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If You've Got the Money, I've Got the Time: The Benefits of Incentive Contracts with Private Prisons

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**IF YOU'VE GOT THE MONEY, I'VE GOT THE TIME:¹
THE BENEFITS OF INCENTIVE CONTRACTS WITH
PRIVATE PRISONS**

MICHAEL G. ANDERSON[†]

ABSTRACT

Governments increasingly rely on private prison companies to manage the daunting demands associated with their ever-increasing prison populations. The private prison industry provides governments at all levels (federal, state, and local) with an alternative to the costly and time-consuming construction of additional public facilities. Governments, however, have all too often adopted a flawed pricing strategy, paying private prison companies fixed per diem rates to house prisoners. This model both incentivized and tolerated poor conditions with greater emphasis placed on the industry's bottom line than benefits to the state, the prison population, or society as a whole.

This article asserts that governments should instead experiment with cost-reimbursement contracts and outcome-based incentives. Re-thinking contract types would encourage governments to engage in strategic, long-term thinking about their goals for prison, appreciating that a rehabilitative model can ultimately save the state money and generate other societal benefits. For example, cost-reimbursement contracts that integrate programs for mental health illnesses or drug and alcohol

¹ WILLIE NELSON, *If You've Got the Money, I've Got the Time*, on THE SOUND IN YOUR MIND (Columbia Recs. 1976).

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rehabilitation may ultimately result in a decrease of the next generation's prison population.

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It's hard to imagine any greater disconnect between public good and private profit: the interest of private prisons lies not in the obvious social good of having the minimum necessary number of inmates but in having as many as possible, housed as cheaply as possible.²

INTRODUCTION

With over 2.2 million prisoners,³ the United States has the largest population of inmates,⁴ the highest per capita rate of incarceration,⁵ and the most women imprisoned in its vast prison system.⁶ The United States houses an astounding twenty-five percent of the world's prison population, despite being home to only five percent of world's population.⁷ Alas, incarcerating

² Adam Gopnik, *The Caging of America*, THE NEW YORKER, Jan. 30, 2012, at 72, 74, <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>.

³ Roy Walmsley, *World Prison Population List (Tenth Edition)*, INTERNATIONAL CENTRE FOR PRISON STUDIES, (Nov. 21, 2013), http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1_10.pdf.

⁴ *Id.* (The U.S. has approximately 2.2 million people imprisoned. China has the next highest total at 1.6 million imprisoned people.)

⁵ *Id.* (In the U.S., there are 716 prisoners per 100,000 people. The next highest among countries with a population over 1 million people are Cuba with 510 prisoners per 100,000 people and Rwanda with 492 prisoners per 100,000 people.)

⁶ Roy Walmsley, *World Female Imprisonment List (Second Edition)*, INTERNATIONAL CENTRE FOR PRISON STUDIES, (Mar. 8, 2012), http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wfil_2nd_edition.pdf.

⁷ Inimai Chettiar et al., REFORMING FUNDING TO REDUCE MASS INCARCERATION, BRENNAN CTR. FOR JUSTICE, 3 (2013), https://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_0.pdf.

criminals does not appear to lower the crime rate;⁸ indeed, incarceration appears to have no distinguishable effect on preventing future crime.⁹

Not only is our current incarceration system unsuccessful at preventing crime, it is also extraordinarily expensive.¹⁰ American taxpayers annually spend between \$80 billion¹¹ incarcerating prisoners. Governments¹² are forced to spend money on prisons to keep the community safe; unfortunately, this is often at the expense of more productive, visible uses, such as crime prevention, education, and health care.¹³ Once a person is imprisoned, they can no longer contribute to society; instead, they become a full burden upon it.¹⁴

⁸ Doran Larson, *Why Scandinavian Prisons Are Superior*, THE ATLANTIC, (Sept. 24, 2013), <http://www.theatlantic.com/international/print/2013/09/why-scandinavian-prisons-are-superior/279949/> (“From 2000 to 2010, Indiana increased its prison population by 45 percent and reduced its crime rate by 0.08 percent.”).

⁹ Oliver Roeder, *The Prisoner’s Dilemma*, FIVETHIRTYEIGHT.COM, (Feb. 13, 2015), <http://fivethirtyeight.com/features/the-imprisoners-dilemma/#ss-5> (“If I were speaking to a fellow economist, I’d say the incarceration elasticity of crime is not distinguishable from zero. At a cocktail party, I’d say that crime no longer responds to changes in incarceration.”).

¹⁰ Sharon Dolovich, *Confronting the Costs of Incarceration: Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 239-40 (2009).

¹¹ Tracey Kyckelhahn, *Justice Expenditure and Employment Extracts, 2012 - Preliminary*, BUREAU OF JUSTICE STATISTICS, (Feb. 26, 2015), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239>.

¹² As these concepts are universally applicable, I will simply use “governments” or “the government” as inclusive terms to mean governments at every level: federal, state, and local.

¹³ Sam Brodey, *Arizona’s New Governor: We Have No Money for Public Education, But Let’s Fund This Private Prison*, MOTHER JONES, (Feb. 12, 2015), <http://www.motherjones.com/politics/2015/02/arizonas-new-governor-just-cut-education-funding-build-big-new-private-prison> (discussing Arizona’s \$1.5 billion budget deficit, which led to cuts in “\$384 million in state programs, including \$75 million in funding for Arizona’s public universities [while] earmark[ing] \$5 million for a new, 3,000-bed private prison”).

¹⁴ Inimai M. Chettiar, *The Many Causes of America’s Decline in Crime*, THE ATLANTIC, (Feb. 2015), <http://www.theatlantic.com/features/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/>.

Quite simply, the current approach to incarceration is neither efficient nor sustainable. Governments at all levels in the United States find themselves in desperate need for a solution to the intertwined problems of prison overcrowding and accelerating prison expenses. Private prison companies promise to help governments reduce prison management costs by outsourcing. Yet evidence suggests that private prison companies rarely innovate and consistently fail to deliver advertised cost savings. A 2001 Bureau of Justice Assistance study demonstrated that, despite private prisons touting of twenty percent potential cost savings, governments actually realize only a seemingly statistically insignificant one percent savings.¹⁵

Moreover, governments struggle to realize the potential of outsourcing because it rarely contemplates long-term goals with regard to imprisonment.¹⁶ Historically “incapacitation, deterrence, retribution and rehabilitation” were the main goals of imprisonment.¹⁷ More recently, intervention and skill development were added.¹⁸ But the emergence of the private prison industry demoted these goals in favor of private profits.¹⁹

It is time for governments to employ more thorough contract planning and administration to gain better performance from private prisons. Government’s use of fixed-price contracts²⁰

¹⁵ Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 599, 604-05 (2012).

¹⁶ Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 79 (2016); Alexander Volokh, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1873-74 (2002).

¹⁷ Fulcher, *supra* note 15, at 599.

¹⁸ Stan Stojkovic, *Oversight: Overview of Correctional Oversight: Prison Oversight and Prison Leadership*, 30 PACE L. REV. 1476, 1482 (Fall 2010).

¹⁹ Fulcher, *supra* note 15, at 592.

²⁰ See *infra* II.Fixed-price contracts); see also RALPH C. NASH, JR. ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, 243 (4th ed. 2013) (defining fixed-price contracts as “a type of contract providing for a firm pricing arrangement established by the parties at the time of contracting”).

when dealing with private prison services has prioritized easy contract administration over returns on investment, like cost savings and lower crime rates, which require more administrative effort.²¹

Cost savings and rehabilitation cannot be accomplished through the use of fixed-price contracts, where private prison companies are paid a fixed daily rate for each prisoner in its control. Fixed-price contracting tied to prisoner population leads to the commoditization of the prisoners. As commodities, prisoners are unlikely to be rehabilitated. Governments should instead use incentive based contracts, award-fee and incentive-fee contracts,²² which occur in both fixed-price and cost-reimbursement contracts.²³ By utilizing incentive based contracts for prison services, the government can incentivize the private prison industry to no longer treat prisoners as commodities. As the only buyer for private prison services, governments should insist that private prisons truly innovate to find better solutions with incarceration.

Incentive contracts require the government to better define its output goals of imprisonment. The government, seeing the rising cost of imprisonment, and its lack of preventing crime,

²¹ Stojkovic, *supra* note 18, at 1486-88 (discussing the goals of prison oversight: namely, defining the reasonable expectations a society can have of prisons).

²² See 48 C.F.R. § 16.401 (2015). See generally Karen L. Manos, GOVERNMENT CONTRACT COSTS & PRICING, §4:4 (2015) (“Under an award fee contract, the contractor’s profit is determined subjectively by the Government in accordance with an established award fee plan; whereas under an incentive fee contract, the contractor’s additional profits or losses are determined objectively, using a predetermined formula based on the relationship between the contractor’s actual performance and the targets specified in the contract.”).

²³ NASH, JR., *supra* note 20 at 141 (explaining that cost-reimbursement contract is “a contract that provides for payment to the contractor for allowable costs to the extent provided in the contract”); see 48 C.F.R. § 16.301-1 (2015) (“Cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.”).

should look for ways to incentivize the private prisons to help achieve these goals. While it is costly in the short term, governments should invest in rehabilitating its prisoners to prevent them from reoffending after release. By improving stated goals and properly incentivizing achievement, the government can leverage the private prison industry to help accomplish beneficial/important goals. Using incentive-fee or award-fee contracting, the government can properly evaluate the private prison industry's rehabilitation of prisoners. Properly defining goals and incentivizing success can lead to long-term, meaningful, socially beneficial cost savings for taxpayers.²⁴

Part I will explore the history of prison privatization and introduce the current state of incarceration. Part II will address some of the problems associated with fixed-price contracting and prison privatization. Lastly, Part III will examine the possible replacement of fixed-price contracting with cost-reimbursement contracting, specifically cost-plus-award-fee contracts, to gain more value for the government customer.

I. BACKGROUND/HISTORY

This section will briefly explore the history of punishment and imprisonment in America from its beginnings as an English colony to the present day. Subpart A will focus on how prisons were funded and how the effects of societal shifts in punishment philosophy and the reemergence of the private prison industry have shaped funding practices. Subpart B will examine the private prison oligarchy, starting in the 1980s, and concluding with the current model, dominated by two monoliths. Finally, Subparts C and D will examine the current state of imprisonment, focusing first on the size of the prison system and secondly on the costs associated with it.

²⁴ See generally Wendy Netter Epstein, *Public-Private Contracting and the Reciprocity Norm*, 64 AM. U.L. REV. 1 (2014).

A. A history of government's use of private funding to defray imprisonment costs

Since the nation's founding, the United States has faced the challenge of paying for the incarceration and punishment of its criminals. Recognizing the potential profit opportunity, private corporations have always been willing to help the government defray imprisonment costs. By studying the historical public-private partnerships in the government's incarceration function, we can see the emergence of government dependence on the private sector.

Private corporations have participated in the American criminal justice system since the American colonial era, when English companies would sell prisoners to Virginians as servants.²⁵ Imprisonment was not the foremost punishment in colonial times; instead, punishment generally involved fines, stocks, and gallows.²⁶ Jails primarily held debtors and those awaiting trial. For this service, private jail facilities were paid fixed fees by the local government.²⁷ On occasion, governments required prisoners to pay for their own cost of imprisonment.²⁸

²⁵ Michael Ames, *Captive Market: Why We Won't Get Prison Reform*, HARPER'S, Feb. 2015, at 34, 39.

²⁶ See generally JON RONSON, *SO YOU'VE BEEN PUBLICLY SHAMED* (2015). (Ronson explains that public shaming was quite prevalent during the 17th Century, but had devastating effects. Jails and prisons were seen as much more humane places to punish people for transgressions, to the point where people, if they were punished with shaming, would beg for it to occur early in the morning so that they would be spared the humiliation. One of the most interesting anecdotes in the book comes from a psychologist in Massachusetts, James Gilligan, who found a direct correlation between a rise in violence—both murders and suicides—in prisons during the 1970s and how prisoners were mistreated and humiliated by prison guards. Once the prisoners were treated with respect and dignity by guards, violence quickly decreased.)

²⁷ Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450 (2005).

²⁸ Peter J. Duitsman, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C.L. REV. 2209, 2214 (1998). (Prisoners were not released until their debts to the prison keepers were paid. If prisoners were

America's movement towards a penal system grounded in imprisonment began when the first modern American prison, Philadelphia's Walnut Street Jail, was established in 1790.²⁹ At this time, governments defrayed incarceration costs by selling prison labor to private contractors. Under the most common prison labor lease programs, prisoners worked on plantations, railroads, or mines. Private companies also used prison labor to manufacture goods from raw materials sent to the prison. In order to reap the benefit of prison labor one private company even assumed the control and the costs of operating the prison.³⁰

When private contractors used prison labor, contractual and human rights problems quickly arose. Due to the seemingly endless supply of prisoners, private companies could disregard the health and safety of the labor. Prison laborers faced harsh conditions resulting, at worst, in death.³¹ Even when it was clear that the private companies were exploiting the prisoner's health and safety to maximize profits, contracts were not easily terminated.³²

In modern America, prison labor is still contracted out to mitigate incarceration costs. Federal Prison Industries, Inc. (FPI or UNICOR) was established so that all physically abled prisoners

unable to pay for their release, they were subjected to horrible working conditions until they could earn enough money to secure their freedom.)

²⁹ Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America*, THE VERA INSTITUTE OF JUSTICE, Feb. 2015, at 6, <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

³⁰ Dolovich, *supra* note 27, at 450-51.

³¹ *Id.* at 452.

³² *Id.* at 453 ("The reasons for this incapacity varied from state to state and included the lessee's political connections (as in Louisiana and Kentucky), the state's dependence on the contractor to provide for the prisoners' needs (as in New York, where in 1851 the wardens of Auburn penitentiary were forced to give significant concessions to the contractor running an on-site carpet shop or leave 'idle more than 300 inmates' and risk the loss of necessary revenue), and the risk that courts would side with the contractors (as in California), thus forcing the state to pay dearly to regain state control of its prisons.").

would work with the goal of providing prisoners a means to acquire skills that would be beneficial to them after their release. Concerned with affecting the open market, UNICOR originally was designed to provide goods for federal government consumption.³³ UNICOR's size peaked in 2007 with 110 factories and 23,000 inmates enrolled. These highs were short lived as numbers fell to eighty-eight factories and 14,200 inmates enrolled in 2011, leaving an astounding 20,000 inmates on a waiting list for UNICOR positions.³⁴ Inmates enrolled in UNICOR receive between a minuscule \$0.23 and \$1.15 per hour.³⁵

In Colorado, prison labor is used to make children's toys, farm blueberries and grapes, raise fish and other aquaculture for food, and run a gift shop, which is open to the public.³⁶ Under this program, the most a prisoner can earn is approximately \$125 per month, roughly \$1.50 per hour. While these rates appear shockingly low, prisoners working in Texas and Georgia receive no compensation for their labor. Prisoners may receive higher compensation if the goods they work on are sold in interstate commerce under the Prison Industry Enhancement Certification Program (PIE),³⁷ where wages are mandated to be in line with federal minimum wage standards.³⁸

³³ Michael C. Groh, *FAR (8.602) Gone: A Proposal to Maintain the Benefits of Prison Work Programs Despite the Restructuring of Federal Prison Industries' Mandatory Source Status*, 42 PUB. CONT. L.J. 391, 395-6 (Winter 2013).

³⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-743, GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 75 (2012).

³⁵ BOP: UNICOR, BOP.GOV, http://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (last visited Aug. 13, 2015).

³⁶ Graeme Wood, *From Our Prison to Your Dinner Table*, PACIFIC STANDARD, (Mar. 3, 2015), <http://www.psmag.com/business-economics/from-our-prison-to-your-dinner-table>.

³⁷ See *infra* notes 238-240.

³⁸ Wood, *supra* note 36 ("PIE, which has existed by statute since 1979 and employs inmates in about 35 state prison systems, stipulates that laborers must receive prevailing wages, which are theoretically no lower than the federal minimum wage of \$7.25 per hour. But after taxes, fees, mandatory savings, and

Prison labor is also used to mitigate costs of other, non-prison programs, such as snow removal or firefighting. In Massachusetts, inmates were paid approximately \$3-\$4 *per day* to remove snow in freezing conditions, while non-inmates doing the same task were paid \$30 *per hour*. During the winter of 2015, Massachusetts used 90 inmates in this program, potentially saving the state as much as \$21,330 per day.³⁹ In California, more than four thousand minimum-security inmates are paid between \$1.45 and \$3.90 per hour to provide fire emergency response services, saving the state up to \$80 million per year.⁴⁰

The punishment landscape changed in the 1970s, moving away from rehabilitation and toward incarceration.⁴¹ Proponents of this shift were weary of how effectively government could rehabilitate criminals. The theory behind incarceration is that if criminals could not be rehabilitated the best solution is to confine them in prison, away from their potential victims in the general public.⁴² Incarceration became the default punishment to the detriment of other punishments like rehabilitation.⁴³

With an increased focus on incarceration, the U.S. prison system quickly became overcrowded. The War on Drugs⁴⁴ brought

money confiscated for restitution or other court-ordered payments, few prisoners receive more than \$3 per hour.”).

³⁹ Josh Israel, *The Windchill Was Negative 25 Degrees And These Inmates ‘Volunteered’ To Shovel Snow All Day For \$4*, THINK PROGRESS, (Apr. 2, 2015, 10:45 AM), <http://thinkprogress.org/justice/2015/04/02/3641557/prison-inmates-mbta-shovel> (estimating savings using a comparison based on an 8-hour work day).

⁴⁰ *Conservation (Fire) Camps*, Department of Corrections and Rehabilitation, CDCR.CA.GOV, http://www.cdcr.ca.gov/Conservation_Camps/ (last visited Aug. 13, 2015).

⁴¹ JONATHAN SIMON, MASS INCARCERATION ON TRIAL, 37 (2014).

⁴² *Id.* at 39.

⁴³ *Id.* at 41.

⁴⁴ See generally Seth Harp, *Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico*, 85 N.Y.U.L. REV. 1661 (2010); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was A “War on Blacks”*, 6 J. GENDER RACE & JUST. 381

new mandatory sentencing guidelines,⁴⁵ which included harsh mandatory minimums for drug offenses. These laws not only increased the time an inmate was in prison, but also increased the total number of inmates in prison.⁴⁶ Existing prisons were unable to adequately contain the rising influx of inmates so new prisons were designed to operate overcapacity by installing plumbing and electrical systems capable of accommodating the overcrowded conditions.⁴⁷ After the judiciary ordered governments to lower prison capacity levels, the private prison industry, able to build new prisons faster than government entities, quickly re-emerged.⁴⁸

B. History of government's use of private funding to defray imprisonment costs

1. The rise of the private prison industry

Modern private prison contracting re-emerged in the 1980s when Corrections Corporation of America (CCA)⁴⁹ and GEO Group,⁵⁰ the two major oligarchs in the private prison industry,

(2002); Susan Stuart, *War As Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U.L.J. 1 (2011).

⁴⁵ See 21 U.S.C. § 841 (2006).

⁴⁶ Fulcher, *supra* note 15, at 594 (“Drug offenders sentenced prior to the adoption of mandatory minimum sentences served an average of twenty-two months in prison, while drug offenders sentenced after the adoption of mandatory minimums were expected to serve almost sixty-two months in prison.”).

⁴⁷ SIMON, *supra* note 41, at 6.

⁴⁸ Ames, *supra* note 25, at 39.

⁴⁹ CCA was incorporated in January 1983 and is currently the largest private prison company. Yet it was not until November of that year that CCA won its first contract, a facility for the Immigration and Naturalization Services (INS). CCA quickly grew, assuming the management of its first facility in January 1984, and opening its first facility in April 1984. *CCA: Our History*, CCA.COM, <https://www.cca.com/our-history> (last visited Apr. 17, 2015).

⁵⁰ GEO Group incorporated in 1984 as the Wackenhut Corrections Corporation. GEO Group received its first contract in 1987 with INS. *History*, GEOGROUP.COM, <http://www.geogroup.com/history> (last visited Aug. 16, 2015).

were incorporated. Today, CCA is not only the largest private prison company in the United States, it houses the fifth largest prison population in the entire United States,⁵¹ behind only the federal government, Texas, California, and Florida.⁵² CCA currently owns or operates sixty-four facilities with a maximum capacity of 84,500 inmates in nineteen states and the District of Columbia.⁵³ By its own estimates, CCA manages forty-one percent of the U.S. private prison market.⁵⁴

GEO Group is the second largest private prison contractor in the United States⁵⁵ and the sixth largest prison system in the United States.⁵⁶ Along with its prison business, GEO Group also provides security services to the Department of Defense.⁵⁷ GEO Group currently controls sixty-six facilities with over 73,000

⁵¹ CORRECTIONS CORPORATION OF AMERICA, ANNUAL REPORT (FORM 10-K), at 5 (Feb. 25, 2011).

⁵² E. ANN CARSON, PRISONERS IN 2013, BUREAU OF JUSTICE STATISTICS BULLETIN, 3 (2014). (Compared to populations as of December 31, 2013 when the United States Government had a prison population of 215,866 inmates, Texas had 168,280 inmates, California had 135,981, and Florida had 103,028. The next highest state population was Georgia's with 54,004 inmates.)

⁵³ Corrections Corporation of America, ANNUAL REPORT (FORM 10-K), 5 (February 28, 2014) (hereinafter "CCA 10-K 2014").

⁵⁴ *Id.* at 8.

⁵⁵ GEO Group, ANNUAL REPORT (FORM 10-K), 10-11 (Feb. 26, 2014) (hereinafter "GEO GROUP 10-K 2014").

⁵⁶ CARSON, *supra* note 52.

⁵⁷ Jenny J. Yang, *Small Business, Rising Giant: Policies and Costs of Section 8(a) Contracting Preferences for Alaska Native Corporations*, 23 ALASKA L. REV. 315, 331 (2006). (Wackenhut has come under scrutiny for misusing Alaska Native Corporation preferences, which provide contracts to Alaskan corporations without usual competitive bidding procedures. Wackenhut entered into subcontract deals with Alutiiq Security and Technology to provide forty-nine percent of a contract so that the Wackenhut/Alutiiq partnership could more easily secure a contract. A 2004 security services contract with the Department of Energy in Idaho originally awarded to the Wackenhut/Alutiiq partnership was cancelled when an Idaho Congressman opposed the deal because of Wackenhut's misuse of the ANC preference.)

beds,⁵⁸ housing between 69,350 and 70,810 inmates at any given time.⁵⁹ Worldwide, GEO Group oversees an approximate additional 4,000 beds in thirty-two facilities.⁶⁰ With facilities in Australia, Canada, the United Kingdom, and South Africa, GEO Group's international market represents approximately fourteen percent of its total revenue.⁶¹

In 2010, CCA purchased its first prison from a government, Ohio's Lake Erie Correctional Institution, for \$72.7 million.⁶² Two years later, CCA intensified its purchasing efforts when it offered to purchase all of the prisons in 48 states in exchange for a twenty-year contract, guaranteeing a ninety percent occupancy quota.⁶³ No states accepted this proposal.⁶⁴ GEO Group bought the Joe Corley Detention Center (JCDC) in Montgomery County, Texas, in May of 2013 for \$65 million.⁶⁵ Montgomery County originally paid \$45 million to build the JCDC in 2008, but realized a \$20 million profit as a result of the sale, and now collects \$250,000 per year in taxes and \$500,000 a year to manage the facility.⁶⁶

⁵⁸ LOCATIONS, GEOGROUP.COM, <http://www.geogroup.com/locations> (last visited Mar. 2, 2015).

⁵⁹ GEO GROUP 10-K 2014, *supra* note 55, at 63. (The average occupancy rate of all U.S. prisons was between ninety-five to ninety-seven percent.)

⁶⁰ *Id.* at 3.

⁶¹ *Id.* at 11.

⁶² Terry Carter, *Prison Break: Budget Crises Drive Reform, But Private Jails Press On*, A.B.A. J., (Oct. 1, 2012), http://www.abajournal.com/magazine/article/prison_break_budget_crises_drive_reform_but_private_jails_press_on/.

⁶³ IN THE PUBLIC INTEREST, *Criminal: How Lockup Quotas and 'Low-Crime Taxes' Guarantee Profits for Private Prison Corporations*, (Sep. 2013), 3, <http://www.inthepublicinterest.org/sites/default/files/Criminal-Lockup%20Quota-Report.pdf>.

⁶⁴ *Id.*

⁶⁵ Cindy Horswell, *Montgomery County Seeks Answers For Swelling Jail Population*, THE HOUSTON CHRONICLE (Aug. 16, 2011 11:09 PM), <http://www.houstonchronicle.com/neighborhood/woodlands/news/article/Montgomery-County-seeks-answers-for-swelling-jail-5693311.php>.

⁶⁶ *Id.*

CCA's stock price has risen over 239 percent to its current⁶⁷ level of \$33.33 since its low of \$9.82⁶⁸ during the Great Recession (December 2007–June 2009).⁶⁹ Similarly, GEO's stock has risen 209 percent, from a low of \$11.18 on February 23, 2009,⁷⁰ to its current price of \$34.53 on August 7, 2015.⁷¹ In comparison, Lockheed Martin's stock rose 355 percent, from a low of \$45.94 on March 9, 2009 to its current value of \$209.09.⁷² IBM rose 116 percent, from \$71.74 at its Great Recession low on November 20, 2008 to a current \$155.12.⁷³ Over this same period, the Dow Jones Industrial Average rose from a low of \$6,594.44 on March 5, 2009 to its current level \$17,373.38, a 163 percent increase.⁷⁴ The S&P 500 Index similarly rose from its recession low of \$676.53 on March 9, 2009 to \$2,077.57, a 207 percent increase.⁷⁵

A person who invested \$10,000⁷⁶ in CCA stock on August 8, 2005 would have a current value of \$38,026.15 on August 6,

⁶⁷ All references to the current prices are the closing price on August 7, 2015.

⁶⁸ *CWX Historical Prices & Data*, NASDAQ.COM, <http://www.nasdaq.com/symbol/cwx/historical> (closing price March 6, 2009).

⁶⁹ See generally Henry S. Farber, *Job Loss in the Great Recession: Historical Perspective from the Displaced Workers Survey, 1984-2010*, NATIONAL BUREAU OF ECONOMIC RESEARCH, (May 2011), <http://www.nber.org/papers/w17040>.

⁷⁰ GEO GROUP 10-K 2014, *supra* note 55, at 36.

⁷¹ *GEO Historical Prices & Data*, NASDAQ.COM, <http://www.nasdaq.com/symbol/geo/historical> (closing price April 10, 2015).

⁷² *Lockheed Martin Corporation (LMT) Historical Prices & Data*, NASDAQ.COM, <http://www.nasdaq.com/symbol/lmt/historical>.

⁷³ *International Business Machines (IBM) Historical Prices & Data*, NASDAQ.COM, <http://www.nasdaq.com/symbol/ibm/historical>.

⁷⁴ *Dow Jones Industrial Average (DJIA)*, WSJ.COM, <http://quotes.wsj.com/index/DJIA/historical-prices>.

⁷⁵ *S&P 500 Index (SPX)*, WSJ.COM, <http://quotes.wsj.com/index/SPX/historical-prices>.

⁷⁶ Computing the value of a stock though the investment of \$10,000 allows for a better analysis of the growth of the company's value because it accounts for reinvestment of dividends into the stock. For instance, GE stock had a value of \$33.76 on August 8, 2005 and a closing value of \$26.03 on August 6, 2015.

2015, a 280 percent increase.⁷⁷ A similar investment in GEO Group stock would yield \$54,829.66, a 448 percent return on investment.⁷⁸ A \$10,000 investment in Lockheed Martin on the same date would currently be worth \$44,803.68.⁷⁹ Similarly, IBM's value increased by 126 percent, from \$10,000 to \$22,630.68.⁸⁰

2. The two roles private prisons play for the government

Private prisons operate by filling two, often concurrent, roles for the government. First, private prisons assist with infrastructure, building new prisons that are subsequently leased back to the government.⁸¹ Private prisons are able to build much faster than the government because of the arcane, complicated, and lengthy procedures that the government has to endure to get funding approved. In order to build a new prison facility, governments are often forced to take out public bonds (and thus become transparent with how it intends to spend public money).⁸² By selling government bonds, governments are forced to ask the public for approval, which is more difficult to get when the money

Without accounting for reinvestment of dividends, the stock would appear to have been a loss of \$2,289.69 over those ten years ($(\$10,000/\$33.76) * \$26.03 = \$7,710.31$). By reinvesting GE's \$8.41 of dividends over that 10-year period, the initial investment is currently worth \$11,002.55. *GE Split History*, SPLITHISTORY.COM, <https://www.splithistory.com/ge/> (last accessed August 7, 2015) (archived at <http://perma.cc/2Z7X-6ZJJ>).

⁷⁷ *CWX Split History*, SPLITHISTORY.COM, <https://www.splithistory.com/cxw/> (last visited Aug. 7, 2015) (archived at <http://perma.cc/UE9C-A2QJ>).

⁷⁸ *GEO Split History*, SPLITHISTORY.COM, <https://www.splithistory.com/geo/> (last visited Aug. 7, 2015) (archived at <http://perma.cc/F529-ZXDQ>).

⁷⁹ *LMT Split History*, SPLITHISTORY.COM, <https://www.splithistory.com/lmt/> (last visited Aug. 7, 2015) (archived at <http://perma.cc/BP36-BK7M>).

⁸⁰ *IBM Split History*, SPLITHISTORY.COM, <https://www.splithistory.com/ibm/> (last visited Aug. 7, 2015) (archived at <http://perma.cc/4AP6-2HBX>).

⁸¹ Dolovich, *supra* note 27, at 457 (calling this "nominal privatization").

⁸² Rachel Christine Bailie Antonuccio, *Prisons for Profit: Do The Social and Political Problems Have a Legal Solution?*, 33 J. CORP. L. 577, 591 (2008).

will be spent on prisons compared to spending on any other program like education.⁸³ Some estimates state that it could take the government up to two years to build a prison, whereas a private company could do the same job in eighteen months.⁸⁴ However, according to CCA estimates, a private company can build a prison in between twelve and eighteen months, compared to the forty-eight to sixty months that it would take a state government to build a prison.⁸⁵

Governments encounter time and cost overruns occur when building its own prison infrastructure. The State of New Hampshire, for instance, began its plan to build a public women's prison in 2010,⁸⁶ yet prison construction is so far behind schedule that eighteen months before the prison was scheduled to be completed, the completion date was already delayed by a year.⁸⁷ Unsurprisingly, the original proposed cost of the prison ballooned from \$38 million⁸⁸ to a current estimate of \$58 million.⁸⁹ Much of the blame for the delays and increased costs can be attributed to New Hampshire's lack of a clear plan. Instead of designing a prison plan and then out-sourcing, New Hampshire depended on

⁸³ JOHN W. ELLWOOD & JOSHUA GUETZKOW, *Footing the Bill: Causes and Budgetary Consequences of State Spending on Corrections in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM*, 229 (2009).

⁸⁴ Antonuccio, *supra* note 82, at 580.

⁸⁵ *CCA At A Glance*, CCA.COM, http://www.cca.com/Media/Default/documents/CCA-Resource-Center/CCA_At-a-Glance.pdf (last visited Mar. 2, 2015).

⁸⁶ Lynne Tuohy, *New Women's Prison in Concord May Not Have Enough Beds When It Opens*, CONCORD MONITOR, (Dec. 2, 2014), <http://www.concordmonitor.com/news/cops/courts/fires/14623221-95/new-womens-prison-in-concord-may-not-have-enough-beds-when-it-opens>.

⁸⁷ Jeremy Blackman, *Swelling Prison Price Tag Not Entirely a Surprise*, CONCORD MONITOR, (Mar. 19, 2015), <http://www.concordmonitor.com/community/town-by-town/concord/16161773-95/swelling-prison-price-tag-not-entirely-a-surprise>. (In December 2014, the anticipated opening in October 2016 was postponed a year to October 2017.)

⁸⁸ *Id.*

⁸⁹ *Id.*

the contractors and architects to design the building providing only the budget as guidance.⁹⁰ The prison has a design capacity of 224 beds and yet, due to the delays in construction, the prison is already scheduled to open overcapacity.⁹¹

Secondly, private prisons provide staffing and operation services to the government within the government-owned facilities.⁹² The recent prison closure in Willacy County, Texas provides an example of the vulnerabilities governments could encounter when contracting in this manner. By contracting with a private company, the government takes on tremendous risk; if the private prison firm does not provide its obligated service, the government can be left with crippling debts and significant job losses for its citizens. A riot by prisoners in February 2015 left the Willacy County Correctional Center (hereinafter, “Willacy”) in a state of ruin.⁹³ Willacy County initially built the prison to attract a prison contractor to run the facility (ultimately used for housing low-level border crossing offenders and minor felony convicts) in hopes that the prison would create jobs and boost the county’s economy. While the prison was operational, it employed over four hundred people.⁹⁴ Additionally, Willacy County received \$2.50 per prisoner per day from the contractor, Management & Training Corporation (MTC), for the use of the government-constructed prison—potentially earning the County \$3 million this year.⁹⁵ However, after the riot, the Federal Bureau of Prisons, which oversaw the prison, canceled the prison management contract with

⁹⁰ *Id.*

⁹¹ Tuohy, *supra* note 86 (stating that New Hampshire had 223 women incarcerated across the state, all of whom were scheduled to be incarcerated at the new facility when it opens).

⁹² Dolovich, *supra* note 27 at 457.

⁹³ John Burnett, *Closure of Private Prison Forces Texas County to Plug Financial Gap*, NPR.ORG, (Mar. 26, 2015, 3:49 AM), <http://www.npr.org/2015/03/26/394918220/closure-of-private-prison-forces-texas-county-to-plug-financial-gap>.

⁹⁴ *Id.*

⁹⁵ Maurice Chammah, *After Willacy*, THE MARSHALL PROJECT, (Mar. 16, 2015 5:29 PM), <https://www.themarshallproject.org/2015/03/04/after-willacy>.

MTC. All 2,800 inmates in Willacy were transferred to other facilities while the prison undergoes repairs, and Willacy County is left with an empty prison in need of repair and \$63 million in debt from the initial construction.⁹⁶

Despite providing functions that can cover both the construction and operations of a prison, private prison contracting is fraught with challenges. Cost and time delays are endemic to the prison construction, but using the private prison industry to mitigate these risks introduces additional/different risks. Governments are stuck without an easy solution with no relief in sight.

C. The increase in American mass incarceration

1. Increasing prison population

Currently, in the United States, approximately 2.2 million adults are incarcerated,⁹⁷ and an additional 4.75 million people are under correctional supervision (probation or parole), bringing the total correctional population to just under seven million people.⁹⁸ In comparison, China, which has billion more people than the United States, nonetheless has a third less inmates than the United States.⁹⁹

No other country approaches the United States' incarceration population. Between 1980 and 2010, per capita incarceration rates in the U.S. have more than tripled, growing from 220 incarcerated people per 100,000 people to 731 inmates

⁹⁶ Burnett, *supra* note 93.

⁹⁷ Lauren E. Glaze & Danielle Kaeble, *Correctional Populations in the United States, 2013*, BUREAU OF JUSTICE STATISTICS, 2 (Dec. 2014).

⁹⁸ *Id.*

⁹⁹ Allen Hopper et al., *Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment*, 54 SANTA CLARA L. REV. 527, 537 (2014) (noting China has a population of 1.35 billion people, compared to the United States' population of just under 314 million people, yet China incarcerates only 1.65 million people).

per 100,000 people.¹⁰⁰ In 2013, among countries with more than 1 million people, the United States' per capita rate of 716 prisoners per 100,000 citizens ranks highest, far ahead of second place Cuba, with 510 prisoners per 100,000 citizens.¹⁰¹

According to a 2013 Bureau of Justice Statistics report, the number of prisoners held in private facilities, both state and federal, rose from 85,500 in 2000, to 124,000 in 2013, a forty-five percent increase.¹⁰² The Federal prison population grew from 24,640 inmates in 1980, to 214,149 inmates in 2014, a 769 percent increase.¹⁰³ Approximately thirteen percent (25,700) of federal prisoners were housed in private facilities.¹⁰⁴

In 1990, there were only forty-four private prisons in the United States, housing an estimated 15,000 prisoners. In 2000, there were 264 private prisons (a 500 percent increase). Just five years later, in 2005, there were 415 private prisons (a 843 percent increase on 1990's number).¹⁰⁵ Ten percent of United States inmates are currently housed in private prisons.¹⁰⁶

Jails, primarily used by local communities to house pre-trial defendants and those convicted with short-term sentences,

¹⁰⁰ Gopnik, *supra* note 2.

¹⁰¹ Walmsley, *supra* note 3.

¹⁰² Glaze & Kaeble, *supra* note 97, at 12. (During the same 2000-2013 time period, public prisons rose from 1,225,700 to 1,352,500, a 10 percent increase. It is interesting to note that federal private prison populations grew from 9,400 inmates in 2000 to 31,900 in 2013, a 239 percent increase; whereas state private prison populations grew from 76,100 inmates in 2000 to 92,100 in 2013, a 21 percent increase.)

¹⁰³ BOP: POPULATION STATISTICS, BOP.GOV, http://www.bop.gov/about/statistics/population_statistics.jsp (last visited Mar. 1, 2015).

¹⁰⁴ *Id.* (The total amount of prisoners was 209,824 on February 26, 2015.)

¹⁰⁵ Peter H. Kyle, *Contracting for Performance: Restructuring the Private Prison Market*, 54 WM. & MARY L. REV. 2087, 2092 (2013).

¹⁰⁶ Ames, *supra* note 25, at 39 (noting also that private prison inmate "rates [are] as high as 44 percent in some states."). Of this ten percent, CCA has approximately four percent of the population (84,500 CCA prisoners in a total population of 2,200,000), and GEO Group has approximately three percent (73,000 GEO prisoners).

have also seen a sharp increase in inmates.¹⁰⁷ From 1983 to 2013, jails increased its population from six million to 11.7 million inmates. The number of people in jail on a single day increased approximately 226 percent between 1983 and 2013.¹⁰⁸ During this same time, the average duration spent in jail increased from fourteen days to twenty-three days.¹⁰⁹ In 1983, there were approximately ninety-six people in jail per 100,000 citizens, which rose to an apex in 2007 of 259 people per 100,000 before declining to current levels of 231 people per 100,000. In large cities, jails often find that a majority of its admissions consist of a small group of people who are repeatedly imprisoned and jailed.¹¹⁰

The Federal Government's Immigration and Customs Enforcement (ICE) represents the fastest growing sector of prison industry. The total number of detainees increased by 205 percent in the ten years between 2001-2011, from 209,000 detainees to 429,000.¹¹¹ In 2000, only 8,900 ICE detainees were held in private prisons each night,¹¹² but by 2011, that total rose to 33,330 detainees, a 274 percent increase.¹¹³

¹⁰⁷ Subramanian et al., *supra* note 29, at 7.

¹⁰⁸ *Id.* at 8 (“The number of people in jail on any given day has also climbed—from 224,000 people in 1983 to 731,000 in 2013.”).

¹⁰⁹ *Id.* at 10.

¹¹⁰ *Id.* at 7-8 (“In Chicago, 21 percent of the people admitted to jail between 2007 and 2011 accounted for 50 percent of all admissions. In New York City, from 2008 through mid-year 2013, just shy of 500 people were admitted to jail 18 times or more, accounting for more than 10,000 jail admissions and 300,000 days in jail.”).

¹¹¹ Ames, *supra* note 25, at 35.

¹¹² Cody Mason, *Dollars and Detainees: The Growth of For-Profit Detention*, THE SENTENCING PROJECT, (July 2012), http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf.

¹¹³ *Detention Management*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, (Nov. 10, 2011), <https://www.ice.gov/factsheets/detention-management>.

2. The rising costs of incarceration

Along with the rising number of inmates across the U.S. prison population, the costs of incarceration have also risen drastically. In 2001, the estimated cost of housing one state prisoner for one day was \$62.05 (\$22,648.25 annually) and a federal prisoner was \$62.01 (\$22,633.65 annually).¹¹⁴ By contrast, in 2009, the average cost of incarcerating a person for one day was \$78.88 (amounting to \$28,791.20 annually), a 27.2 percent increase.¹¹⁵ The state of New Hampshire released a report in 2013, where it estimated the costs of housing a male inmate in 2012, at \$36,435, and a female at \$37,573.¹¹⁶ The state also estimated that the projected cost in 2033, would be \$61,050 for male inmates and \$74,631 for female inmates.¹¹⁷ The cost of housing a juvenile is nearly six times higher than an adult, at \$366.88 per day or \$133,911.20 per year.¹¹⁸

The costs of housing a prisoner in a private prison can be even higher. A 2011 Arizona Department of Corrections report showed that private prisons can cost as much as \$1,680 more per year to house an inmate than a public prison.¹¹⁹ This increase is

¹¹⁴ Fulcher *supra* note 15, at 603.

¹¹⁵ Paul Ashton & Amanda Petteruti, *Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies*, JUSTICE POLICY INSTITUTE, 31 (June 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf.

¹¹⁶ DEPARTMENT OF CORRECTIONS & DEPARTMENT OF ADMINISTRATIVE SERVICES, REPORT ON REVIEW OF CORRECTIONAL FACILITY RFPs 1356-12, 1380-12 AND 1387-12, STATE.NH.US, 8 <http://admin.state.nh.us/purchasing/State%20Summary%20Report%20Final.pdf> (last visited Mar. 2, 2015).

¹¹⁷ *Id.*

¹¹⁸ Maurice Chammah, *The 17-Year-Old Adults*, THE MARSHALL PROJECT, (Mar. 3, 2015), <https://www.themarshallproject.org/2015/03/03/the-17-year-old-adults>.

¹¹⁹ BIENNIAL COMPARISON OF "PRIVATE VERSUS PUBLIC PROVISION OF SERVICES" REQUIRED PER A.R.S. § 41-1609.01(K)(M), CORRECTIONS.AZ.GOV, 61, (2011), https://corrections.az.gov/sites/default/files/ars41_1609_01_biennial_comparison_report122111_e_v.pdf (\$1,680 yearly savings calculated

especially stark because private prisoners typically require less significant attention to physical, health, or mental concerns and disabilities.¹²⁰ The medical costs that private prisons do not provide can increase the cost of public prisons by a third.¹²¹

For minimum-security prisons, private prisons are only saving \$0.03 per day per inmate. That advantage is lost at the medium security level, where public prisons cost between 4.4 percent and 8.7 percent less than its private counterparts. This can add up to as much as \$2 million per prison or \$1,679 per inmate in a year. A recent study of public and private prisons in Mississippi shows that prisoners serving in private prisons generally serve sixty to ninety days more than they would in a public prison, which costs the state between \$3,000 and \$4,500.¹²²

3. Imprisonment's growing burden on society

Despite the high incarceration rates, imprisonment has lost its effectiveness as a deterrent from crime. While the crime rate has diminished in the past twenty-five years, there is no demonstrated

from the difference between the average adjusted medium custody per diems in private prisons (\$53.02) and public prisons (\$48.42), multiplied by 365 days).

¹²⁰ Richard A. Oppel, Jr., *Private Prisons Found to Offer Little in Savings*, N.Y. TIMES, (May 18, 2011), <http://www.nytimes.com/2011/05/19/us/19prisons.html?pagewanted=all>. (For example, Arizona's eight private prison contracts have clauses that prevented inmates with severe mental health issues from being housed in the private prisons, while five of Arizona's eight contracts contain terms that allowed private prison companies to reject prisoners with severe physical disabilities. Private prison companies are also allowed to "return [inmates who became sick] to state prisons due to an increase of their medical scores that exceeds contractual exclusions.")

¹²¹ *Id.*

¹²² Anita Mukherjee, *Do Private Prisons Distort Justice? Evidence on Time Served and Recidivism*, 31, (Mar. 15, 2015), <http://ssrn.com/abstract=2523238>.

correlation with the increase in imprisonment.¹²³ Instead, the drop in the crime rate is attributed to increasingly sophisticated policing strategies and an aging population.¹²⁴ A recent report has shown that increasing incarceration levels by one percent will not decrease the crime level in any statistically distinguishable manner.¹²⁵ Surprisingly, lowering the prison population has actually coincided with a drop in crime in some states. Fourteen states that saw its prison populations decline in the past ten years also experienced crime rates drop of at least 15 percent.¹²⁶ With these diminishing marginal returns on incarceration, states are finding it increasingly difficult to justify incarcerating non-violent offenders.

California, whose infamous Three Strikes law¹²⁷ sought to dissuade crime by levying life sentences to repeat offenders led to massive overpopulation in its state prisons, provides an interesting example. Unfortunately, due to the increased prison population, Three Strikes is directly responsible for a \$19.2 billion prison budget increase in the state.¹²⁸ In *Brown v. Plata*,¹²⁹ the Supreme

¹²³ Chettiar, *supra* note 14 (“Crime is about half of what it was at its peak in 1991. Violent crime plummeted 51 percent. Property crime fell 43 percent. Homicides are down 54 percent.”).

¹²⁴ *Id.*

¹²⁵ Oliver Roeder et al., *What Caused the Crime Decline?* Brennan Center for Justice, at 23 (2015), https://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf.

¹²⁶ Chettiar, *supra* note 14 (“New York reduced imprisonment by 26 percent, while seeing a 28 percent reduction in crime. Imprisonment and crime both decreased by more than 15 percent in California, Maryland, New Jersey, New York, and Texas. Eight states—Connecticut, Delaware, Massachusetts, Michigan, Nevada, North Carolina, South Carolina, and Utah—lowered its imprisonment rates by 2 to 15 percent while seeing more than a 15 percent decrease in crime.”).

¹²⁷ CAL. PENAL CODE § 667 (2016).

¹²⁸ CALIFORNIA STATE AUDITOR, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION: INMATES SENTENCED UNDER THE THREE STRIKES LAW AND A SMALL NUMBER OF INMATES RECEIVING SPECIALTY HEALTH CARE REPRESENT SIGNIFICANT COSTS, 2, (2010), <https://www.bsa.ca.gov/pdfs/reports/2009-107.2.pdf>.

¹²⁹ 131 S. Ct. 1910 (2011).

Court required California to reduce prison capacity from the then current levels, which could reach as high as 300 percent capacity, to *only* 137 percent capacity.¹³⁰ As a result, California began releasing prisoners who were given life sentences under the Three Strikes Law. As of February 2015, only 4.7 percent of the approximately 2,000 inmates released were re-incarcerated after committing new crimes.¹³¹

II. PROBLEMS CURRENTLY WITH FIXED-PRICE CONTRACTS FOR PRISONS

Despite no reliable data showing that private prisons deliver promised cost savings, the private prison industry is growing. To understand why private prisons may not be delivering its purported, sometimes legally required cost savings,¹³² it is first important to understand how private prison contracts are constructed. By examining the standard fixed-price per diem contract private prisons use, this section will show why this contracting approach favors the private prison industry over the government. First, this section will describe how fixed-price contracts work and why they may fail to meet the governments' needs for prison contracts. Then this section will discuss some of the problems associated with the current fixed-price contract structure, in particular, those problems related to quotas, correctional staffing costs, termination clauses and the resulting lack of transparency.

¹³⁰ SIMON, *supra* note 41, at 7.

¹³¹ Erik Eckholm, *Out of Prison, and Staying Out, After 3rd Strike*, N.Y. TIMES, Feb. 26, 2015, <http://www.nytimes.com/2015/02/27/us/california-convicts-are-out-of-prison-after-third-strike-and-staying-out.html>.

¹³² ARIZ. REV. STAT. ANN. § 41-1609.02(B) (2015); FLA. STAT. § 957.07 (2014).

A. Fixed-price contracts

A fixed-price contract is one that “provide[es] for a firm pricing arrangement established by the parties at the time of contracting.”¹³³ Fixed-price contracting places the risks and responsibility for the costs on the contractor. By providing a known price on the value of the contract, the only way a contractor will receive a profit is if it performs at a cost below the agreed upon fixed-price. Thus, fixed-price contracting works best when purchasing items that have a known, definable cost, such as commercial items like office supplies or food.¹³⁴ While contractors benefit from fixed-price contracting, because it allows them to allocate resources without the normal risk of revenue changes, the government benefits from fixed-price contracting because it is the best method to incentivize contractors to control costs and leaves the government with little performance administration.¹³⁵

Payments to private prisons represent a variant of the traditional fixed-priced model. Most, if not all, private prisons are paid on a fixed per diem rate (often described as “per bed” or “per bed night”) for each inmate it houses.¹³⁶ Thus, the more inmates a private prison houses, the more revenue that contractor will earn. In general, a contractually guaranteed fixed daily rate is already a huge advantage for contractors because it removes the risk of revenue fluctuation. This advantage is amplified in private prison contracts. While the rate is fixed, the number of inmates (and thus, the number of rates the company can collect) is not, allowing private prisons to maximize profits by increasing the quota level or the number of inmates.¹³⁷

¹³³ NASH, JR., *supra* note 20 at 243; *see* 48 C.F.R. § 16.201 (2015).

¹³⁴ Kara M. Sacilotto, *Déjà vu All Over Again: Cost-Reimbursement Contracts Fall Out of Favor (Again)*, 40 PUB. CONT. L.J. 681, 685 (2011) (citing 48 C.F.R. § 16.202-1).

¹³⁵ 48 C.F.R. § 16.202-1 (2015).

¹³⁶ Fulcher, *supra* note 15, at 601.

¹³⁷ *See supra* II.Fixed-price contracts rely on quotas) for discussion on what private prison companies have done to ensure that this risk is alleviated.

To maximize the benefits of fixed-price contracting, both the government and the contractor need to know the exact costs of the inputs.¹³⁸ The government is at a disadvantage when contracting for prison services because the input costs are difficult to estimate. The government may have only one point of comparison, its own current prison systems, while private prison companies have many facilities around the country from which to learn best practices. Furthermore, the government often looks to outsource the prison function when it is overburdened, making its current system a poor comparison point. Without a central government agency that can provide cost estimates and industry norms for prison operations, governments are in a weak position to maximize the benefits of fixed-price contracting in the private prison context.

While fixed-price contracts lock in revenue for the contractors, it does not lock in expenses, which are still susceptible to market fluctuation. If expenses rise too high, the contractor can only earn a profit if it cuts costs on those expenses it deems unnecessary or expendable, such as staffing, food or programs. When input costs rise, companies are incentivized to cut costs to maintain profit, appeasing shareholders at the expense of inmates and the government as its customer.¹³⁹

With fixed-price contracting, governments must be explicit with what it wants to achieve from the contract. This becomes increasingly difficult in private prison contracts where humans become commodities and the cost aspects vary widely across inputs, including health resources and the type of inmates received. Because contractors have inherently broad latitude of discretion in applying the vague cost standards, these contracts are susceptible to contractor abuses and difficult to police.¹⁴⁰

¹³⁸ 48 C.F.R. § 16.202-2(c) (2015).

¹³⁹ See *infra* II. When private prisons are forced to cut costs to ensure profit, correction officers often bear the brunt of the cuts).

¹⁴⁰ Dolovich, *supra* note 27, at 478.

B. Fixed-price contracts rely on quotas to guarantee contractor profits

Private prison companies typically are paid fixed per diem rates for each prisoner it houses. While the per diem rate is fixed, the number of inmates required to be in prison is not necessarily fixed, thus creating an imbalance where the private prisons assume the risk of running a fully operational facility populated with insufficient inmates to cover its costs. To rectify this incongruity, many private prison companies negotiate a quota for a minimum number of inmates to be housed in a prison at any time, and, as a result, nearly two-thirds of private prison contracts contain quota provisions that call for contractually guaranteed minimum payments of eighty to one hundred percent prison capacity.¹⁴¹

Typical of contracts that include quotas, the government often requires a per diem rate up to that quota, then a flexible rate for each prisoner over that quota.¹⁴² The quota system acts as a

¹⁴¹ IN THE PUBLIC INTEREST, *supra* note 63, at 6 (“Arizona has three contracts that contain 100 percent occupancy guarantee clauses. Oklahoma has three contracts with a 98 percent occupancy guarantee provision, while a couple of Louisiana’s contracts contain occupancy requirements at 96 percent, and Virginia has one at 95 percent.”); CCA 10-K 2014, *supra* note 54 (“For the years 2013, 2012, and 2011, the average compensated occupancy of [CCA’s] facilities, based on rated capacity, was 85 percent, 88 percent, and 90 percent, respectively.”).

¹⁴² See *Operations and Management Service Contract Bay Correctional Facility*, DMS#13/14-009A, 61, http://www.dms.myflorida.com/content/download/90674/524385/Bay_Contract_-_Executed_Redacted.pdf (Bay Correctional has a per diem rate of \$48.53 for the first 90 percent, with an additional \$3.52 for each prisoner over 90 percent); *Operations and Management Service Contract Moore Haven Correctional Facility*, DMS#13/14-009B, 61, http://www.dms.myflorida.com/content/download/91291/526701/Moore_Haven_Contract_-_Executed_Redacted.pdf (explaining that Moore Haven has a per diem rate of \$48.18 for the first 90 percent capacity, and \$3.65 for each additional prisoner); *Operations and Management Service Contract Graceville Correctional Facility*, DMS#12/13-010, 61, http://www.dms.myflorida.com/content/download/73740/437613/Graceville_Contract_DMS1213-010_-_Executed-Redacted-OCR_pdf_Adobe_Acrobat_Pro.pdf (\$39.44 for the first 90 percent, then \$3.94 for each additional prisoner);

mechanism to help the contractor estimate its incurred costs so it can properly operate. After the quota is met, using economies of scale, the contractor is able to provide housing services to additional prisoner at a substantially reduced rate.¹⁴³

Quotas benefit both the government and contractors. The government, knowing its minimum costs, can budget accordingly, while contractors know the minimum amount of revenue it will receive. Quota minimums on contracts encourage governments to ensure that no money is wasted. It also ensures that contractors will be able to recoup expense it has incurred in front of the contract (*e.g.* building the facility).

Many scholars view these quotas as capacity guarantees, where the government will pay for a contractually obligated minimum number of beds, even if prisoners do not occupy those beds.¹⁴⁴ These contracts should instead be viewed as variable supply contracts.¹⁴⁵ For example, the Blackwater River Correctional Facility in Milton, Florida has a 90 percent quota, where the per diem rate is \$45.80 for the first 1,800 inmates in its 2,000-prisoner facility, and \$7.70 for each additional prisoner.¹⁴⁶ Thus, the contract terms are actually \$82,400.00 per day, with a variance that can add an additional \$1,540.00 per day to the costs.

Solitary confinement quotas are emblematic of the perverse incentives that result when using a quota system in prison

Amendment #7 Operations and Management Service Contract South Bay Correctional Facility, 08/09-077, 4, http://www.dms.myflorida.com/content/download/102644/585430/SBCF_Executed_Amendment_#7_for_DMS_Website.pdf (\$48.85 for the first 90 percent, then \$7.00 for each additional inmate).

¹⁴³ RICHARD W. HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY*, 104 (1997).

¹⁴⁴ See Ames, *supra* note 25, at 40; Alex Friedmann, *Apples-to-Fish: Public and Private Prison Cost Comparisons*, 42 *FORDHAM URB. L.J.* 503, 540 (2014).

¹⁴⁵ See 48 C.F.R. § 11.701 (2015).

¹⁴⁶ *Operations and Management Service Contract, Blackwater River Correctional Facility*, DMS 08/09-026, 94, [http://www.dms.myflorida.com/content/download/90742/524628/Redacted_Blackwater_O&M_Contract_DMS_08-09-026\[1\].pdf](http://www.dms.myflorida.com/content/download/90742/524628/Redacted_Blackwater_O&M_Contract_DMS_08-09-026[1].pdf).

contracts. The Federal Bureau of Prisons contracts, for instance, contain a quota for solitary confinement, which was set at ten percent until last year, when it was halved.¹⁴⁷ Housing solitary confinement inmates can be two to three times more costly than a typical inmate.¹⁴⁸ So, with a ten percent mandated quota for solitary confinement, a prison is encouraged to use that space, since the state is already paying for it.¹⁴⁹ The recent controversy surrounding probable human rights violations associated with use of solitary confinement complicates this problem,¹⁵⁰ especially where juveniles housed in adult prisons are relegated to solitary confinement for their protection.¹⁵¹ Solitary confinement should not be used solely because the government has a contractual requirement to pay extra money to a private prison.

¹⁴⁷ Carl Takei, *A Most Unsurprising Riot*, THE MARSHALL PROJECT, (Feb. 24, 2015 7:15 AM), <https://www.themarshallproject.org/2015/02/24/a-most-unsurprising-riot>.

¹⁴⁸ *The Dangerous Overuse of Solitary Confinement in the United States*, ACLU BRIEFING PAPER, 11, (Aug. 2014), https://www.aclu.org/sites/default/files/field_document/stop_solitary_briefing_paper_updated_august_2014.pdf.

¹⁴⁹ See generally Jerry R. DeMaio, *If You Build It, They Will Come: The Threat of Overclassification in Wisconsin's Supermax Prison*, 2001 WIS. L. REV. 207 (2001) (discussing a similar problem in sentencing prisoners to higher security prisons than their crime would normally command, which increases the costs to the government and is worse for the prisoners).

¹⁵⁰ See generally Davis v. Ayala, 135 S. Ct. 2187, 2208-11 (2015); Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Unusual Punishment*, 90 IND. L.J. 741 (2015); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441 (2006); Atul Gawande, *Hellhole*, THE NEW YORKER, 36-45 (Mar. 20, 2009).

¹⁵¹ See generally Jennifer Gonnerman, *Before the Law*, THE NEW YORKER, 26, (Oct. 6, 2014); Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEWYORKER.COM, (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>; Fred Grimm, *Florida Still Sticks Juvenile Inmates In the Box*, MIAMIHERALD.COM, (June 12, 2015), <http://www.miamiherald.com/news/local/news-columns-blogs/fred-grimm/article23904103.html>.

C. When private prisons are forced to cut costs to ensure profit, correction officers often bear the brunt of the cuts

When private prisons need to cut costs to preserve profits, it generally elects to reduce staffing costs before enacting other cost-savings strategies. Staffing costs, mainly salaries and associated benefits, can account for nearly sixty to eighty percent of the total operating expenses for a prison.¹⁵² CCA estimates that staffing costs accounted for sixty-five percent of its expenses in 2012 and 2013.¹⁵³ Reducing staffing costs for a private prison is easier than reducing similar costs in a public prison, because most private prison corrections officers are not members of a union, which would normally fight to maintain high salaries for correctional officers.¹⁵⁴

Correctional officers, both in the public and private sector, earn extremely low rates of pay, which have decreased in the last twenty years. In 1998, a correctional officer in New York made, on average, \$36,000 per year.¹⁵⁵ Today, the average starting wage for corrections officers in many states is \$15 per hour (approximately \$30,000 annually).¹⁵⁶ Moreover, wild disparities are seen between various states. In California, new correctional officers can earn approximately \$38,064 per year, while an experienced correctional

¹⁵² Cassandre Monique Davilmar, *We Tried To Make Them Offer Rehab, But They Said, "No, No, No!": Incentivizing Private Prison Reform Through The Private Prisoner Rehabilitation Credit*, 89 N.Y.U.L. REV. 267, 279 (2014).

¹⁵³ CCA 10-K 2014, *supra* note 53, at 56.

¹⁵⁴ *Id.* at 24. (As of December 31, 2013, CCA employed approximately 15,400 people, only 800 of which were in a union.)

¹⁵⁵ Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC, (Dec. 1998), <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669>.

¹⁵⁶ Miles Bryan, *States Face Correctional Officer Shortage Amid a Cultural Stigma*, NPR.ORG, (March 3, 2015 3:41 PM), <http://www.npr.org/2015/03/03/390229369/states-face-correctional-officer-shortage-amid-a-cultural-stigma>.

officer can earn \$79,728 annually.¹⁵⁷ In a February 2015 advertisement searching for correctional officer job applicants in the state of Alabama, the starting salary was listed as \$28,516 (plus benefits). These applicants were only required to be at least nineteen years old, have a high school diploma or GED, and be drug free.¹⁵⁸

Decreasing an already low salary for correctional officers does not improve prison conditions. Private prison companies experience high turnover rates with its staff.¹⁵⁹ Similarly, many states are facing shortages in corrections staffing. High turnover rates are associated with poor training and morale, which can lead to high rates of violence in the prison among other concerns.¹⁶⁰

Training new recruits becomes more important when there are high turnover rates among correctional officers, yet states have decreased the amount of training a correctional officer receives so that the workforce volume can be increased. For example, California is decreasing the amount of training that Correctional Officers receive, from sixteen weeks to twelve weeks, so that new Correctional Officers can start their jobs quicker and the state can train more Correctional Officers per year. Correctional officers who have more training often command a higher salary, so this decrease in training leads to lower salaries for most correctional officers. California needs to add approximately 7,000 new Correctional Officers over three years to properly maintain their

¹⁵⁷ Jon Ortiz, *Shorter California Prison Officer Academy to Start Next Month*, THE SACRAMENTO BEE, (June 23, 2015), <http://www.sacbee.com/news/politics-government/the-state-worker/article25344946.html>.

¹⁵⁸ Kelsey Stein, *Alabama Department of Corrections Taking Applications for New Officers This Week*, AL.COM, (February 25, 2015 2:23 PM), http://www.al.com/news/index.ssf/2015/02/alabama_department_of_correcti_2.html#incart_river.

¹⁵⁹ CCA 10-K 2014, *supra* note 53, at 49.

¹⁶⁰ Bryan, *supra* note 156. (Currently, Wyoming is 20 percent understaffed, Oklahoma is 33 percent understaffed, and Texas, Kansas, and Michigan also face huge shortages on staff.)

prison system. Even with the decreased training requirements, California can only train 1,056 Correctional Officers per year.¹⁶¹

Private prisons will often look to reduce labor costs as a way to save money and maintain or increase profits when it uses fixed-price contracts. Using cost-reimbursement contracts will allow private prisons to maintain adequate staffing levels while also keeping training at high standards. Without the incentive to cut staff costs, the private prisons will find value in the better-trained and more experienced correctional officers.

D. Termination clauses are not properly utilized to ensure best value for the government

Termination clauses, for convenience¹⁶² and for cause,¹⁶³ are some of the most useful tools a government has to ensure proper performance in its contracts. This is especially true where the industry in which the government is contracting is plagued with problems. However, governments are unable to fully utilize termination clauses because of the dual presence of a private prison oligarchy, with three major private companies controlling ninety percent of the market, and a single buyer government monopsony.¹⁶⁴

¹⁶¹ Ortiz, *supra* note 157.

¹⁶² 48 C.F.R. § 2.101 (2015) (Termination for Convenience is defined as “the exercise of the Government’s right to completely or partially terminate performance of work under a contract when it is in the Government’s interest.”).

¹⁶³ 48 C.F.R. § 49.401(a) (2015) (“Termination for default is generally the exercise of the Government’s contractual right to completely or partially terminate a contract because of the contractor’s actual or anticipated failure to perform its contractual obligations.”).

¹⁶⁴ Ames, *supra* note 25, at 39 (stating that CCA and GEO Group account for approximately 75 percent of the private prison market share, while the third largest private prison company, MTC, occupies approximately 15 percent of the market.).

Myriad stories describing reprehensible actions in private prisons¹⁶⁵ should have concluded with terminated contracts; however, the government has chosen not to act. Because governments generally outsource when its facilities are at or over capacity, desperate to find new places to put inmates, the government is unable to terminate contracts with a poor performing private prison because there is no alternative venue to house the prisoners that are in the private facility.¹⁶⁶ Additionally, when the private prison company often owns the building where the prisoners are held, the government cannot simply re-compete the contract for another private prison firm to replace the terminated one.

Sharon Dolovich raises three characteristics of the private prison industry that tend to show that termination does not provide the necessary threat to maintain appropriate quality.¹⁶⁷ First, the “only buyers in this market are public officials, spending other people’s money.”¹⁶⁸ Second, there are a limited number companies with the necessary “experience, resources, and infrastructure” ready to replace a terminated contract. Third, the state would see high costs associated with re-acquiring the prison responsibility,

¹⁶⁵ Jerry Mitchell, *East Mississippi Prison Called “Barbaric,”* THE CLARION-LEDGER, (Sep. 24, 2014, 9:35PM), <http://www.clarionledger.com/story/news/2014/09/25/east-mississippi-prison-called-barbaric/16242399/> (stating that the East Mississippi Correction Facility, housing 1200 mentally ill inmates, was sued by the ACLU and Southern Poverty Law Center when inmates did not have access to water or working plumbing, assaults by officers and widespread drug and violence); R.L. Nave, *MDOC, Private Prisons on Trial*, THE JACKSON FREE PRESS, (Apr. 8, 2015, 6:00 AM), <http://www.jacksonfreepress.com/news/2015/apr/08/mdoc-private-prisons-trial/> (stating that a suit was filed against the Mississippi Department of Corrections and private prison contractor Management & Training Corporation for conditions at the Walnut Grove Correctional Facility, including “Reported correctional officers trafficking contraband, drug use, daily gang fights, sexual assaults . . . and at least three riots”).

¹⁶⁶ Dolovich, *supra* note 27, at 495.

¹⁶⁷ *Id.* at 495.

¹⁶⁸ *Id.* at 495-96 (quoting *Richardson v. McKnight*, 521 U.S. 399, 418-19 (Scalia dissenting) (1997)).

including start up costs and litigation.¹⁶⁹ States have been more willing to terminate contracts when it has contracted to send inmates to prisons out of state than when it has long term abuses happening in its own state.¹⁷⁰

E. Transparency lost when using fixed price contracts

While the majority of the criminal justice process is conducted in open fora, the criminal justice system essentially closes to the public eye once the defendant is convicted and sentenced to a term in prison or jail. The conditions in which a person serves their sentence can significantly impact their life during and after incarceration, where health, psychological, and social issues can emerge as a result of incarceration.¹⁷¹ Not only is it in the inmates' best interest to be treated with dignity, it is also in the government's and citizenry's interest, those ultimately paying the dollar and societal costs of imprisonment, to know how inmates are being treated.

Fixed-price contracts should only be used when "available cost or pricing information permits realistic estimates of the probable costs of performance."¹⁷² Prison services are unique in that prisoners are the commodities, with private prisons being paid a fixed-price per diem for each prisoner housed. There is a wide variance of health and mental problems among prisoners. Many prisoners could have drug or alcohol issues¹⁷³ that would increase the cost to a private prison to house that prisoner. Governments and private prisons cannot adequately place a fixed-price on the wide array of prisoners who will enter the private prison with any

¹⁶⁹ *Id.* at 496.

¹⁷⁰ *Id.* at 497-99.

¹⁷¹ Andrea Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 437 (2014).

¹⁷² 48 C.F.R. § 16.202-2(c) (2015).

¹⁷³ *See supra* III.B. Drug and alcohol rehabilitation).

degree of certainty that the price will meet basic government contracting standards.

In relation to other government programs, prisons are uniquely closed to the public.¹⁷⁴ Because prisons are closed to the public, there is likely less public scrutiny to the conditions in prisons. In order to ensure that there is little public knowledge of prisons, many prisons strictly restrict media access, only giving access on the prisons' own terms.¹⁷⁵

Furthermore, prisons lack the transparency and oversight that could make them truly effective.¹⁷⁶ There are several factors that contribute to a closed prison system. First, prisoners face higher barriers to sue when they have been mistreated.¹⁷⁷ The Prison Litigation Reform Act of 1996 (PLRA) was enacted to prevent prisoners from filing frivolous inmate lawsuits.¹⁷⁸ Instead, the PLRA has made filing any lawsuit, frivolous or not, nearly impossible for an inmate. The main barrier created by the PLRA that prisoners face is the large filing fee that must accompany any lawsuit. Filing fees are often waived for inmates, but a recent

¹⁷⁴ See generally David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, (2010) (explaining why the lack of oversight and non-standardization of prisons has brought more corruption and mistreatment.).

¹⁷⁵ Armstrong, *supra* note 171, at 462.

¹⁷⁶ Stojkovic, *supra* note 18, at 1486-88 (discussing the goals of prison oversight: namely, defining the reasonable expectations a society can have of prisons).

¹⁷⁷ See generally Lynn S. Branham, *Of Mice and Prisoners: The Constitutionality of Extending Prisoners' Confinement for Filing Frivolous Lawsuits*, 75 S. Cal. L. Rev. 1021 (2002); Sharon I. Fiedler, *Past Wrongs, Present Futility, and the Future of Prisoner Relief: A Reasonable Interpretation of "Available" in the Context of the PLRA*, 33 U.C. Davis L. Rev. 713 (2000).

¹⁷⁸ Alysia Santo, *Suing From Prison*, THE MARSHALL PROJECT, (February 18, 2015 4:45 PM), <https://www.themarshallproject.org/2015/02/18/suing-from-prison> ("During the debate in Congress over the law, PLRA proponents liked to cite the tale of an inmate who sued because the prison canteen sent a jar of crunchy peanut butter when he had ordered the creamy kind -- a prime example of frivolous inmate litigation. But the issue was not the peanut butter. The inmate sued because after he sent the peanut butter back he was still charged \$2.50, and he had no other way to recover the money.").

Supreme Court case limited this waiver.¹⁷⁹ In *Coleman-Bey v. Tollefson*, the Court upheld PLRA's three strikes rule, which precluded inmates from receiving a waiver of the court filing fee if they had three previous filings dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted, even if one of those previous filings is the subject of an appeal.¹⁸⁰ The plaintiff in this case earns seventeen and a half cents per hour; if he worked his maximum allowable hours (thirty in a week) it would take him two years to earn the money for the filing fee.¹⁸¹ Without lawsuits, it is difficult for prisoners to ever get relief if they have been harmed.

Second, private prisons enjoy enhanced secrecy that other facets of the criminal justice system do not enjoy. Private prisons are usually not subject to Freedom of Information Act requests, nor may they be sued for damages under the *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* standard.¹⁸² Under the same logic, because the private companies are operating the facilities, the government is typically shielded from lawsuits dealing with activity in the private prisons.¹⁸³

Third, there is a lack of reliable data that could provide more information about how prisons are operated and which programs are best suited for rehabilitation. This may be a result of many factors, including the use of unreliable questionnaires and a lack of resources for data collection among the prisons.¹⁸⁴

Finally, many states try to obscure information about its prisons for fear of how the public would react if they were aware of the state of prison conditions. In February 2015, the Florida

¹⁷⁹ *Id.*

¹⁸⁰ *Coleman v. Tollefson*, 135 S.Ct. 1759 (2015).

¹⁸¹ *See Santo*, *supra* note 178.

¹⁸² *Fathi*, *supra* note 174, at 1462; *see generally* Matthew W. Tikonoff, *A Final Frontier in Prisoner Litigation: Does Bivens Extend to Employees of Private Prisons Who Violate the Constitution?*, 40 SUFFOLK U. L. REV. 981 (2007).

¹⁸³ *Antonuccio*, *supra* note 82, at 580.

¹⁸⁴ *Armstrong*, *supra* note 171, at 464.

Department of Corrections (FDOC) issued a gag order to its inspectors, preventing them from releasing any public records, discussing investigations, or otherwise providing information to anyone.¹⁸⁵ This came just two days after Florida legislators questioned FDOC officials about complaints about prison practices including inmate deaths, abuse on inmates by guards, and poor medical care.¹⁸⁶

III. INCENTIVE CONTRACTS PROVIDES AN ALTERNATIVE TO FIXED PRICE CONTRACTS TO OBTAIN BETTER OUTCOMES IN THE PRISON SYSTEM

Governments looking to outsource its prison function should look at incentive contracts, instead of fixed-price contracts. By using incentive and award-fee contracts, governments can encourage private prison companies to offer more programs that will lower recidivism rates, thus lowering the prison population. These contract methods require more administrative maintenance and support, and thus will force government oversight to ensure that stated goals and outcomes are met. With current private prison contracting, scholars have noted that a “for-profit prison operator [has] almost no contractual incentive to provide rehabilitation opportunities or educational or vocational training that might benefit inmates after release, except insofar as these services act to decrease the current cost of confinement.”¹⁸⁷

¹⁸⁵ Mary Ellen Klas and Julie Brown, *New Prison Policy Punishes Investigators Who Speak Out*, MIAMI HERALD, (February 5, 2015 8:17 PM), <http://www.miamiherald.com/news/special-reports/florida-prisons/article9371633.html>.

¹⁸⁶ *Id.*

¹⁸⁷ Patrick Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public versus Private Management*, 48 J.L. & ECON. 549, 549 (2005) (cited in Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113 (2009)).

The government has generally favored short-term solutions to the problem of prison overcrowding and rising costs instead of making a commitment to long-term goals. A current bill in the Alabama State Legislature shows that increasing prison capacity may cost the same as increasing rehabilitation services. Alabama prisons are currently operating at over 195 percent capacity. To reduce this overcrowding, the bill plans to spend \$25 million a year to reduce the prison population by 4,500 inmates, while allocating \$60 million over five years to expand prisons by 2,000 beds.¹⁸⁸ These amounts show that it would potentially cost far less to rehabilitate someone and keep them out of the prison system as it would to incarcerate them.

Similarly, Rhode Island lawmakers tried to reduce costs in the short term by sending seventeen-year-old juvenile inmates to adult prison. The cost of incarcerating an adult (\$40,000 per year) is less expensive than a juvenile (\$98,000 per year) because juveniles have additional education and rehabilitation costs. Because these seventeen-year-old inmates were housed in isolation, away from dangerous adult inmates, the final cost, \$104,000 annually, was higher than that of a juvenile facility. The high annual costs of housing a juvenile is more palatable when the long-term benefits are considered; each juvenile who completes their sentence, and becomes fully rehabilitated by completing the required programs, can save taxpayers between an estimated \$1.7 million and \$2.3 million over the life of the inmate.¹⁸⁹ Those long-term cost savings make the investment of the additional \$58,000, in Rhode Island's instance, a more attractive solution.

This section will continue by exploring the benefits of incentive contracting, for both the government and the contractor. This part will next address three potential programs that can be

¹⁸⁸ Mike Cason, *Bill to Reduce Alabama's Prison Population Draws Praise, Raises concerns About Costs*, AL.COM, (March 4, 2015 7:32 PM), http://www.al.com/news/index.ssf/2015/03/bill_to_reduce_alabamas_prison.html#incart_river.

¹⁸⁹ Chammah, *supra* note 118.

implemented and expanded with incentive contracting: education and job training programs, drug and alcohol rehabilitation treatment, and mental health programs. These three programs, if implemented, can ultimately reduce the prison population, therefore lowering the long-term costs of incarceration.

A. How use of cost-reimbursement and incentive contracts can benefit the government by focusing on long-term goals and solutions

Cost-reimbursement contracts provide that the government will pay the contractor for all allowable costs incurred in performing the contract.¹⁹⁰ Contractors are given a ceiling value which limits the total amount of costs allowed to be reimbursed, above which the contractor must obtain the contracting officer's approval to raise.¹⁹¹ This reimbursement of allowable costs shifts the cost risk from the contractor to the government. Typically, cost-reimbursement contracts should be used when it is difficult to estimate the cost of performance.¹⁹² A contractor is paid a fee on cost-reimbursement contracts, which is the contractor's profit from the contract.¹⁹³ Recently, cost-reimbursement contracts have fallen out of favor with the government.¹⁹⁴

By utilizing cost-reimbursement contracts, however, the government can accomplish two goals. First, cost-reimbursement contracts provide clarity to the closed private prison market by requiring contractors to account for its expenses. Second, cost-reimbursement contracts can lower long-term government costs by encouraging rehabilitation programs. Focusing on rehabilitation programs will lower recidivism rates, provide with job skills for

¹⁹⁰ 48 C.F.R. § 16.301-1 (2015).

¹⁹¹ *Id.*

¹⁹² 48 C.F.R. § 16.301-2(b) (2015).

¹⁹³ See NASH, JR., *supra* note 20, at 238.

¹⁹⁴ See generally Ralph C. Nash, *Cost-Reimbursement Contracting: Throttling a Good Contract Type*, 29 NO. 3 NASH & CIBINIC REP. NL ¶ 12 (2015).

post-release employment, and address their mental health issues and drug and alcohol problems.

Cost-reimbursement contracts put the risk of expenses on the government instead of the contractor. Without the risk of uncompensated expenses, the contractor is not at risk of losing revenue due to increased input costs. However, the contractor is also limited to the amount of profit it can make. In fixed-price contracts, by taking the risk of input costs, the contractor can change its other inputs so that it can maximize profits. This ability to maximize revenues is lost with typical cost-reimbursement contracts where a fixed fee is the contractor's sole ability to earn profit.

Award-fee contracts are subsets of cost-reimbursement contracts¹⁹⁵ and fixed price contracts.¹⁹⁶ A cost-plus-award-fee contract has two parts: a base-amount (which can be set at zero) and an award amount.¹⁹⁷ This model is best used when it is important to the government that the contractor is motivated to perform in a certain way or level of execution.¹⁹⁸ Cost-plus-award-fee allows the contractor to have the benefits of shifting input cost risks to the government, while retaining the ability to maximize revenue with good performance. By changing to a cost-plus-award-fee contract, the government can encourage private prisons to offer programs such as job training, drug and alcohol counseling, and mental health services. The government will pay for the costs of running these programs, with the private company realizing a fee on these services.

Using cost-reimbursement contracts would also address the termination problem. If contractors do not fulfill its services, the contract can continue, but the contractor will see lower profits. Instead of incentivizing cost-cutting with fixed price contracts, these cost-reimbursement contracts will encourage rehabilitation

¹⁹⁵ 48 C.F.R. § 16.305 (2015).

¹⁹⁶ 48 C.F.R. § 16.404 (2015).

¹⁹⁷ *Id.*

¹⁹⁸ 48 C.F.R. § 16.305(b) (2015).

programs and other similar options for the government. Furthermore, cost-reimbursement contracts will encourage innovation (which is virtually non-existent in the current fixed priced model).¹⁹⁹

While the government will likely incur more short-term costs by switching to a cost-reimbursement contract and incentivizing private prisons to provide rehabilitation programs, it will save substantial costs by lowering the recidivism rate in the long run, which will decrease the prison population and save the taxpayers money. Treating inmates in rehabilitative programs will not only keep them out of prison upon release, but will prepare them for re-entry into society, and they will no longer be a burden to their community, but rather an addition to the local tax base.

There is a large subset of people who are repeatedly incarcerated, taking up not only the majority of the space in jail, but also a majority of the funds used to jail them.²⁰⁰ If the government were to find a better way to rehabilitate recidivists, it will find cost savings from its non-use of the prison system, which has become a crutch for the services prisoners really need.

Even a simple change in how we view ex-convicts can change how they succeed once they are released from prison. “Once you’re labeled a felon, depending on the state you’re in, the . . . forms of discrimination—employment discrimination, housing

¹⁹⁹ *History*, BOBBARKERNEWSROOM.COM, <https://www.bobbarker.com/about-us/history> (last visited April 17, 2015). Of the few innovations I was able to find in my research was a three tiered bunk bed made so that more prisoners could sleep in the space that was built for two inmates, or worse, to be placed in converted gymnasiums. David Muradyan, *Review of Selected 2007 California Legislation: Government: California's Response to Its Prison Overcrowding Crisis*, 39 MCGEORGE L. REV. 482, 483 (2008). A more indicative example of “innovation” occurred in Virginia, where public prisons commonly stored 30 days’ worth of food—a holdover from the pre-industrial era—until it noticed the possible cost savings that private prisons enjoyed by not continuously holding a 30-day supply of food. James F. Blumstein, Mark A. Cohen, & Suman Seth, *Do Government Agencies Respond to Market Pressure? Evidence from Private Prisons*, 15 VA. J. SOC. POL’Y & L. 446, 452 (2008).

²⁰⁰ See Subramanian, *supra* note 29, at 7-8.

discrimination, denial of the right to vote, and exclusion from jury service—are suddenly legal.”²⁰¹ It is a system where one’s debt can never be repaid to society.²⁰²

According to a 2014 Bureau of Justice Statistics report, sixty-eight percent of prisoners recidivate within three years of release, and seventy-seven percent within five years.²⁰³ CCA touted these statistics in a recent investor presentation.²⁰⁴ By displaying high recidivism rates, some critics have argued that this shows that CCA is not interested in rehabilitating, but simply touting the high rates as a potential source for a good investment.²⁰⁵ CCA also emphasizes that it wants to expand its business to include the prisoner re-entry market.²⁰⁶ This willingness should be taken as a sign to local and federal governments that the private sector is willing to assist in rehabilitating prisoners. If done in a smart, well-thought-out, long term plan, governments can benefit from using this emerging private market to assist with cost savings in both the prison sector and overall.

B. Using incentive contracts to enhance the benefits of in-prison programs

Rehabilitation programs, which assist inmates in overcoming obstacles to prepare them to re-enter society after

²⁰¹ Michelle Alexander, *The New Jim Crow*, THE AMERICAN PROSPECT, (Dec. 6, 2010), <http://prospect.org/article/new-jim-crow-0>.

²⁰² *Id.*

²⁰³ Matthew R. Durose, Alexia D. Cooper, Ph.D. & Howard N. Snyder, Ph.D., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT (2015), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

²⁰⁴ CCA Investor PowerPoint, Feb. 2015, slide 22 (last accessed April 3, 2015), <http://phx.corporateir.net/External.File?item=UGFyZW50SUQ9NTcwNTM2fENoaWxkSUQ9MjcxNjY0fFR5cGU9MQ==&t=1>.

²⁰⁵ *Last Week Tonight: Episode 11* (HBO television broadcast July 20, 2014).

²⁰⁶ CCA Investor PowerPoint, *supra* note 204, at 26.

serving their sentence, have been shown to lower recidivism rates. For example, California's Preventing Parolee Crime Program (PPCP) has shown great effects in offering programs to former inmates to make the transition from prison to normal society easier. PPCP programs include education and job training, and drug and alcohol rehabilitation. Use of these programs has shown significant benefits to those who enroll. An eight percent drop in recidivism has been shown of those who merely attended (but did not complete the program). Completion of two or more of the programs has shown an astonishing forty-seven percent drop in recidivism.²⁰⁷

Volunteers run the most successful rehabilitation programs, and governments should demand similar returns from its private prison vendors.²⁰⁸ A study looking at San Francisco's Behavioral Health Court (BHC) treatment program for mentally ill defendants showed that those who made it through BHC "were fifty-five percent less likely to be charged with a new violent offense than were their peers who had not been through the program," and "BHC clients were twenty-six percent less likely to be charged with any offense after finishing treatment."²⁰⁹ Interestingly, after three years of the program, BHC saved "\$1 for every ninety cents invested."²¹⁰ A similar program in Allegheny County, Pennsylvania showed that re-offense rates were lower among those who attended the health course, and the cost savings increased over time, implying that there were long-term benefits. Courts similar to

²⁰⁷ Dusty Collier, *The "Ideal" Pendulum Swing: From Rhetoric to Reality*, 13 BERKELEY J. CRIM. L. 175, 189 (2008) (citing Sheldon Zhang et al., *Preventing Parolees from Returning to Prison Through Community-Based Reintegration*, 52 CRIME & DELINQ. 551, 553-62 (2006)).

²⁰⁸ Adam Serwer, *Permanent Lockdown*, THE AMERICAN PROSPECT (Dec. 6, 2010), <http://prospect.org/article/permanent-lockdown-0> ("The truth is that most successful re-entry programs focus on counseling and job training, relying on the commitment of enthusiastic volunteers. We don't yet know which of these programs can be effectively replicated by state and local governments.").

²⁰⁹ Sasha Abramsky, *May It Please the Court*, THE AMERICAN PROSPECT, (Dec. 6, 2010), <http://prospect.org/article/may-it-please-court>.

²¹⁰ *Id.*

BHC have shown to prevent future crime and provide cost savings. A study showed that the costs saved by taxpayers could be as high as \$1,300 in health treatment costs and between \$6,000 and \$12,000 in reduced costs associated with recidivism and victimization.²¹¹

Private prisons boast about the programs it has to help inmates; however, there is little evidence these programs are effective, let alone more effective than similar programs within government prisons. Again, when private prisons operate in a closed market, it is nearly impossible to tell if the private prison industry is fulfilling its advertised goal of providing useful programs for inmates. Assessing an award-fee for successful rehabilitation programs will allow for better results for the prisoners in the program, and better data to the government as to which programs are most effective.

1. Educational, vocational and life skills

Using cost-reimbursement or award-fee contracts can encourage prisons to offer more GED or college degree programs. A meta-analysis conducted by the Rand Corporation in 2013 found that an inmate's potential of incarceration was forty-three percent lower if they participated in an educational program while incarcerated (versus those who did not participate in an educational program).²¹² This lower recidivism rate leads to a savings of five dollars for every dollar invested.²¹³

When fixed-price contracts are used, the expense of GED programs will come from the fixed-fees. CCA estimates that 3,000

²¹¹ *Id.* (“Cost-benefit analyses by the National Institute of Justice have concluded that problem-solving courts save taxpayers about \$1,300 in treatments and other costs and between \$6,000 and \$12,000 per participant in reduced costs associated with recidivism and victimization.”).

²¹² Lois M. Davis et al., *How Effective Is Correctional Education, and Where Do We Go from Here?*, THE RAND CORPORATION, 14, (2013), http://www.rand.org/content/dam/rand/pubs/research_reports/RR500/RR564/RAND_RR564.pdf.

²¹³ *Id.* at 78.

of its inmates earn a GED annually.²¹⁴ Similarly, GEO Group averages 1,000 inmates earning a GED in a year.²¹⁵ This would indicate that only 3.55 percent²¹⁶ of CCA's population and an estimated 1.4 percent²¹⁷ of GEO Group's population are earning GED degrees in a year. Private prisons will only offer such a program if it does not infringe too much on cost. Shifting costs to the government or awarding fees for performance will encourage more of these programs.

Many prisoners lack formal education. In 1998, approximately seventy percent of United States inmates were illiterate.²¹⁸ Recent estimates suggest that approximately forty-seven percent of those in jail do not have a high school diploma nor a GED.²¹⁹ A 2003 report from the Bureau of Justice Statistics showed that only 25.5 percent of state prisoners and 40.6 percent of federal prisoners had earned a high school diploma in 1997.²²⁰ Of the remaining 74.5 percent of state prisoners, 34.8 percent received a GED during their incarceration, while 32.8 percent of federal prisoners attained the same during their incarceration.²²¹

²¹⁴ *The Recidivism Problem*, CCA, <http://www.cca.com/Media/Default/documents/Social-Responsibility/Providing-Proven-Re-Entry-Programs/Reentry-Commitment-Fact-Sheet.pdf> (last visited Mar. 2, 2015).

²¹⁵ *Rehabilitation*, GEOGROUP.COM, <http://www.geogroup.com/rehabilitation> (Figured calculated using GEO Group's estimate that 10,000 inmates received a GED in the past decade) (last visited Mar. 2, 2015).

²¹⁶ Using CCA's estimate from *supra* note 211 of 3,000 inmates per year earning a GED, and using the estimate of CCA's total inmate population using the nationwide average prison occupancy from *supra* note 60, we find that $3,000/84,500 = 0.0355$.

²¹⁷ Using the estimate from *supra* note 212 of 1000 inmates per year earning a GED, and using the estimate of GEO Group's total inmate population using the nationwide average prison occupancy from *supra* note 60, we find that $1,000/69,350 = 0.0144196 \dots$ and $1,000/70,810 = 0.014122 \dots$, thus between 1.41 percent and 1.44 percent.

²¹⁸ Schlosser, *supra* note 155.

²¹⁹ Subramanian, et al., *supra* note 29, at 11.

²²⁰ Caroline Wolf Harlow, Ph.D., *Education and Correctional Populations*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, 3 (2003), <http://www.bjs.gov/content/pub/pdf/ecp.pdf>.

²²¹ *Id.*

Of course, these numbers tell us nothing about the quality of private prison GED programs (nor does calculating the percentage of the population earning GEDs). Without additional data, such as eligibility, enrollment qualifications and requirements, it is almost impossible to tell if prisoners and the contracting government are receiving the benefit that the private prisons are implying they receive.

A recent editorial in the *New York Times* written by an Attica inmate calls for increased college courses in prison, especially free classes called Massive Open Online Courses (MOOCs).²²² Before the rise of institutionalization, many colleges offered degree programs for prisoners. These programs have shown a low recidivism rate, yet had fallen out of favor.²²³ This trend may be changing. On August 3, 2015, the Obama Administration announced that they would allow inmates to receive Pell Grants to attend college while incarcerated.²²⁴ The Pell program had, at its height, 782 programs, 77,300 students and 252 degrees awarded, but was prevented from awarding inmates grants with the passage of the 1994 Crime Bill.²²⁵

A troublingly faulty line of reasoning against college courses being taught in prisons is exemplified by former Massachusetts Governor William Weld: “We have to stop this idea of giving free college education to inmates . . . otherwise people

²²² John J. Lennon, *Let Prisoners Take College Courses*, N.Y. TIMES, (April 4, 2015), <http://www.nytimes.com/2015/04/05/opinion/sunday/put-schools-back-in-prison.html>.

²²³ *Id.* (“In Sing Sing, for example, one forward-thinking educational program [Hudson Link], launched in 1998, has a recidivism rate of less than 2 percent.”).

²²⁴ Federal Registrar, *Notice Inviting Postsecondary Educational Institutions to Participate in Experiments Under the Experimental Sites Initiative; Federal Student Financial Assistance Programs Under Title IV of the Higher Education Act of 1965, as Amended* (Aug. 3, 2015), <https://federalregister.gov/a/2015-28010>.

²²⁵ Mary Rachel Gould and SpearIt, *Twenty Years After the Education Apocalypse: The Ongoing Fall Out From the 1994 Omnibus Crime Bill*, 33 ST. LOUIS U. PUB. L. REV. 283, 288-89 (2014).

who are too poor to go to college are going to start committing crimes so they can get sent to prison for a free education.”²²⁶ First, it is illogical to think that anyone who wants to go to college would choose to do so in prison, even if college were then free. Relatedly, Weld only said this because the prisons in Massachusetts were making such great strides with rehabilitating prisoners that he had to actually address the fact that providing a great service would somehow incentivize crime. The conclusion that should have been reached was that there are people who are desperate for an education, who may not be ready for that education at the same time others are. By seeing an example of a group of people, who have been hard for educators to reach, finally become responsive to an education, Weld should have seen this great success and used it to create education programs to keep those people *out* of prison.

Prisons are trying to help by enrolling inmates in vocational training programs, such as GEO Group’s vocational training programs, cognitive behavior programs, and education programs.²²⁷ CCA also offers many of the same academic and vocational training services.²²⁸ GEO estimates that over the past ten years 40,000 inmates completed vocational training programs, and 90,000 inmates completed life skills programs.²²⁹ CCA also estimates that 20,000 of its 80,000 inmates currently participate in vocational or life skills programs.²³⁰ While these statistics are touted on the companies’ websites, statistics on the impact of these programs helping former prisoners in obtaining long-term jobs are non-existent.

Even when a prisoner has a formal education, they may lack necessary job skills that will translate to a long-term job. The shift in incarceration theory from rehabilitation to simple

²²⁶ RONSON, *supra* note 27, at 252-53.

²²⁷ *Rehabilitation*, *supra* note 215 (including Weaving, Auto Mechanics, Barbering, Cabinet Making, Carpentry, “Commercial Driver’s License (CDL),” and “Computers.”).

²²⁸ *The Recidivism Problem*, *supra* note 214.

²²⁹ *Rehabilitation*, *supra* note 215.

²³⁰ *The Recidivism Problem*, *supra* note 214.

confinement has caused many prisoners to leave prison with no new skills and a deterioration or obsolescence of their skills once they are released back into society.²³¹ Even in situations where new skills that are acquired, those skills may not have real-life application.²³²

When inmates receive an education, problems will still persist. Prisoners who re-enter society find barriers that preclude a smooth transition.²³³ The social stigma of being a former prisoner can contribute to difficulties in finding jobs, with sixty percent of released felons facing long-term unemployment.²³⁴ A former prisoner in Syracuse, New York was hired to sell cars, based on his resume and an interview, but was subsequently fired after completing an application where he disclosed he had criminal convictions.²³⁵ But even when former prisoners can find employment, they often earn forty percent less than non-felons.²³⁶ With the aforementioned barriers to entry in finding credible work,

²³¹ Dolovich, *supra* note 10, at 245.

²³² *Id.*; see *infra* notes 235-237.

²³³ See generally Carimah Townes, *State House Passes Bill Rewarding Inmates Who Pursue Education Behind Bars With Shorter Sentences*, THINK PROGRESS, (April 20, 2015 2:05 PM), <http://thinkprogress.org/justice/2015/04/20/3648781/state-house-passes-bill-rewarding-inmates-pursue-education-behind-bars-shorter-sentences>. (Illinois has recently introduced bills in its legislature that try to ameliorate the problem of re-entry into society by encouraging prisoners to earn a degree, no matter the level. One of the bills seeks to seal the criminal records of those who receive a degree if they are non-violent felons, while the other offers a 90-day credit on the sentence of anyone who completes an education program. These measures are similar to those in other states and the District of Columbia who have tried to remove criminal history questions on job applications.)

²³⁴ Chettiar, *supra* note 14.

²³⁵ Marnie Eisenstadt, *Car Dealer Fires Former Gang Member After Syracuse.com Story About His Success*, SYRACUSE.COM, (June 17, 2015, 5:20 PM), http://www.syracuse.com/news/index.ssf/2015/06/car_dealer_fires_former_gang_member_after_syracusecom_story_about_his_success.html.

²³⁶ Chettiar, *supra* note 14.

many former prisoners resort to crime, contributing to high recidivism rates.²³⁷

The Prison Industry Enhancement Certification Program (PIE) programs²³⁸ focus on rehabilitation and creating job skills to ease the transition for inmates re-entering society. There is some evidence that inmates who work in PIE programs have an easier time finding a job post-release than other inmates who do not participate in similar programs. One problem facing the government trying to incorporate PIE, or similar programs, is the pushback by domestic companies worried about being undercut on price by PIE.²³⁹ This corporate pressure pushes prison labor to obscure professions, such as “game-bird and buffalo husbandry.”²⁴⁰

2. Drug and alcohol rehabilitation

Drug and alcohol dependency is the cause of many problems in society, including the rise of drug abuse and violence.²⁴¹ Drug epidemics and tougher drug use laws have led to a higher rate of imprisonment for drug related crimes.²⁴² Approximately sixty-eight percent of people currently in jail have a drug or alcohol problem.²⁴³ The high proportion of inmates with substance abuse problems stems from issues of addiction and tough drug laws.²⁴⁴ Yet the amount of available drug treatment

²³⁷ Erin R. Yoshino, *California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners*, 18 S. CAL. REV. L. & SOC. JUST. 117, 150 (2008).

²³⁸ See *supra* I.A (A history of government's use of private funding to defray costs of imprisonment).

²³⁹ Groh, *supra* note 33, at 393.

²⁴⁰ Graeme Wood, *From Our Prison to Your Dinner Table*, PACIFIC STANDARD (March 3, 2015), <http://www.psmag.com/business-economics/from-our-prison-to-your-dinner-table>.

²⁴¹ Stephen Raphael & Michael A. Stoll, *Why Are So Many Americans in Prison?*, in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM, 62-63 (2009).

²⁴² *Id.*

²⁴³ Subramanian, et al., *supra* note 29, at 11.

²⁴⁴ Raphael & Stoll, *supra* note 241.

programs are diminishing. For example, from 1993 to 1998 the number of opportunities for drug treatment in prison declined by half.²⁴⁵ In 1998, only about ten percent of those who needed drug treatment had the necessary help available.²⁴⁶ An estimated twenty-six percent of former prisoners on probation abuse drugs, compared to only eight percent of the total U.S. population.²⁴⁷ Nearly seventy percent of drug users recidivate within three years of release; approximately forty-one percent of that population re-enters prison for drug offenses.²⁴⁸

GEO Group reports that it provided drug and alcohol treatment services for 100,000 inmates in the past ten years.²⁴⁹ Thus, on average, only one eighth of those who need counseling receive it.²⁵⁰ Of CCA's sixty-six facilities, only fifteen had a residential drug abuse treatment program (RDAP) in 2008.²⁵¹ Unfortunately, there are no concrete numbers on how many inmates CCA treats for drug and alcohol addiction.²⁵²

Drug treatment programs, when given in prison, have been shown to effectively reduce recidivism and relapse.²⁵³ By using cost-reimbursement contracts and award fees, the government can focus on those inmates who have addictions that factor in their potential recidivism. By treating the problem at the source, the

²⁴⁵ Schlosser, *supra* note 155.

²⁴⁶ *Id.*

²⁴⁷ Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 721 (2008).

²⁴⁸ *Id.*

²⁴⁹ Rehabilitation, *supra* note 215.

²⁵⁰ Locations, *supra* note 58.

²⁵¹ CCA Recognizes National Alcohol and Drug Addiction Recovery Month, CCA.COM, (September 2, 2008, 12:00 PM), <http://www.cca.com/press-releases/cca-recognizes-national-alcohol-and-drug-addiction-recovery-month>.

²⁵² *Addiction Treatment*, CCA, <https://www.cca.com/inmate-services/inmate-reentry-preparation/addictions-treatment>.

²⁵³ Dusty Collier, *The "Ideal" Pendulum Swing: From Rhetoric to Reality*, 13 BERKELEY J. CRIM. L. 175, 189 (2008).

government can encourage private prisons to treat addicted inmates, leading to less recidivism.

3. Mental illness

The deinstitutionalization movement in the 1960s left a void for those who need mental health treatment, making prisons the default provider for mental health services.²⁵⁴ In the early twentieth century, mental health care was predominately provided by the state.²⁵⁵ In the 1950s, over half a million people were in these state-sponsored mental institutions. By the end of the century, deinstitutionalization forced the hospitals to close. As a result, many of the mentally ill moved from the state mental hospital system to the prison system.²⁵⁶

Over sixty percent of all incarcerated prisoners have reported that they have dealt with symptoms of mental health issues in the last year.²⁵⁷ Over half of all incarcerated people have some kind of mental illness,²⁵⁸ and over twenty percent of inmates have a severe mental illness (*e.g.* bipolar disorder, schizophrenia, major depression).²⁵⁹ Of those with a mental illness “less than one half had ever received treatment for their illnesses before entering the criminal justice system, and an even smaller fraction had ever taken medication for their illnesses.”²⁶⁰ Even when in jail, those with mental illnesses are left untreated. A reported eighty percent

²⁵⁴ Spearlt, *Mental Illness in Prison; Inmate Rehabilitation & Correctional Officers in Crisis*, 14 BERKELEY J. CRIM. L. 277, 281 (2009).

²⁵⁵ Christina Canales, *Prisons: The New Mental Health System*, 44 CONN. L. REV. 1725, 1731 (2012).

²⁵⁶ *Id.* at 1733.

²⁵⁷ Subramanian et al., *supra* note 29, at 12.

²⁵⁸ Spearlt, *supra* note 254, at 280.

²⁵⁹ Subramanian et al., *supra* note 29 at 12 (“Serious mental illness . . . affects an estimated 14.5 percent of men and 31 percent of women in jails—rates that are four to six times higher than the general population.”).

²⁶⁰ John E. Cummings, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety*, 56 LOY. L. REV. 279, 286 (2010).

of inmates with mental health issues do not receive the treatment or help they need.²⁶¹

Not only are those inmates with mental health issues more expensive, due to increased health care costs, but they are also confined longer than those inmates without mental health issues.²⁶² In Los Angeles, inmates who sought treatment for mental health issues averaged forty-three days incarcerated, compared to eighteen days for those who did not seek treatment.²⁶³

Inmates with mental illnesses are disproportionately homeless, unemployed and using drugs and alcohol before their arrest.²⁶⁴ There is an obvious disincentive for prisons, both state and private, to treat prisoners with mental health issues because it increases the cost of housing them in two ways: there is an increased cost to provide mental health care to inmates, and the total cost of imprisonment is compounded by the increased number of days the inmate is imprisoned.

Due to these cost factors, Oklahoma, for example, has recently cut its preventative mental health programs for both group and individual sessions; an increase in the number of inmates with mental health issues needing treatment, as well as an inability to hire mental health professionals led to these cuts. Nearly a third of inmates have mental health problems, but this decrease in funding will result in treatment only to those with dire mental health needs.

²⁶¹ Subramanian, et al., *supra* note 29, at 12.

²⁶² *Id.* (“While most people with serious mental illness in jails, both men and women, enter jail charged with minor, nonviolent crimes, they end up staying in jail for longer periods of time. In Los Angeles, for example, . . . users of the Department of Mental Health’s services on average spent more than twice as much time in custody than did the general custodial population—43 days and 18 days respectively.”).

²⁶³ Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted, a Report Says*, N.Y. TIMES (Feb. 11, 2015), <http://www.nytimes.com/2015/02/11/us/jails-have-become-warehouses-for-the-poor-ill-and-addicted-a-report-says.html>.

²⁶⁴ Subramanian et al., *supra* note 29, at 13.

Since the cutbacks, the incidents of mental health events has risen forty-one percent.²⁶⁵

By structuring contracts as cost reimbursement with incentive fees, governments can incentivize private prisons to provide mental health support. By focusing money on mental health treatment, governments may be able to rehabilitate these inmates, thus reducing recidivism rates by preventing repeated arrests that stem from the underlying mental illness issues (such as arrests due to homelessness). If private prisons could assist with finding mental health solutions with those individuals, incarceration rates may be lowered and those with mental health issues will integrate into society, instead of being imprisoned with no access to adequate assistance.

Private prisons can use its economies of scale to ensure that prison facilities can hire and retain mental health professionals. Currently, governments cannot hire mental health professionals because they are unable to compete with higher paying opportunities elsewhere. If governments are able to use the private industry to improve mental health programs, private prisons may be able to attract more mental health professionals to work in the prisons.

IV. CONCLUSION

The government has used private contractors since the beginning of the U.S. criminal justice system. Today, this practice is more prevalent than it has ever been. Ever growing stock prices, increasing revenues, and expansions into new, related markets make it likely that the private prison industry will remain the government's partner. Because private prison contracting will continue within the U.S. criminal justice system, it is imperative that governments use its resources to maintain a partnership with private prisons while also ensuring cost savings and low recidivism

²⁶⁵ Clifton Adcock, *In Prisons, Fewer Therapy Sessions for the Mentally Ill*, OKLAHOMA WATCH (Mar. 26, 2015), <http://oklahomawatch.org/2015/03/26/in-shorter-supply-mental-health-therapy-for-inmates>.

rates for the government. By using incentive contracts, governments can ensure that both sides of prison privatization will operate to benefit each other.

