a separate phenomenon. When it became clear that the United Kingdom would begin to experiment with private prisons, many commentators echoed Robert Porter’s pronouncement that the “time-honoured cliché that what happens in America today happens in Britain tomorrow would seem to be ringing true once again.”<sup>33</sup> Yet the amount of direct policy transfer was small, and the traffic of ideas was always dialectic, a two-way flow. For example, the United Kingdom’s Adam Smith Institute,

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<sup>31</sup> STEPHAN, *supra* note 27, at 6 (Table 9).

<sup>32</sup> See Jamie Bennett, *Private Prisons and Public Benefit: The Impact and Future of Privately Operated Prisons*, 135 PRISON SERVICE J. 40, 40-43 (2001); McDonald, *Public Imprisonment by Private Means*, *supra* note 7, at 32-35, 42.

<sup>33</sup> Porter, *supra* note 6, at 65.

though supported with American money from the Heritage Foundation, also maintained a U.S. office that promoted British free-market correctional initiatives to the American public.<sup>34</sup> British politicians did not simply transplace American ideas and policies into the U.K. correctional system, nor could they have given its vastly different structure from that of the United States.<sup>35</sup> After the initial presentation of the privatization option by the Home Affairs Committee,<sup>36</sup> the Home Office spent over four years before inviting private firms to tender for the first management contract in 1991. In that interim period, it sponsored a number of studies and hearings to assess the possible costs and benefits of private prisons,<sup>37</sup> and the approach it ultimately took to privatization—with output-based contracts, multiple levels of monitoring, and market testing for existing Prison Service facilities—departed from the American model in substantive ways. Thus, while the United States' experience with prison privatization in the 1980s set an important precedent and helped launch the idea onto the British political agenda, it did not in and of itself constitute a motivation or guideline for privatization in the United Kingdom.

A. *Pragmatic Considerations*

As incarcerated populations in the United States and the United Kingdom increased throughout the last three decades of the twentieth century, public prisons found themselves increasingly unable to cope. In the United States, rising crime rates, stricter sentencing laws, the War on Drugs, and efforts to combat illegal immigration all helped contribute to a massive increase in the prisoner population. Between 1973 and 1990, the number of

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<sup>34</sup> See RYAN & WARD, *supra* note 5, at 45.

<sup>35</sup> See discussion in Section II *supra*.

<sup>36</sup> HOME AFFAIRS COMMITTEE, *supra* note 19. This report cites the committee members' recent experience visiting private prisons in the United States as encouraging evidence of the potential role for private contractors in the British prison system. The committee members' reactions to what they saw on their visit reveal how the impact of America's privatization example was mediated in the United Kingdom by politicians' party affiliations and beliefs: all four Labour members of the committee voted against adopting the report, while all seven Conservative members of the committee voted in favor of it. See Forsythe, *supra* note 13, at 35.

<sup>37</sup> See, e.g., DELOITTE, HASKINS & SELLS, *supra* note 21; HOME OFFICE FOR THE UNITED KINGDOM, PRIVATE SECTOR INVOLVEMENT IN THE REMAND SYSTEM (1988); HOME OFFICE FOR THE UNITED KINGDOM, CRIME, JUSTICE AND PROTECTING THE PUBLIC (1990); HOME OFFICE FOR THE UNITED KINGDOM, COURT ESCORTS, CUSTODY AND SECURITY: A DISCUSSION PAPER (1990).

prisoners under custody at any one time in the United States grew nearly fourfold.<sup>38</sup> Many American prisons became overcrowded as a result, which created “acute difficulties in maintaining tolerable regimes or minimum standards.”<sup>39</sup> In the 1980s, federal courts found large numbers of correctional facilities, and even entire state prison systems, to be in violation of the Constitution’s prohibition of “cruel and unusual punishment” because of overcrowding and inadequate conditions of confinement, so that by mid-1991, 40 states were operating prisons found by the courts to have unconstitutional conditions.<sup>40</sup>

In the United Kingdom, increasing prisoner populations also led to a severe overcrowding problem in the 1980s;<sup>41</sup> in the early 1980s, for example, a third of the offenders in custody were sharing with one or two others cells designed for only one person,<sup>42</sup> and in June 1989 Wadsworth prison in London had only eight cells with access to sanitation at night versus 1,149 without access.<sup>43</sup> The British remand population nearly doubled between 1979 and 1988,<sup>44</sup> and conditions were particularly deplorable in the remand prisons.<sup>45</sup> Often, they were so overcrowded that prisoners had to be kept in police cells, forcing police officers to do double duty as prison officers.<sup>46</sup>

In both countries, then, rising incarcerated populations helped lead to overcrowding and deteriorating conditions of confinement, which in turn led to demands for expanded prison capacity and

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<sup>38</sup> McDonald, *Public Imprisonment by Private Means*, *supra* note 7, at 37. See also ROBYN L. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PRISONERS IN 1990 (1991). A brief write-up of Cohen’s study is available at <http://www.druglibrary.org/schaffer/govpubs/prsn90.htm> (last visited Nov. 5, 2003).

<sup>39</sup> Harding, *Private Prisons*, *supra* note 4, at 269.

<sup>40</sup> McDonald, *Public Imprisonment by Private Means*, *supra* note 7, at 37.

<sup>41</sup> By 1990, England alone was imprisoning more people than any other Western European country. Lilly & Knepper, *An International Perspective*, *supra* note 6, at 180. The United Kingdom’s prisoner population leveled off in the early 1990s, but strong growth resumed thereafter. HOME OFFICE, *supra* note 3, at 4 (Figure 1.1), 6 (Figure 1.3), available at [www.official-documents.co.uk/document/cm57/5743/5743.htm](http://www.official-documents.co.uk/document/cm57/5743/5743.htm) (last visited Nov. 5, 2003).

<sup>42</sup> *Id.* at 180.

<sup>43</sup> *Id.*

<sup>44</sup> A. KEITH BOTTOMLEY ET AL., RESEARCH AND STATISTICS DIRECTORATE, HOME OFFICE FOR THE UNITED KINGDOM, MONITORING AND EVALUATION OF WOLDS REMAND PRISON AND COMPARISONS WITH PUBLIC-SECTOR PRISONS, IN PARTICULAR HMP WOODHILL 9 (1997).

<sup>45</sup> Reportedly, a 1991 Council of Europe probe condemned the standards of many British remand prisons as “inhuman.” Lilly & Knepper, *An International Perspective*, *supra* note 6, at 189 n.17.

<sup>46</sup> Rutherford, *supra* note 6, at 44-46.

regime improvement. Privatization emerged as a response to both of these demands. As the United States and the United Kingdom each undertook one of the biggest prison building programs in its history during the 1980s, recruiting the private sector in the effort offered a chance to expand capacity more quickly and possibly more cheaply.<sup>47</sup> In the United Kingdom, the 1988 Green Paper on remand prisons, for example, argued that private contractors could add “a new dimension of urgency and flexibility to the prison building programme.”<sup>48</sup> Private contractors could add even more urgency and flexibility in the United States because most U.S. state governments finance prison construction through bond issues, which are usually subject to voter approval by referendum. Throughout the late 1970s and early 1980s, citizens often voted down prison bonding proposals even as they were simultaneously demanding that more criminals be imprisoned.<sup>49</sup> State officials therefore began to bypass voter referenda for bond issues, resorting instead to lease-buyback arrangements with private firms for the design, construction, management, and financing of prisons, which allowed rent payments to be paid out of the operational state budget instead of capital accounts.<sup>50</sup> Because the United Kingdom’s centralized prison system draws its financial resources from general taxation, there is no need for express voter approval of prison-related expenditures and so this ease-of-financing motivation for private prison construction was not pertinent there. Yet by the mid-1990s the DCMF model had won out in the United Kingdom too, as prison administrators on both sides of the Atlantic sought to avoid up-front capital outlays, induce price competition among bidding contractors, and shift design and construction risks to the private sector.<sup>51</sup>

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<sup>47</sup> Expansion of prison capacity had come at a large financial cost in both countries. In the United States, for instance, federal and state prison systems allocated 14.5 percent more money for new facilities or additions in 1991-92 than they had in 1989-90, while in the United Kingdom, Home Office spending on jails increased almost 55 percent from 1988-89 to 1989-90. Lilly & Knepper, *An International Perspective*, *supra* note 6, at 180.

<sup>48</sup> HOME OFFICE, *supra* note 20, at para. 9.

<sup>49</sup> See Harding, *Private Prisons*, *supra* note 4, at 270; McDonald, *Public Imprisonment by Private Means*, *supra* note 7, at 32.

<sup>50</sup> Although some of the earliest private prison arrangements in the United States involved only the private sector management of prisons built and owned by the state, the DCMF contract soon became the standard model. In McDonald et al.’s 1997 inventory of private prisons in the U.S., 50 of the 84 facilities were privately owned and subject to DCMF contracts. MCDONALD ET AL., *supra* note 5, at 20.

<sup>51</sup> See Harding, *Private Prisons*, *supra* note 4, at 270-71.

In addition to easier (for U.S. states) and potentially cheaper financing of new prison construction, many correctional officials in both countries believed privatization would yield cost savings through reduced operational expenditure. Early government-sponsored reports on prison privatization in the United States<sup>52</sup> and the United Kingdom<sup>53</sup> put forward the standard argument that private firms' profit motives would allow them to carry out imprisonment tasks more cost-efficiently. Correctional agencies expected these efficiency gains from contracting to save them money every year. Some U.S. states made this expectation explicit, as in Florida's statutory requirement that its Correctional Privatization Commission "may not enter into a contract . . . unless [it] determines that the contract or series of contracts in total for the facility will result in a cost savings to the state of at least seven percent over the public provision of a similar facility."<sup>54</sup>

In light of the deteriorating conditions of confinement in the public prisons, privatization also offered the possibility for prison reform, though this argument featured much more prominently in the British debate than in America's.<sup>55</sup> There were many variants of this argument, but generally privatization advocates argued that the management experience, results-driven culture, and enhanced accountability mechanisms of private contractors would enable them to deliver prison services of higher quality, as well as lower cost. Although the Prison Service did not face court orders to improve prison conditions as did many U.S. states, these arguments gained traction in the United Kingdom after a number of disturbances rocked its public prisons throughout the 1980s, culminating in the nearly month-long riot in 1990 at Risley—the "notoriously squalid"<sup>56</sup> remand prison near Manchester. The Risley riot cemented the sense of a crisis in corrections and prompted one of the most thorough

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<sup>52</sup> JOAN MULLEN ET AL., NATIONAL INSTITUTE OF JUSTICE, *THE PRIVATIZATION OF CORRECTIONS* (1985).

<sup>53</sup> DELOITTE, HASKINS & SELLS, *supra* note 21.

<sup>54</sup> Fla. Stat. Ann. § 957.07 (West 1993).

<sup>55</sup> That privatization will lead to positive changes in prisoner treatment and prison conditions is, of course, not a foregone conclusion; many have argued it will do just the opposite. For a good summary of the arguments on either side of this debate, see LOGAN, *supra* note 6.

<sup>56</sup> Tony Ward, *Privatization in the British and American Penal Systems*, 4 *EUROCRIMINOLOGY* 51, 55 (1992).

reviews ever of the British prison system, conducted by Lord Woolf.<sup>57</sup> It also served to bolster the government's commitment to better care for inmates, especially in remand prisons, through whatever means possible. When invitations to tender for the running of The Wolds remand prison were issued to private firms in 1991, the accompanying Home Office document emphasized "the opportunity this presented for providing a constructive regime and for developing a fresh approach to the treatment of remand prisoners."<sup>58</sup> By equating privatization with better performance, privatization advocates in the United Kingdom were able to assume the moral high ground in the debate over prison reform by claiming that critics who argued no one ought to profit from punishment were placing an ideological preference for the public sector over the very real needs of prisoners.<sup>59</sup>

In the United Kingdom, the idea of cross-fertilization—that having a private sector role would force the public sector to improve its performance—became institutionalized in the 1990s in the form of "market testing."<sup>60</sup> After the first two private prison contracts were awarded for The Wolds and Blakenhurst, the Home Office began to allow, and sometimes force, the Prison Service to compete with private firms for management contracts, thereby testing its market viability as a prison owner/operator in a consistent, explicit way. As Home Secretary Kenneth Clarke argued in a newspaper editorial at the time, the Home Office believed that doing so would yield cross-fertilization benefits: "[m]arket testing will . . . cause the prison

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<sup>57</sup> LORD JUSTICE WOOLF, PRISON DISTURBANCES, APRIL 1990: REPORT OF AN INQUIRY BY THE RT. HON. LORD JUSTICE WOOLF AND HIS HON. JUDGE STEPHEN TUMIN (1991).

<sup>58</sup> BOTTOMLEY ET AL., *supra* note 44, at 10. This tender document thus evoked the Home Affairs Committee's argument in the United Kingdom's first government report on prison privatization that the "problems of out of date and overcrowded prisons" could not be overcome by the present system and "given the squalor of the state provided system [of remand] there is no reason to suppose that privately managed institutions could not improve conditions to the benefit of inmate and public alike." HOME AFFAIRS COMMITTEE, *supra* note 19, at vii.

<sup>59</sup> See, e.g., PETER YOUNG, ADAM SMITH INSTITUTE, THE PRISON CELL: THE START OF A BETTER APPROACH TO PRISON MANAGEMENT (1987); Kenneth Clarke, *Prisoners with Private Means*, THE INDEPENDENT, Dec. 22, 1992, at 17; Max Taylor & Ken Pease, *Private Prisons and Penal Purpose*, in PRIVATIZING CRIMINAL JUSTICE 178 (Roger Matthews ed., 1989).

<sup>60</sup> McConville had been the first to discuss cross-fertilization as a potential benefit of private prisons. Sean McConville, *Aid from Industry? Private Corrections and Prison Overcrowding*, in AMERICA'S CORRECTIONAL CRISIS 221, 240 (Stephen D. Gottfredson & Sean McConville eds., 1987). In the United States, request-for-proposal competition for prison management has typically been limited to private firms.

service to examine its own performance in the light of competitive pressure and encourage the spread of those reforms across public sector prisons much more quickly than would otherwise have been the case.”<sup>61</sup>

In the United States, by contrast, the issue of improving prisons and correctional regimes did not play a significant role in the privatization debate.<sup>62</sup> Following the “nothing works” doctrine made famous by Lipton, Martinson, and Wilks,<sup>63</sup> widespread disillusionment over the potential for prisoner rehabilitation had diminished the public’s interest in prison services and increased its interest in deterrence and (especially) incapacitation.<sup>64</sup> Accordingly, the improvement of prisons “was seen as a possible and desirable, but not essential, by-product of better and more cost-effective [private] management.”<sup>65</sup> In the American privatization discourse, private prisons were conceived of as supplementary to the overstretched existing facilities, not as partners in the system that could provoke widespread reforms.<sup>66</sup>

#### *B. Political and Ideological Considerations*

The prison privatization movements of the United States and the United Kingdom each reflected a combination of pragmatic and political/ideological motivations, but in the United Kingdom political/ideological motivations loomed larger than they did in the United States. In the face of rising crime rates, both countries’ governments were concerned to look tough on crime in the 1980s

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<sup>61</sup> Clarke, *supra* note 59, at 17.

<sup>62</sup> McDonald et al. administered a survey on the last day of 1997 in which they asked 28 directors of U.S. state correctional agencies that were contracting with private firms to rank their objectives in doing so. Only one director ranked “[i]mproving caliber of services” as his first objective, while fourteen directors and eight directors ranked “[r]educe overcrowding” and “[o]perational cost savings,” respectively, as their first objective. MCDONALD ET AL., *supra* note 5, at 15-17.

<sup>63</sup> DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975).

<sup>64</sup> See generally FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* (1995); Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1 (2003); Norval Morris, *The Contemporary Prison: 1965-Present*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 227 (Norval Morris & David J. Rothman eds., 1995).

<sup>65</sup> Harding, *Private Prisons*, *supra* note 4, at 272.

<sup>66</sup> See Sparks, *supra* note 6.



and early 1990s, and they therefore supported stiffer sentences and the building of more prisons.<sup>67</sup> More generally, the Republican platform under Ronald Reagan and George H. W. Bush and the Conservative (New Right) platform under Margaret Thatcher and John Major stressed the virtues of competition, fiscal restraint, and an ethic of “managerialism,” with a focus on efficiency and outputs, rather than the old ethic of “bureau-professionalism.”<sup>68</sup> These values translated into an attachment to private sector involvement in service provision; Thatcher’s government, in particular, had what one commentator described as “a pathological . . . antipathy to the public sector *per se*, accompanied by a largely untested belief that the quest for profits automatically increased the economic efficiency of virtually any enterprise.”<sup>69</sup> The first wave of privatization under Thatcher primarily took the form of denationalization, with the state-owned enterprises British Aerospace, British Airways, British Gas, British National Oil, and British Telecom all sold to private buyers. Prison privatization occurred in the second wave of British privatization, in which the Thatcher administration challenged the government’s monopoly over ostensibly core functions in fields like education, health care, and corrections. Because the deprivation of a citizen’s liberty constitutes such an awesome manifestation of the state’s power and because the degree of control prisons exert over their inmates is so great, many agreed with Charles Logan that private prisons represented in the 1980s—and still represent today—“an especially significant part of the broader privatization movement.”<sup>70</sup>

They also represented an especially significant victory for the Thatcher administration. With a smaller, more slowly growing incarcerated population than the United States (by proportional as well as absolute measures), with less prison overcrowding and less legal pressure to reduce it, and with weaker fiscal incentives in favor of private prison construction, the United Kingdom did not have as strong pragmatic reasons for privatizing prisons as did the United States. Instead, as Mick Ryan and Tony Ward assert, prison

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<sup>67</sup> See Ward, *supra* note 56, at 51-55.

<sup>68</sup> See generally DESMOND S. KING, *THE NEW RIGHT: POLITICS, MARKETS AND CITIZENSHIP* (1987); Ruth Levitas, *Competition and Compliance: The Utopias of the New Right*, in *THE IDEOLOGY OF THE NEW RIGHT* (Ruth Levitas ed., 1986).

<sup>69</sup> HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY*, *supra* note 9, at 19.

<sup>70</sup> LOGAN, *supra* note 6, at 4.

privatization came “on the agenda because the New Right want[ed] the state to do less as a matter of principle.”<sup>71</sup> Under Reagan and Bush, the United States also experienced a marked trend towards privatization in the 1980s and early 1990s, and this helped establish a climate conducive to the introduction and expansion of private prisons.<sup>72</sup> However, with a federal government under divided Republican and Democratic control and with responsibility for prison management diffused over literally thousands of county, state, and federal agencies, the administrations’ ideological attachment to privatization could not transform the whole prison system in the way that it could in the United Kingdom. Prison privatization came about in the United States as the product of dozens of disparate cost-benefit calculations by prison administrators, perhaps influenced but certainly not led by a governing ideology. In the United Kingdom, on the other hand, Conservative members of parliament had to press the case for private prisons in a single, public forum in the face of fierce opposition.<sup>73</sup> As a result, the debate over prison privatization in the United Kingdom was more transparent, more concentrated, and more overtly political. It served as a sort of ideological battleground on which the New Right challenged some of the most fundamental assumptions about state provision while the Labour Party and the penal lobby defended one of the few remaining purely public services from private sector encroachment.

Further evidence for the ideological tenor of Britain’s prison privatization movement can be found in the influence of the Adam Smith Institute (ASI), a right-wing think tank that came to prominence during Thatcher’s tenure. Whereas in the United States

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<sup>71</sup> RYAN & WARD, *supra* note 5, at 2.

<sup>72</sup> Most concretely, the President’s Commission on Privatization, convened by Reagan’s executive order in 1987, argued that “contracting should be regarded as an effective and appropriate form for the administration of prisons and jails at the federal, state, and local levels” and recommended that “proposals to contract for the administration of entire facilities at the federal, state, or local level ought to be seriously considered.” PRESIDENT’S COMMISSION ON PRIVATIZATION, *PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT*, REPORT OF THE PRESIDENT’S COMMISSION ON PRIVATIZATION 149-50 (1988).

<sup>73</sup> Virtually the entire British penal lobby—from the Prison Service, to the Prison Officers’ Association, to the prisoners’ union PROP, to the Prison Reform Trust, to the Howard League—opposed privatization. See RYAN & WARD, *supra* note 5, at xii. There were many opponents of prison privatization in the United States as well, such as the National Sheriffs’ Association, the American Federation of State, County and Municipal Employees, the National Prison Project of the ACLU, and the American Bar Association, but there were also many U.S. correctional administrators who supported privatization. *Id.* at xii, 31-34.

the initial stimulus for private prisons came mainly from entrepreneurs who were promoting their own correctional-services ventures, in the United Kingdom the earliest proposals for private prisons came from pressure groups like the ASI and policy reformers like Sean McConville and Eryl Hall-Williams.<sup>74</sup> In its 1984 report, *The Omega File: Justice Policy*,<sup>75</sup> the ASI made a zealous case for prison privatization and put the issue on Britain's political agenda for the first time. The organization continued to play a leading role in promoting prison privatization throughout the 1980s.<sup>76</sup> Its ideas were picked up by the Conservative Study Group on Crime,<sup>77</sup> and they were aggressively championed within the Conservative Party by MP Michael Forsyth.<sup>78</sup> The ASI lent the notion of private prisons a measure of intellectual legitimacy in the United Kingdom, and its single-minded push for privatization created a sense of urgency and a flow of policy proposals on which politicians could draw.

The British New Right's interest in private prisons also had a more concrete motivation: it saw them as a tool to help break the power of the Prison Officers' Association (POA), one of the few trade unions that had not already been marginalized since Thatcher came to power in 1979.<sup>79</sup> Anne Owers, the current HM Chief Inspector of Prisons, reflects that "twenty years ago, the POA *ran* prisons. . . . Their staffing levels could sometimes be ridiculously high."<sup>80</sup> Richard Harding has documented the POA's long-standing obstructionism to meaningful prison reforms through artificial enhancements of overtime payments and through resistance to the introduction of rehabilitative and vocational programs.<sup>81</sup> The New

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<sup>74</sup> See ADAM SMITH INSTITUTE, *supra* note 18; MCCONVILLE & HALL-WILLIAMS, *supra* note 18.

<sup>75</sup> ADAM SMITH INSTITUTE, *supra* note 18.

<sup>76</sup> RYAN & WARD, *supra* note 5, at 44-47; Ward, *supra* note 56, at 51.

<sup>77</sup> See CONSERVATIVE STUDY GROUP ON CRIME, PRISONS (1986).

<sup>78</sup> RYAN & WARD, *supra* note 5, at 47.

<sup>79</sup> The POA, unsurprisingly, opposed privatization from the start. See *id.* at xii, 51; Porter, *supra* note 6, at 74. After sending representatives to make a tour of private prisons in the United States, the POA submitted a memorandum to the Home Affairs Committee of the House of Commons in February 1987 that attacked the conditions of confinement in the prisons it had visited and questioned their corporate operators' long-term motivations. See Porter, *supra* note 6, at 76.

<sup>80</sup> Anne Owers, unpublished, personal communication following speaking event at Trinity College, Oxford University (May 21, 2003) (on file with author).

<sup>81</sup> HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 9, at 20, 134-36. Some have recently suggested that the POA may have tried to undermine the performance of certain private prisons in the 1990s by creating bureaucratic obstacles and withholding

Right's general ideological aversion to unionized labor was thus reinforced in the case of the POA by specific complaints about the union's historic behavior, and in its quest to break the POA's influence the government found support, at least in the beginning, from prison reformers who saw the POA as an obstacle to progress.<sup>82</sup> In the United States, the relative weakness of unions, even in public sector employment, meant that this issue never became as important as in the United Kingdom. American correctional officials were interested in gaining more control over their labor force, but they saw this as an ancillary benefit of privatization, not as a compelling rationale in its own right.

#### IV. PUBLIC VERSUS PRIVATE RESULTS

While researchers in the United States and the United Kingdom have conducted numerous comparisons between public and private prisons, they have focused almost exclusively on cost and quality-of-confinement measures and their findings have tended to be inconclusive.<sup>83</sup> Recidivism outcomes and prisoners' opinions have

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resources. LORD LAMING, TARGETED PERFORMANCE INITIATIVE WORKING GROUP, MODERNISING THE MANAGEMENT OF THE PRISON SERVICE (2000); DAVID RAMSBOTHAM, HM INSPECTORATE OF PRISONS, HOME OFFICE FOR THE UNITED KINGDOM, INSPECTION REPORT: HM PRISON BUCKLEY HALL (Feb. 2000). If true, such behavior would constitute a serious and pernicious form of obstructionism.

<sup>82</sup> See HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 9, at 20.

<sup>83</sup> Representative examples from the United States include: WILLIAM G. ARCHAMBEAULT & DONALD R. DEIS, JR., COST EFFECTIVENESS COMPARISONS OF PRIVATE VERSUS PUBLIC PRISONS IN LOUISIANA: A COMPREHENSIVE ANALYSIS OF ALLEN, AVOUELLES, AND WINN CORRECTIONAL CENTERS (1996); HARRY HATRY ET AL., THE URBAN INSTITUTE, COMPARISON OF PRIVATELY AND PUBLICLY OPERATED CORRECTIONAL FACILITIES IN KENTUCKY AND MASSACHUSETTS (1989); CHARLES H. LOGAN, NATIONAL INSTITUTE OF JUSTICE, WELL KEPT: COMPARING QUALITY OF CONFINEMENT IN A PUBLIC AND A PRIVATE PRISON (1991); CHARLES W. THOMAS, ARIZONA DEPARTMENT OF CORRECTIONS, COMPARING THE COST AND PERFORMANCE OF PUBLIC AND PRIVATE PRISONS IN ARIZONA (1997) *available at* <http://web.crim.ufl.edu/pcp/research/Ariz.html> (last visited Nov. 5, 2003); Samuel J. Brakel, *Prison Management, Private Enterprise Style: The Inmates' Evaluation*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175 (1988); Charles H. Logan & Bill W. McGriff, *Comparing Costs of Public and Private Prisons: A Case Study*, 216 NIJ RESEARCH IN BRIEF REPORTS 2 (1989); Douglas C. McDonald, *The Costs of Operating Public and Private Correctional Facilities*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 86 (Douglas C. McDonald ed., 1990). Representative examples from the United Kingdom include: BOTTOMLEY ET AL., *supra* note 44; ISABELLE PARK, RESEARCH AND DEVELOPMENT STATISTICS, HOME OFFICE FOR THE UNITED KINGDOM, REVIEW OF COMPARATIVE COSTS AND PERFORMANCE OF PRIVATELY AND PUBLICLY OPERATED PRISONS 1998-99 (2000), *available at* <http://www.homeoffice.gov.uk/rds/pdfs/hosb600.pdf> (last visited Nov. 5, 2003); JO WOODBRIDGE, RESEARCH AND DEVELOPMENT STATISTICS, HOME OFFICE FOR THE UNITED KINGDOM, REVIEW OF COMPARATIVE COSTS AND PERFORMANCE OF PRIVATELY AND PUBLICLY

typically been ignored, and the empirical analysis has often been subject to serious methodological concerns. In a representative lament, one oft-cited survey of research on prison privatization in the United States found most of the studies comparing public and private facilities to be “fundamentally flawed,”<sup>84</sup> and in a similar survey Kenneth Avio noted, “[t]o date, the empirical evidence comparing private and public management of [correctional] facilities has been scant and somewhat unsatisfactory.”<sup>85</sup> Given these weaknesses in the comparative literature, it is difficult to reach any definitive conclusions about how successful prison privatization has been in the United States and the United Kingdom. What evidence we have, however, suggests that private prisons have a decent if patchy record in the United States, while in the United Kingdom their performance has at least equalled and probably outpaced that of the public sector.<sup>86</sup>

On one of the most conspicuous measures of prison performance—rates of escapes—private prisons in both countries seem to be doing at least as well as their public counterparts.<sup>87</sup> In the United Kingdom, private prisons have had similar rates of intra-prison assaults to those in public prisons.<sup>88</sup> There have, however, been small-scale riots at Parc and Doncaster prisons in the U.K., and several major riots in U.S. private prisons—the best-known one

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OPERATED PRISONS 1997-98 (1999), available at <http://www.homeoffice.gov.uk/rds/pdfs/hosb1399.pdf> (last visited Nov. 5, 2003). There have been many more comparative studies performed in the United States, reflecting the greater size, diversity, and longevity of America’s private prison sector.

<sup>84</sup> Gaes et al., *The Performance of Privately Operated Prisons: A Review of Research*, in PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE app. 2, at 31 (Douglas C. McDonald et al. eds., 1998).

<sup>85</sup> Kenneth L. Avio, *The Economics of Prisons*, 6 EUR. J.L. & ECON. 143, 151 (1998), available at <http://www.kluweronline.com/issn/0929-1261> (last visited Nov. 5, 2003).

<sup>86</sup> As a number of thorough meta-analyses of public/private studies already exist, I do not attempt to summarize here all of the studies’ findings. SHICHOR, *supra* note 6; Gaes et al., *supra* note 84; Charles W. Thomas and Charles H. Logan, *The Development, Present Status, and Future Potential of Correctional Privatization in America*, in PRIVATIZING CORRECTIONAL INSTITUTIONS 213 (Gary W. Bowman et al. eds., 1993). I focus instead on the broad pattern of the findings, with particular concern for the most recent results.

<sup>87</sup> Harding, *Private Prisons*, *supra* note 4, at 287.

<sup>88</sup> PARK, *supra* note 83, at 26; WOODBRIDGE, *supra* note 83, at 36. No reliable comparative evidence exists in the United States or the United Kingdom about inmate suicides, but in Australia suicide rates in private and public prisons have been similar. David Biles & Vicki Dalton, *Deaths in Private Prisons 1990-99: A Comparative Study*, 120 TRENDS & ISSUES IN CRIME AND CRIM. JUSTICE 1 (1999).

occurring at a Corrections Corporation of America (CCA) managed facility in Youngstown, Ohio in 1998. Yet because “only fragmentary information is readily available about public sector prison troubles,”<sup>89</sup> it is difficult to infer too much from these disturbances.

On cost and quality grounds, studies in the United States have typically concluded that private prisons performed as well as or better than the comparator public prisons.<sup>90</sup> Looking at cost-efficiency from a governmental perspective, studies in Arizona<sup>91</sup> and Florida<sup>92</sup> found no strong evidence of private prisons offering significant cost savings, while studies in Louisiana, Tennessee, and Texas found that contracting did reduce costs to the correctional agencies.<sup>93</sup> The U.S. General Accounting Office concluded that, nationwide, the existing evidence on cost performance was inconclusive.<sup>94</sup> Looking at prisons’ performance through data on a variety of quality measures—such as administrative compliance, escapes, suicides, assaults on staff and inmates, educational and vocational programming, and health services—studies in Louisiana and Tennessee found broad parity between the public and private sectors,<sup>95</sup> while studies in New Mexico

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<sup>89</sup> Harding, *Private Prisons*, *supra* note 4, at 290.

<sup>90</sup> Research comparing the recidivism rates of public and private facilities has been negligible; only one such study, by Lanza-Kaduce and Parker, has garnered any critical attention, and it has been roundly disparaged for its small sample size and erroneous matching of public and private releasees. LONN LANZA-KADUCE & KAREN F. PARKER, A COMPARATIVE RECIDIVISM ANALYSIS OF RELEASEES FROM PRIVATE AND PUBLIC PRISONS IN FLORIDA (1998). The key criticisms are FLORIDA DEPARTMENT OF CORRECTIONS, BUREAU OF RESEARCH AND DATA ANALYSIS, PRELIMINARY ASSESSMENT OF A STUDY ENTITLED: ‘A COMPARATIVE RECIDIVISM ANALYSIS OF RELEASEES FROM PUBLIC AND PRIVATE PRISONS IN FLORIDA’ (1998); Gaes et al., *supra* note 84. These criticisms remain salient for the subsequent, published version of the study. Lonn Lanza-Kaduce et al., *A Comparative Recidivism Analysis of Releasees from Private and Public Prisons*, 45 CRIME & DELINQ. 28 (1999).

<sup>91</sup> THOMAS, *supra* note 83.

<sup>92</sup> FLORIDA LEGISLATURE, OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, REVIEW OF BAY CORRECTIONAL FACILITY AND MOORE HAVEN CORRECTIONAL FACILITY (1998).

<sup>93</sup> ARCHAMBEAULT & DEIS, *supra* note 83 (studying Louisiana); TENNESSEE LEGISLATURE, FISCAL REVIEW COMMITTEE, COST COMPARISON OF CORRECTIONAL CENTERS (1995) (studying Tennessee); TEXAS LEGISLATURE, SUNSET ADVISORY COMMISSION, RECOMMENDATIONS TO THE GOVERNOR OF TEXAS AND MEMBERS OF THE 72ND LEGISLATURE: FINAL REPORT (1991) (studying Texas).

<sup>94</sup> U.S. GENERAL ACCOUNTING OFFICE, PRIVATE AND PUBLIC PRISONS: STUDIES COMPARING OPERATIONAL COSTS AND/OR QUALITY OF SERVICE (1996).

<sup>95</sup> ARCHAMBEAULT & DEIS, *supra* note 83 (studying Louisiana); TENNESSEE LEGISLATURE, SELECT OVERSIGHT COMMITTEE ON CORRECTIONS, COMPARATIVE EVALUATION OF PRIVATELY MANAGED CCA PRISON AND STATE-MANAGED PROTOTYPICAL PRISON (1995) (studying Tennessee).

and Florida found superior performance on average under private management.<sup>96</sup> Douglas McDonald et al. conducted a national survey of private prison contract administrators, who were asked to rate the quality of service of the private prisons they oversaw.<sup>97</sup> Sixty-eight of 80 respondents reported that the contractors' performance met contractual requirements, and 58 respondents reported that the private prisons had an equal quality of service to comparable facilities operated by government correctional agencies.<sup>98</sup> McDonald et al.'s national findings corroborate the more localized findings of other American studies: "[i]n general, it appears that state and federal governments are getting what they ask for in privately operated prisons, with some notable exceptions."<sup>99</sup>

The United Kingdom has also had examples of good and bad private prisons, but overall its experience with privatization seems more positive than negative. In his recent report on improving prison management in the United Kingdom, Lord Laming provoked no controversy by stating, "[t]o date the performance of the private sector has been encouraging."<sup>100</sup> Initially, private prisons in the United Kingdom generated significant cost savings for the state both per prisoner and per certified place, but since the mid-1990s there has been a convergence between private and public sector costs.<sup>101</sup> The most recent comparative study sponsored by the Home Office found that privately operated prisons offered an average savings of 13 percent in cost per prisoner in 1998-99, but little or no savings after accounting for their greater rates of overcrowding.<sup>102</sup> Despite this overcrowding, the study also found that private prisons' regimes were of similar quality to regimes in public prisons, except the "privately operated facilities tended to provide more purposeful activity and

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<sup>96</sup> LOGAN, *supra* note 83 (studying New Mexico); THOMAS, *supra* note 83 (studying Florida).

<sup>97</sup> MCDONALD ET AL., *supra* note 5, at 47-56.

<sup>98</sup> On the former survey question (about meeting contractual requirements), three private prisons were rated as exceeding requirements, and ten were seen as failing to meet requirements. On the latter question (about quality of service in private versus public prisons), ten private prisons were thought to exceed the performance of the public prisons, and twelve were deemed inferior. *Id.* at 53.

<sup>99</sup> *Id.* at 56.

<sup>100</sup> LAMING, *supra* note 81, at 19, para. 8.

<sup>101</sup> PARK, *supra* note 83, at 1; WOODBRIDGE, *supra* note 83, at 1.

<sup>102</sup> PARK, *supra* note 83, at 3-4.

out of cell hours than their comparators, and more flexible visiting hours.”<sup>103</sup>

Chief Inspectors’ reports over the last decade have often praised the performance of private prisons in the United Kingdom, with two glaring exceptions: Blakenhurst and, more recently, the juvenile prison Ashfield.<sup>104</sup> Of the last five inspection reports on private prisons published by the Chief Inspector, three gave the management highly positive reviews—at Doncaster, The Wolds, and Forest Bank—and one gave the management at Parc a fairly positive review.<sup>105</sup> When evaluating Ashfield, however, Owers remarked,

this report is probably the most depressing I have issued during my time as Chief Inspector. It describes an establishment that was failing, by some margin, to provide a safe and decent environment for children, or to equip the young people in it with the education, training and resettlement opportunities that are supposed to be at the core of their sentences.<sup>106</sup>

In a subsequent speech, Owers seemed to find Ashfield’s performance disturbing, but not indicative of any broader failures in the private sector: “[Ashfield] was the worst, but some of the best prisons I’ve inspected have been private ones.”<sup>107</sup> Owers’

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<sup>103</sup> *Id.* at 26.

<sup>104</sup> DAVID RAMSBOTHAM, HM INSPECTORATE OF PRISONS, HOME OFFICE FOR THE UNITED KINGDOM, INSPECTION REPORT: HM PRISON BLAKENHURST (May 2001); ANNE OWERS, HM INSPECTORATE OF PRISONS, HOME OFFICE FOR THE UNITED KINGDOM, INSPECTION REPORT: HM PRISON AND YOUNG OFFENDER INSTITUTION ASHFIELD (Oct. 2002). Along with Buckley Hall, Blakenhurst is one of the two privately operated prisons in the United Kingdom to have had its contract cancelled and its (direct) management turned over to the Prison Service. In the case of Buckley Hall, however, this cancellation occurred in spite of the Chief Inspector calling its corporate managers and staff “constructive and humane” and appraising it “a thoroughly good prison.” RAMSBOTHAM, *supra* note 81, at 3.

<sup>105</sup> ANNE OWERS, HM INSPECTORATE OF PRISONS, HOME OFFICE FOR THE UNITED KINGDOM, INSPECTION REPORT: HM PRISON AND YOUNG OFFENDER INSTITUTION DONCASTER (Sept. 2001); ANNE OWERS, HM INSPECTORATE OF PRISONS, HOME OFFICE FOR THE UNITED KINGDOM, INSPECTION REPORT: HM PRISON THE WOLDS (Oct. 2001); ANNE OWERS, HM INSPECTORATE OF PRISONS, HOME OFFICE FOR THE UNITED KINGDOM, INSPECTION REPORT: HM PRISON AND YOUNG OFFENDER INSTITUTION FOREST BANK (Aug. 2002); ANNE OWERS, HM INSPECTORATE OF PRISONS, HOME OFFICE FOR THE UNITED KINGDOM, INSPECTION REPORT: HM PRISON PARC (Nov. 2002).

<sup>106</sup> OWERS, ASHFIELD, *supra* note 104, at 3.

<sup>107</sup> Anne Owers, unpublished, speaking event at Trinity College, Oxford University (May 21, 2003) (on file with author).



predecessor, moreover, considered the privately operated Altcourse prison the best he had seen: "Altcourse is, by some way, the best local prison that we have inspected during my time as HM Chief Inspector."<sup>108</sup>

Beyond private prisons' own performance record, their introduction in the United Kingdom also seems to have generated considerable cross-fertilization benefits in the Prison Service's *public* prisons. In the same speech, Owers commented that "[p]rivate sector prisons have been a way of changing practice . . . to be more forward-looking and flexible, including in the public sector."<sup>109</sup> Similarly, a Prison Service governor, discussing improvements in the efficiency and quality of public prisons over the past decade, recently acknowledged that "[p]rivately operated prisons have played their part in this culture change."<sup>110</sup> The Laming Report documents a host of these improvements, using such indicators as escape rates, drug-testing results, and the quality of rehabilitative programs.<sup>111</sup> The Prison Service has also adopted a number of measures aimed at increasing cost-efficiency,<sup>112</sup> which may help explain the convergence in private and public sector costs per prisoner that occurred over the latter part of the 1990s.

## V. REGULATION AND ACCOUNTABILITY

There has been an extensive debate in the literature about whether privately operated prisons will be more or less accountable to the state than publicly operated ones and how this will translate into cost and quality performance.<sup>113</sup> Prison accountability can be enforced by governments through the mechanisms of public and private monitoring, litigation, accreditation, and contractual stipulations such as mandatory disclosure requirements. Penal

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<sup>108</sup> DAVID RAMSBOTHAM, HM INSPECTORATE OF PRISONS, HOME OFFICE FOR THE UNITED KINGDOM, INSPECTION REPORT: HM PRISON ALT COURSE 7 (Dec. 1999).

<sup>109</sup> Owers, *supra* note 107.

<sup>110</sup> Bennett, *supra* note 32, at 41.

<sup>111</sup> LAMING, *supra* note 81.

<sup>112</sup> See Bennett, *supra* note 32, at 40.

<sup>113</sup> See, e.g., JAMES AUSTIN & GARRY COVENTRY, U.S. DEPARTMENT OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS (2001); HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 9; LOGAN, *supra* note 6; YOUNG, *supra* note 59. For a succinct summary of the arguments on either side of this debate, see LOGAN, *supra* note 6, at 41-48, available at <http://www.ucc.uconn.edu/~wwwsoci/proscons.html> (last visited Nov. 5, 2003).

officials and reformers seek more accountability in the prison system in order to improve the standard and efficiency of operations; to minimize the potential for corruption, prisoner abuse, and other illegal practices; to facilitate better comparisons between prisons; and to help avoid the problem of “agency capture,” in which regulators become more concerned to serve the interests of industry groups than some vague notion of the public interest. On many levels, the accountability debate underlines the broader debate over whether private prisons can be more effective than public prisons and whether they can possess the same legitimacy.

*A. Regulatory Strengths and Weaknesses*

Compared to the United States, the United Kingdom has instituted stronger administrative mechanisms for ensuring the accountability of its private prisons, although both countries’ systems of accountability suffer from conspicuous weaknesses. In the United States, not all states statutorily require that private prison contracts provide for the appointment of a monitor, and many states that have such a statutory requirement do not specify what duties the monitor should have or grant the monitor autonomous status.<sup>114</sup> Practices vary widely across jurisdictions; some state correctional departments maintain a full-time, on-site monitor at all private prisons, whereas some states have no on-site monitoring presence and only rare inspections by contract administrators.<sup>115</sup> At the national level, there is no contract oversight unit or comparable body within the Federal Bureau of Prisons. The primary mechanism by which government agencies in the United States monitor their private prison contracts is through American Correctional Association (ACA) accreditation: at the end of 1997, 57 of the 91 private prison contracts in force in the United States required ACA accreditation within a specified time period, usually three years.<sup>116</sup> Since then, the requirement of ACA accreditation has become nearly universal for private prisons, even in states where the public prisons are not required to be accredited.<sup>117</sup>

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<sup>114</sup> HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 9, at 39.

<sup>115</sup> MCDONALD ET AL., *supra* note 5, at 50.

<sup>116</sup> *Id.* at 49. Sixty-one of the contracts explicitly required compliance with conditions established in consent decrees or other court-mandated standards. *Id.*

<sup>117</sup> See Harding, *Private Prisons*, *supra* note 4, at 315. ACA accreditation requires twenty-one types of correctional facilities, including adult prisons, to meet all mandatory standards during

Although this does induce a measure of accountability in the private sector, the ACA has been frequently criticized for possible bias resulting from its dependence on fees from prison inspections, for the limited nature of its standards and inspections, and for its focus on policies and procedures rather than practices.<sup>118</sup> Moreover, in most American private prisons no independent ombudsman exists to whom prisoners can complain about their treatment. To the contrary, private prisons generally have wide discretion to discipline prisoners for on-site infractions, and critics have warned that these prisons may make deliberate attempts to maintain occupancy, and therefore profits, by making it more difficult for inmates to accumulate the “good behavior” points necessary for early release.<sup>119</sup>

On the other hand, several aspects of prison regulation in the United States play a strong role in ensuring accountability. Most notably, opportunities for litigation by both individual prisoners and by class actions (often initiated by watchdog groups on behalf of prisoners) create a safeguard against inmate abuses. The threat of litigation may also help enforce contract compliance since prisoners can sue private prison operators for breaches of contractual standards.<sup>120</sup> Unlike public employees, private employees in the United States are shielded neither by qualified immunity nor by the Eleventh Amendment, which prevents inmates from suing state employees in their official capacities for monetary damages.<sup>121</sup> In April 1999, for example, CCA paid out 1.65 million dollars to prisoners who were affected by the riot in its Youngstown prison.<sup>122</sup> In addition, executives of private companies can be sued more easily and are less likely to be indemnified than government officials, and

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an inspection by an ACA audit team. To remain accredited, a facility must pass inspection every three years. *Id.* at 315-16.

<sup>118</sup> See, e.g., PAUL W. KEVE, AMERICAN CORRECTIONAL ASSOCIATION, MEASURING EXCELLENCE: THE HISTORY OF CORRECTIONAL STANDARDS AND ACCREDITATION 78-89 (1996); Michelle India Baird & Mina B. Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J.L. & POL’Y 177, 193 (1996) (claiming the ACA’s standards fall short of international law’s human rights standards).

<sup>119</sup> See, e.g., BURTON A. WEISBROD, THE NONPROFIT ECONOMY 40 (1988).

<sup>120</sup> ROBBINS, *supra* note 6, at 648-55.

<sup>121</sup> Richardson v. McKnight, 521 U.S. 399 (1997); Alabama v. Pugh, 438 U.S. 781, 782 (1978).

<sup>122</sup> InterNet Bankruptcy Library, *Inmates Litigation: D.C. Scatters Inmates from Troubled Ohio Prison*, 3 CLASS ACTION REPORTER (2001), at [http://bankrupt.com/CAR\\_Public/010514.mbx](http://bankrupt.com/CAR_Public/010514.mbx) (last visited Nov. 5, 2003).

judges and juries tend to be less deferential to private companies.<sup>123</sup> Beyond the possibilities for legal redress, the United States also features relatively open access to private prison contracts, as state procurement laws typically require their public availability and publicly listed corporations must file annual reports with the Securities and Exchange Commission. Finally, prison authorities in the United States have proven more willing than their peers in other countries to cancel contracts of under-performing operators. McDonald et al. document the cancellation of five state contracts in the early and mid-1990s,<sup>124</sup> and Harding documents nine more cancellations of private prison contracts from 1995 to 2000.<sup>125</sup>

Despite having more rigorous standards and processes of accountability overall than the United States, the British system of prison regulation also has several notable deficiencies. For starters, British laws make it much more difficult for prisoners—in both private and public prisons—to sue over contractual noncompliance or mistreatment: “U.K. . . . jurisprudence relating to prisoner litigation is, by comparison [to U.S. jurisprudence], stunted and ineffectual. Class actions generally are doomed to fail.”<sup>126</sup> Moreover, the British government allows financial information on private prison contractors to remain proprietary and confidential, which stifles efforts to make independent assessments of the relative costs and cost-effectiveness of their operations.<sup>127</sup> And while the United Kingdom’s Inspectorate of Prisons does an admirable job evaluating prisons and publicizing its criticisms, it only has the power to make recommendations, not to enforce them. The take-up rate of its suggestions has been notoriously poor; as Chief Inspector Owers recently remarked, “[m]ost of our recommendations do get accepted, but of course whether or not they get implemented is a different matter.”<sup>128</sup> Finally, the U.K. Home Office has, to date, been

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<sup>123</sup> See Low, *supra* note 64, at 41-42.

<sup>124</sup> MCDONALD ET AL., *supra* note 5, at 53.

<sup>125</sup> Harding, *Private Prisons*, *supra* note 4, at 323.

<sup>126</sup> *Id.* at 322.

<sup>127</sup> See BOTTOMLEY ET AL., *supra* note 44, at 57; McDonald, *Public Imprisonment by Private Means*, *supra* note 7, at 41. Harding recounts the outrageous case of the Contracts and Competition Group in the United Kingdom commissioning research into the comparative efficiency of the first private prison (The Wolds) and a comparator public prison, only to withhold the relevant contract from the researchers whom it had commissioned to perform the research. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 9, at 70.

<sup>128</sup> Owers, *supra* note 107.

more reluctant than U.S. governmental agencies to cancel private prison contracts. It has made only two such cancellations in over a decade, one of which was unrelated to the contractor's performance.<sup>129</sup>

However, the Home Office enforces accountability in other, powerful ways. As provided for in the Criminal Justice Act 1991, the state has the power to veto any potential hire for any level of employment at a private prison, and it must positively authorize all private prison personnel before they can act in that capacity.<sup>130</sup> In the United States, by contrast, most contracts allow private firms to make their own hires with little intrusion. The Criminal Justice Act 1991 also stipulates that every contracted prison in the United Kingdom must have its own controller, an appointed Crown Servant who investigates and reports on all allegations against correctional officers. In practice, most private prisons have two controllers—evidence of the resource-rich nature of monitoring in the United Kingdom.<sup>131</sup> Because all disciplinary complaints against inmates by the prison staff must be made to the controller, the distinction between the allocation and administration of punishment is kept clearer within British private prisons, whose operators have no authority to make intra-prison disciplinary decisions on their own.<sup>132</sup> The United Kingdom also monitors its correctional facilities through a Prisons and Probation Ombudsman who has jurisdiction over all prisons and through independent monitoring boards, in addition to the inspections and reports by the Inspectorate of Prisons. Taken together, these “U.K. arrangements amount to the strongest statute-based accountability structure currently in existence.”<sup>133</sup> Although the Ombudsman and the Chief Inspector have only recommendatory powers, their reports are followed closely by the media and play an important role in publicizing contractual violations and other

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<sup>129</sup> See discussion in note 104 *supra*.

<sup>130</sup> Harding, *Private Prisons*, *supra* note 4, at 314.

<sup>131</sup> HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 9, at 46. Harding contrasts this resource-rich monitoring situation to that of Florida in the United States. Florida, though known for its careful, structured approach to privatization, had only one monitor available for each contract site in the mid-1990s. Without any administrative or secretarial assistance, the monitors were each responsible for almost 1,000 prisoners. *Id.* at 43-44.

<sup>132</sup> Moyle, *supra* note 6, at 87.

<sup>133</sup> HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 9, at 40.

performance problems. Reports by the Chief Inspector aim to hold prisons to an international human rights standard, they discuss negative findings with candor, and in addition to reviewing quantitative performance results they also feature a substantial qualitative component, including prisoner interviews.

This impressive methodology for evaluating and monitoring prisons is reinforced by the Home Office's approach to writing and enforcing contracts. Compared to most American correctional agencies, the Home Office applies relatively prescriptive, output-based contracts to its private prisons, demanding that they provide more rehabilitative and vocational programming than public prisons and setting measurable expectations for escape, suicide, and assault rates as well as a variety of health and nutrition outcomes.<sup>134</sup> When private operators do not meet the terms of their contract, the Home Office has shown its willingness to withhold performance-linked fees. For instance, in the first six months of 1998 it withheld approximately £800,000 from Securicor Limited, operator of Parc prison, for failing to meet contractual requirements on numerous health and safety measures. The amount of this fine would have accounted for Securicor's whole operating profit budgeted for that period.<sup>135</sup> As a result of such strict contract enforcement, by the end of 1999 the Chief Inspector was able to report that "Parc has largely overcome many of the problems with which it was beset."<sup>136</sup>

## VI. CONCLUSION: INCENTIVES AND REGULATORY REFORM

To the surprise of their critics and the satisfaction of their supporters, private prisons have a reasonable track record in the United States and the United Kingdom so far. In each country, private prisons appear to have performed as well as or possibly better than public prisons in terms of both cost-efficiency and quality of service. Private prisons' quality of service seems to have been particularly high in the United Kingdom. In addition, there have not

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<sup>134</sup> See HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY, *supra* note 9, at 139-41; NATIONAL AUDIT OFFICE, THE OPERATIONAL PERFORMANCE OF PFI PRISONS: REPORT BY THE COMPTROLLER AND AUDITOR GENERAL 1-2 (June 2003).

<sup>135</sup> Harding, *Private Prisons*, *supra* note 4, at 306.

<sup>136</sup> DAVID RAMSBOTHAM, HM INSPECTORATE OF PRISONS, HOME OFFICE FOR THE UNITED KINGDOM, INSPECTION REPORT: HM PRISON PARC 1 (Oct. 1999). See also Harding, *Private Prisons*, *supra* note 4, at 306.

been any major corruption scandals involving corrections firms, and there is no evidence that these firms have distorted or captured policymaking.

Yet while private prisons have performed respectably in the aggregate, their results have been highly inconsistent—including the troubling examples of riots in several U.S. private prisons and abuses at Blakenhurst and Ashfield in the United Kingdom. Rather than be seen as outliers, these breakdowns in prison management should be seen as indicative of the risks of contracting; with for-profit operators, a prison can quickly degenerate when its management is determined to save money by cutting corners and the government does not intervene. Private prisons may have proven themselves more similar than dissimilar to public prisons over the last decade, but their greater risks place an added onus on regulators.

The regulatory weaknesses in the United States and the United Kingdom, enumerated above, suggest areas where correctional officials ought to focus their reform efforts. American officials should establish new systems for monitoring and inspection in most jurisdictions (or at least pressure the ACA to improve its accreditation process), they should write contracts that specify measurable outputs, and they should prohibit private prisons from making their own quasi-judicial decisions concerning complaints by and against prisoners. Meanwhile, the U.K. Home Office should enhance public access to contractors' financial information and implement policies that link contract administration to evaluations from the Chief Inspector. Given the paucity of credible comparative evidence, regulators in both countries should also sponsor more data collection and research into the performance of private versus public prisons.

Perhaps the most powerful reform regulators in either country could make, however, would be to create positive incentives for good performance. Currently, the standard private prison contract in the United States and the United Kingdom remunerates the corporate operator based on the number of person-days of confinement supplied, subject to some minimal level of amenities. The corporate operator thus has almost no contractual incentive to provide rehabilitation opportunities or educational/vocational training that might benefit inmates, except insofar as these services act to decrease

the current cost of confinement.<sup>137</sup> Contracts in the United States and the United Kingdom will fine or possibly even terminate corporate operators for failures to meet certain requirements, but they will not reward operators for achieving performance goals; these contracts are all stick, no carrot. As a result, they fail to capitalize on one of the potential advantages of the private sector—its willingness and ability to innovate in pursuit of profits. If private prison operators stood to make money from, say, improving literacy or prisoner satisfaction rates, from reducing escapes or assaults, or from preventing drug use or the spread of disease, then they would likely find a way to achieve the necessary outcomes.

Creating such fiscal incentives would be especially welcome as a tool to fight recidivism, perhaps the most destructive and intractable problem plaguing both countries' correctional systems.<sup>138</sup> Designing incentives to reduce recidivism would be difficult, but not impossible. By controlling for inmates' exogenous propensity to re-offend, correctional agencies can model the proportion of a prison's recidivism rate attributable to the prison itself, and then make compensation decisions accordingly.<sup>139</sup> Short of fiscal incentives, even simply publicizing league tables of recidivism performance would create pressure for prisons to find recidivism-minimizing solutions. In this way, not only would correctional agencies eliminate any "perverse incentives" for-profit prisons might have to stimulate

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<sup>137</sup> See PETER SCHMIDT & ANN D. WITTE, *AN ECONOMIC ANALYSIS OF CRIME AND JUSTICE: THEORY, METHODS AND APPLICATIONS* 345-46 (1984).

<sup>138</sup> The largest study yet of recidivism in the United States found that of the inmates released from state prisons, almost two-thirds were re-arrested for a felony or serious misdemeanor within three years of release. ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEPARTMENT OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1983* (1989). In the United Kingdom, 59 percent of all prisoners discharged in 1998 were reconvicted—not simply re-arrested—for a standard list offense within two years of their discharge. HOME OFFICE, *supra* note 3, at 152 (Table 9.1). Considering that over 90 percent of all prisoners are eventually released back into society, such high recidivism rates exact an enormous social cost. See RUDOLPH J. GERBER, *CRUEL AND USUAL: OUR CRIMINAL INJUSTICE SYSTEM* (1999).

<sup>139</sup> For a discussion and examples of how to conduct such recidivism analysis, see Patrick J. Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public versus Private Management* (July 2003), Yale University Economic Growth Center Discussion Paper No. 863, available at <http://ssrn.com/abstract=441881> (last visited Nov. 5, 2003). At present, the Florida Department of Juvenile Justice (DJJ) appears to be the only correctional agency in either country that evaluates its facilities based on their recidivism performance. See FLORIDA DEPARTMENT OF JUVENILE JUSTICE, BUREAU OF DATA AND RESEARCH, *2003 OUTCOME EVALUATION REPORT* (2003). The Florida DJJ does not link facilities' revenues to their recidivism performance, however, except through the possible elimination of particularly poorly performing facilities.



recidivism (in order to generate more future business),<sup>140</sup> but they would also enlist these prisons' profit motive in the fight *against* recidivism.

As the private prison industry becomes more transnational<sup>141</sup> and more consolidated and as overcrowding continues to increase the strain on facilities, it will become all the more important in the coming years for the United States and the United Kingdom to have effective prison management systems in place. Correctional agencies in both countries need to confront existing weaknesses in their regulatory frameworks, they need to ensure the marketplace stays competitive and diverse, and they need to create a new breed of positive incentives for prisons to achieve performance targets. Doing so would allow both countries to realize more of the potential benefits of privatization while minimizing the possibilities for abuse. With accountability better enforced, the public-versus-private debate would become less significant and people could return their attention to the broader questions of why we use incarceration and why we have so many prisons in the first place.

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<sup>140</sup> See Avio, *supra* note 85, at 150 (discussing the economics of such “perverse incentives”).

<sup>141</sup> The United Kingdom's correctional marketplace reveals just how transnational the industry has become: all four of the private companies that are currently operators of British prisons—Group 4 Prison Services Limited, UK Detention Services, Premier Prison Services, and Securicor Custodial Services—are local subsidiaries of multinational corporations. Respectively, their parent companies are based in Denmark, France, the United States, and the United Kingdom. COMPETITION COMMISSION, *supra* note 3, at 3.131-3.148, 4.20-4.60.