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Privatization and Prisons*

E. S. Savas**

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I. INTRODUCTION

“Privatization” means increased governmental reliance on the private sector, rather than on government agencies, to satisfy the needs of society. Since the word was first used in 1969,¹ privatization has gained broad recognition and widespread acceptance, and, in recent years, a major trend toward privatization has developed in the United States and abroad. The reasons for this trend are both pragmatic and ideological. Pragmatists advocate privatization because it offers a more efficient way to provide goods and services. Ideological opponents of big government support privatization because it reduces the role of government. Privatization is therefore an important movement in East and West, in developing and developed countries, in communist and capitalist nations. It has taken root even in China and the Soviet Union.

Privatization in the United States has taken a different form than it has in other countries. Outside the United States, in both developing and developed countries, the principal form of privatization is denationalization—the divestment of state-owned enterprises (SOEs). In the United States, which has relatively few SOEs, state and local governments are implementing privatization

* Adapted from E. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* (1987).

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1. The earliest use of the term appears to have been in P. DRUCKER, *THE AGE OF DISCONTINUITY* (1969) (using the term “reprivatization”).

primarily through contracting and, to a lesser degree, vouchers, franchises, free-market arrangements, and voluntary efforts.² Contracting, however, is the primary method governments use to privatize prisons.³

II. THE CURRENT STATE OF PRIVATIZATION IN GENERAL

A. *Extent of Contracting for Services*

The results of a 1982 survey, summarized in Table 1, reveal the extent to which local governments have contracted with private sources for the provision of local government services. On average each jurisdiction surveyed contracted out, in whole or in part, twenty-seven percent of the fifty-nine services examined in the survey. Information concerning the contracting out of emergency medical care, ambulance service, day-care facility operation, programs for children and the elderly, operation and management of hospitals and mental health facilities, and operation of drug and alcohol treatment programs is especially relevant to a discussion of prison contracting. One-quarter to one-half of the jurisdictions surveyed contract with, and rely on, private profit or nonprofit organizations to supply each of these vital services. These services, which primarily are concerned with vulnerable or partially incapacitated segments of the population, have exhibited the greatest growth rate for privatization by contracting.⁴ Government reliance upon private organizations in these areas is significant because prisoners also can be described as a vulnerable and incapacitated segment of the population. Other privatization arrangements relevant to a discussion of prison contracting involve the development of private police protection, alternative dispute resolution, and legal aid.

2. E. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* ch. 4 (1987).

3. Under this approach, government agencies contract with and pay private firms to operate prisons or to provide some of the functional services in prisons.

4. By 1979 government agencies were purchasing 55% of the dollar value of social services from private organizations. Knowledgeable authorities considered this to be the fastest growing area. See H. HATRY & E. DURMAN, *ISSUES IN COMPETITIVE CONTRACTING FOR SOCIAL SERVICES* (National Institute of Governmental Purchasing 1985).

Table 1.⁵

Service	Number of governments reporting	Percentage Contracting With: Profit	Percentage Contracting With: Nonprofit
Public works and transportation			
18 services, average	1121	21	3
Public safety			
Crime			
prevention/patrol	1660	3	7
Police/fire communication	1684	1	3
Fire prevention/suppression	1516	1	4
Emergency medical service	1333	14	11
Ambulance service	1214	25	11
Traffic control/parking enforcement	1505	1	1
Vehicle towing and storage	1285	80	0
Average	1457	18	5
Health and Human Services			
Sanitary			
inspection	939	1	6
Insect/rodent control	1037	14	5
Animal control	1482	6	9
Animal shelter operation	1225	13	19
Day-care facility operation	436	35	43
Child welfare programs	558	5	26
Programs for elderly	1189	4	33
Operation/management of public/elderly housing	602	13	19
Operation/management of hospitals	361	30	28

5. Table 1 is based on a survey of 1780 county and local governments. See C. VALENTE & L. MANCHESTER, *RETHINKING LOCAL SERVICES: EXAMINING ALTERNATIVE DELIVERY APPROACHES*, Table B (Management Information Service Special Report 1984).

Public health programs	721	8	29
Drug/alcohol treatment programs	626	6	45
Operation of mental health/retardation programs/facilities	512	7	43
Average	807	12	25
Parks and recreation			
7 services, average	1050	5	19
Support functions			
15 services, average	1511	18	2
Grand average		17	10

Individuals, businesses, neighborhood associations, or governments may purchase private police services.⁶ In fact, the number of guards in the private security industry far exceeds the number of public law-enforcement officers.⁷ In 1980 expenditures for private security guards in the United States totalled 21.7 billion dollars, as compared to the 13.8 billion dollars expended for public police forces.⁸ Private police provide a large portion of guard services for federal government facilities,⁹ conduct passenger and baggage screening at airports, protect stores against shoplifters, and provide security in banks and hotels, often working in close cooperation with local police departments.¹⁰

Using private sources for the provision of certain judicial functions is another example of the application of the privatization concept. Alternative dispute resolution (ADR), colloquially known as "rent-a-judge," refers to arbitration services available from private sources. Disputants engage such services because they usually are speedier, more convenient, and more economical than traditional civil court proceedings. ADR is less expensive than civil court proceedings because fewer hours of costly legal work are

6. Table 1 lists only government contracts with private guard services.

7. The private security industry employs 680,000 guards while public law enforcement officers number only 580,000. See Cunningham & Taylor, *The Hallcrest Report: Private Security and Police in America*, in CRIME AND PROTECTION IN AMERICA (D. Ford ed. 1985).

8. *Id.*

9. Peyton, *Standards for Public Building Maintenance*, 44 APWA Rep., Oct. 1977, at 28-29.

10. See Stewart, *Public Safety and Private Policy*, 45 PUB. ADMIN. REV. 758-65 (1985).

needed. It is more economical because the cost of litigation in civil courts often exceeds the damages recovered.¹¹

A form of privatization similar to ADR is developing to help resolve certain private disputes that result in misdemeanors. Courts refer these cases to neighborhood justice centers and community dispute resolution committees. The disputes range from squabbles about loose dogs and loud radios to assault and battery and petty theft between neighbors. The mediators, who usually are trained lay persons, hold prompt, informal, and confidential hearings through which they attempt to determine the underlying causes of the disputes.¹²

Commentators have criticized these dispute resolution programs because they believe that the programs create a second-class justice system for the poor.¹³ For example, should judges assign cases of domestic violence to neighborhood justice centers for resolution instead of criminal courts? Although privatized justice for civil cases is both plausible and sensible, the use of privatized justice in criminal cases presents a more difficult question.

In addition to private police protection, ADR, and neighborhood justice centers, various state and local governments have contracted with the private sector to provide legal services for indigent criminal defendants. Such privatized legal aid is an alternative to the in-house government services of a public defender. The two systems have not been subjected to thorough comparative analysis, but privatized legal aid compares favorably with the services of privately retained lawyers¹⁴

B. Attitudes and Evidence on Privatization

Public officials who have contracted with private sources for local governmental services generally have been satisfied with the results of their privatization experiment. Table 2 summarizes the results of a nationwide survey of municipal and county officials

11. The media and civil liberties groups have criticized ADR because the proceedings are closed to the public. But does the public have a right to watch people fight? Must all disagreements be exposed to public view by a prurient press? Why not complain that when a court case is resolved before trial (the vast majority of all cases), the public also is deprived of its gladiator spectacles?

12. See Tolchin, *When the Justice System is Put Under Contract*, N.Y. Times, Aug. 4, 1985, § 6, at 4, col. 4. For example, the Neighborhood Justice Center in Atlanta handled 2400 cases in 1984, 56% of which were criminal. See *id.*

13. *Id.*

14. R. HERMAN, E. SINGLE & J. BOSTON, *COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA* (1977).

who have contracted out local government services. The officials' responses to the survey presumably reflect their experiences with the various contract services listed in Table 1.

Table 2.¹⁵

	Small Jurisdictions	Large Jurisdictions
Costs less	40 %	41 %
Costs same	19	22
Costs more	34	10
Better service	63	33
Same service	14	48
Worse service	22	15

Tables 3 and 4 summarize the results of a larger survey conducted in New Jersey.¹⁶ The results of this survey indicate that the public officials surveyed were highly satisfied with contract services. Cost savings, in-house limitations, and better management are the dominant reasons why public officials contract for services. The in-house limitations that influence a public official's decision to contract with private sources include the need for large capital investments and the lack of facilities.¹⁷ These factors are particularly important in a public official's decision to contract out prison construction, operation, and management.¹⁸

Table 3.¹⁹

Service Area	Very satisfied	Somewhat satisfied	Dissatisfied	No Opinion	N
A. Municipal Officials					
Public works	58 %	29 %	10 %	3 %	149
Public safety	72	22	6	0	18
Social services	74	26	0	0	23
Total	61 %	28 %	8 %	2 %	190

15. The small jurisdiction category covers municipalities with populations under 50,000; the sample size is 89. See Florestano & Gordon, *Public vs. Private: Small Government Contracting with the Private Sector*, 40 PUB. ADMIN. REV., Jan./Feb. 1980, at 29-34. The large jurisdiction category covers 14 municipalities and 14 counties with populations greater than 500,000. See Florestano & Gordon, *Private Provision of Public Services: Contracting by Large Local Governments*, 1 INT'L J. PUB. ADMIN. 307, 307-27 (1979).

16. The stratified random samples employed in this study are representative of all the municipalities and counties in the state.

17. See *infra* note 20 and accompanying Table 4.

18. See *infra* notes 29-30 and accompanying text.

19. "N" is the number of officials responding. Table 3 is derived from EAGLETON INSTITUTE OF POLITICS, *ALTERNATIVE METHODS FOR DELIVERING PUBLIC SERVICES IN NEW JERSEY* 26-29 (1986) (prepared for the State and Local Expenditure and Revenue Policy Commission).

B. County Officials 68 % 25 % 7 % 0 % 57

Table 4.²⁰

Service Area	Cost savings	In-house limitations	Better management	Other	N
A. Municipal Officials					
Public works	43 %	31 %	4 %	22 %	134
Public safety	53	21	5	21	19
Social services	20	36	20	24	25
Total	41 %	30 %	6 %	23 %	178
B. County Officials					
	36 %	30 %	7 %	27 %	56

The evidence provided by numerous studies comparing the efficiency, effectiveness, equity, and quality of contract and in-house services indicates that the positive attitude exhibited by public officials toward contracting is justified.²¹ The results of these studies suggest that direct provision of a service by a government agency generally costs one-third to one-half more than the price charged by a private contractor to do work of equal quality.²²

III. PRIVATIZATION OF PRISONS²³

When first proposed, privatization of the prison industry seemed a dramatic and thought-provoking concept. In retrospect, however, it was a natural and inevitable development. While the demand for criminal incarceration is growing, the supply of prison space is not keeping pace.²⁴ Prison overcrowding demonstrates the need for new facilities, but the cost of prison construction and operation is high. Although the public demands that criminals be incarcerated, the public refuses to pay the price for such services. Privatization of prisons, therefore, represents an influx of new suppliers who are attempting to satisfy these needs, and earn profits in the process.²⁵

20. "N" is the number of officials responding. "In-house limitations" refers to high start-up costs, large capital investment, or lack of physical facilities, manpower, or expertise. "Other" includes convenience, legal mandates, and better service delivery. *Id.*

21. Generally speaking, the most authoritative studies involved quantifiable "hard services" (e.g., public works, commercial, and transportation services) rather than less quantifiable "soft" services (e.g., human and social services). See E. SAVAS, *supra* note 2, at chs. 6 & 7.

22. *Id.*

23. *Id.* at ch. 7.

24. See Logan & Rausch, *Punish and Profit: The Emergence of Private Enterprise Prisons*, 2 JUST. Q. 303, 303-18 (1985). Logan and Rausch estimate that by 1983 state and federal prisons were at 110% of their capacity.

25. See Mullen, *Corrections and the Private Sector*, 65 PRISON J., Autumn-Winter

The private sector can perform several distinct functions with respect to prisons: (1) finance and construct prisons; (2) operate facilities for juveniles; (3) operate facilities for adults; (4) provide work for prisoners; and (5) provide specific contractual services to prisons, for example, health care and vocational education for the inmates and training for the staff. Public interest focuses on the role of private firms in the first three of these areas, the construction and operation of various types of correctional facilities. Private organizations, particularly not-for-profit ones, have operated halfway houses for criminal offenders for many years. Now, however, they also operate detention facilities.²⁶ Private, for-profit firms are planning maximum-security prisons.²⁷ In 1985 private firms were building or operating some two dozen adult prisons, most of them for illegal aliens and protective-custody prisoners.²⁸

Interest in prison privatization stems from the perception that private prisons are more cost effective and efficient, constructed more quickly, and operated under more flexible and innovative management. Although public costs are said to be twenty to forty percent greater than private costs, the evidence is not yet persuasive because public costs omit various factors and private costs may or may not cover the construction costs of new facilities.²⁹ A definitive study of the relative costs of private and public prison service provision cannot be completed until more private prisons are operating and uniform cost frameworks are established.

The private-sector advantage in speed and flexibility of construction has merit. State governments find private financing and construction attractive, in part because it permits them to evade voter approval of bond issues. Typically, the state does not have to raise the capital to build the prison. The private sector builds the prison with private financing and operates it. The state then makes annual payments to the private owner under a lease-purchase contract.³⁰ Although the validity of this arrangement has been questioned because it bypasses express voter approval, it saves time and money for state governments.

1985, at 1.

26. Logan & Rausch, *supra* note 24.

27. *Id.*

28. Telephone Interview with Charles H. Logan, Professor, University of Connecticut (Jan. 14, 1986).

29. Logan & Rausch, *supra* note 24, at 310.

30. *See id.* at 313-16 (presenting several illustrations of the speed and flexibility with which private firms respond to government requests for additional prison space).

Private companies already provide extensive contract services in *existing* prisons. Sixty-six correctional agencies in thirty-nine states plus the District of Columbia spent about 200 million dollars in 1983 on 3215 contracts with private firms for thirty-two different services and programs.³¹ These services consisted mostly of health and mental-health care, drug treatment, counseling, education, vocational training, college programs, and staff training. The agencies reported that contract services were more cost effective than those that the agency could provide, that advantages outweighed disadvantages, and that most of the agencies planned to expand their use of contracts for specific services.³²

IV. RESPONSES TO ARGUMENTS AGAINST PRISON PRIVATIZATION

Despite the widespread and long-standing use of contractors to provide some prison services, civil libertarians and correction officers and officials have expressed concern about the possibility that private, for-profit firms would own or operate prisons. The issues raised by these concerned individuals include basic constitutional questions concerning a private individual's right to deprive others of their freedom. Advocates of privatization respond that although only the state has the right to imprison one of its citizens, it surely is not the only entity that can run a prison in a fair, humane, and efficient manner.

Present prison conditions make it difficult, if not impossible, to argue that governments, rather than private firms, should operate prisons because the latter would tolerate poor conditions in their pursuit of profits. In 1986 thirty-three states and numerous localities were under federal court orders to correct the miserable, overcrowded conditions in their prisons.³³ In 1984 the 382,000 inmates in the Nation's 694 state prisons occupied an average of 57 square feet of housing space—11 percent less than in 1979.³⁴ Fur—

31. Camp & Camp, *Correctional Privatization in Perspective*, 65 PRISON J., Autumn-Winter 1985, at 14.

32. *Id.* at 19-21.

33. See *Inside America's Toughest Prisons*, NEWSWEEK, Oct. 6, 1986, at 46. Indeed, a court may be better able to enforce its orders on a private firm than on an agency in another branch of government. See Applebome, *Texas Held in Contempt of Court Over Prisons*, N.Y. Times, Jan. 6, 1987, at 14, col 1. Moreover, one-third of the nation's 3500 city and county jails recently have been involved in class action lawsuits brought by inmates who allege that inadequate medical care caused serious injuries and death. See Steptoe, *Inmates Claim Prisons Are Failing to Provide Adequate Medical Care*, Wall St. J., May 15, 1986, at 1, col 1.

34. *Study Finds Prison Space Cut*, N.Y. Times, Dec. 13, 1986, at 29, col 1.

thermore, the record of for-profit hospitals demonstrates that a private organization's quest for profits does not lead necessarily to poor services: the quality of medical care provided by for-profit hospitals is equal to that provided by nonprofit hospitals.³⁵

Contracts for private prisons must specify standards for inmate care and staff training, guarantees of constitutional treatment, and guidelines for discipline and the use of force. These standards, guarantees, and guidelines, however, are also necessary in public prisons. If government prison contracts carefully and clearly allocate authority and liability between public and private agents, problems can be minimized.

In addition to the above concerns, some opponents of prison privatization argue that it is immoral to profit from the imprisonment of others. Privatizing prisons, however, is no more immoral than paying police officers to capture criminals or physicians to save lives. The justice system itself is already a source of profit for numerous professions. The fact that an activity is vital to human welfare is no reason to isolate it from competition and profit. If this were true, government agencies would be the exclusive providers of food, clothing, medical care, transportation, and housing.³⁶

Some opponents of privatization further claim that private prison firms will be inclined to lobby for more and longer prison sentences and less use of probation, parole, and halfway houses. If this argument was sound, however, prison officials, guards, and their unions presumably would act in the same manner for the same reasons. This, however, is not the case.³⁷ Even if private prison firms did lobby for these policies such lobbying may demonstrate responsiveness to the public's demand for longer sentences. Moreover, although such lobbying may result in increased spending on private prison projects, it could also result in the improvement of prison conditions.

Private prisons may be able to make a truly significant contribution in the area of prisoner work programs by creating factories with fences instead of warehouses with walls, in the words of former Chief Justice Warren E. Burger. Of course, governments must not create a modern replica of the old system under which states leased prisoners to farms where prisoners worked for substandard

35. NATIONAL ACADEMY OF SCIENCES, *FOR-PROFIT ENTERPRISE IN HEALTH CARE* (1986).

36. D. BAST, *IN DEFENSE OF PRIVATE PRISONS* (Heartland Institute ed. Mar. 4, 1986).

37. Moreover, one can look by analogy at day-care centers: Private contractors in that business are not notably active in encouraging higher birthrates and opposing birth control and abortion.

wages.

Proponents of prison privatization must overcome legislative and political barriers, as well as union opposition, to private prisons and prison work. The need to define clearly the respective roles of the public agency and the contractor, to develop quality standards, and to monitor the performance of the contracted work is critical to the privatization effort. Governments can monitor private prison operations through a gamut of activities, including examining the contractor's records, conducting on-site inspections, and using temporarily imprisoned undercover agents and sophisticated inmate opinion surveys.³⁸

V. CONCLUSION

The unsatisfactory state of America's penal system and the high recidivism rate warrant experimenting with alternative approaches to inmate care and encouraging a much more substantive role for the private sector. Prison privatization will no doubt raise problems. Many issues, including those identified above, will have to be addressed. Nevertheless, the expected innovations from a private prison industry and the introduction of competition as an antidote to government monopoly hold the promise of great improvement in our prison system and the challenge of learning from new experiences.

38. Recidivists who have been imprisoned elsewhere might be particularly in demand as interview subjects because they offer the perspective of a comparison shopper! See, e.g., Press, "A Person, Not a Number," *NEWSWEEK*, June 29, 1987, at 63.

