THE DUE PROCESS FAILURE OF AMERICA'S PRISON PRIVATIZATION STATUTES

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America's private prison industry is expanding at a phenomenal rate. A decade ago, private, for-profit prisons were

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little more than a theoretical idea; in 1985, private prisons housed only 1,345 inmates.[1] Today, the private correctional system holds as many as 74,000 prisoners, with an annual growth rate of over 30% expected for years to come.[2]

As private prisons have spread, a vigorous political and academic debate has erupted over the cost and quality of private correctional facilities.[3] Both popular press stories and academic studies have attempted to assess private prisons' ability to provide cost-savings, as well as their potential impact on the quality of correctional services.[4] With the industry's maturation, once-theoretical debates about privatization's efficacy have given way to empirical studies of operating private facilities.[5]

Unfortunately, fundamental legal questions concerning the appropriate role of private corporations in the correctional context have not received similar attention. During the 1980s, a handful of commentators did express worries that prison privatization would entail an improper delegation of core government functions to mere private parties. Invoking the judicial "nondelegation" doctrine these critics argued that only government officials could constitutionally administer criminal punishment.[6] Because the judicial doctrine of "nondelegation" had lain dormant and discredited since the 1930s, however, such objections failed to halt the burgeoning privatization movement.[7] Moreover, the failure of these critics' broad theoretical attacks has apparently discouraged other commentators from examining the myriad of privatization

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1 *See* Fox Butterfield, *For Privately Run Prisons, New Evidence of Success*, N.Y. TIMES, Aug. 19, 1995, Sec. 1, at 1.

2 *See, e.g.*, Gary Fields, *Privatized Prisons Pose Problems; Not a Panacea, States Discover, Despite Savings*, USA TODAY, Nov. 11, 1996, at 3A; Kathy Walt, *Private Prison Boom, Gloom; Security, Legal Loopholes Pressing Problems*, HOUSTON CHRONICLE, Sep. 1, 1996, at 1; David Van Natta, *Despite Setbacks, a Boom in Private Prison Business*, N.Y. TIMES, Aug. 12, 1995, Sec. 1, at 24. Note that the 74,000 figure is based on the total number of bed spaces in private correctional facilities as of 1996. *See* Fields, *supra*, at 3A.

3 *See, e.g.*, E.S. Savas, *Privatization: The Key to Better Government*, 40 VAND. L. REV. 889 (1987); Butterfield, *supra* note 1, at 1.

4 *See infra* Part I ("The Rise of the Private Prison Industry").

5 *See, e.g.*, DAVID SCHICHOR, PUNISHMENT FOR PROFIT (1995) (presenting overview and analysis of current empirical data).

6 *See, e.g.*, Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 662-63 (1987); Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U.L. REV. 531, 544-77, 757-94 (1989) (proposing model code addressing nondelegation concerns, under auspices of ABA).

7 *Cf.* Section II.A. ("Dismissing the Nondelegation Doctrine").

provisions that have actually become law over the past decade. Today, twenty-five states and the federal government have passed laws authorizing private prisons.[8] Yet, no legal scholar has sifted through the growing body of privatization statues to determine whether they conform with constitutional requirements beyond the early critics' "nondelegation" concerns.

In this Article, I argue that most of the statutes that now authorize private prisons are constitutionally inadequate, because they allow private contractors to exercise inappropriate discretion concerning inmates' liberties. In making this argument, I hope to refocus the debate over the constitutionality of prison privatization: Instead of inquiring whether prison privatization violates some discredited theory of "nondelegation," proponents and opponents of privatization should ask if today's privatization statutes establish correctional systems that conform with constitutional "due process."

Whether prisoners are confined in publicly- or privately-managed facilities, they have a right to adjudicative and rulemaking processes that are free from the taint of private financial bias; constitutional norms of procedural fairness require that judges and rulemakers be financially disinterested. Private prison contractors, however, have a financial interest in maximizing their inmate populations, because their compensation is directly tied to the number of prisoners they house each day. As a result of this financial bias, private prison operators cannot

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[8] *See* 18 U.S.C.A. § 4013 (West 1996); ALASKA STAT. § 33.30.031 (1996); ARIZ. REV. STAT. ANN. § 1609.01 (West 1996); ARK. CODE ANN. § 12-50-108 (Michie 1995); COLO. REV. STAT. ANN. § 17-1-203 (1996); 1995 CT. ALS 229 (LEXIS); FLA. STAT. ANN. § 957.06 (West 1996); 1995 GA. S.R. 457 (enacted 1996); KY REV. STAT. ANN. §§ 197.500-197.900 (Baldwin 1996); LA. REV. STAT. ANN. § 39:1800.5 (West 1996); MISS. CODE ANN. §§ 47-4-1 to 47-4-5, 47-5-1201 to 47-5-1229 (1996); MONT. CODE ANN. § 53-30-106 (1996); NEV. REV. STAT. ANN. 209.141 (Michie 1995); N.H. REV. STAT. ANN. § 21-H:8 (1995); N.M. STAT. ANN. §§ 33-1-17, 33-3-1 to 33-3-19 (Michie 1996); N.C. GEN. STAT. § 148-37 (1996); OHIO REV. CODE ANN. § 9.06 (Anderson 1996); OKLA. STAT. ANN. tit. 57, §§ 41 to 563.3 (West 1996); 1995 Ore. Laws 621 (LEXIS); 61 PA. CONS. STAT. ANN. §§ 390.306, 1081-1085 (1996); TENN. CODE ANN. § 41-24-110 (1996); TEX. GOV'T CODE ANN. § 495.004 (West 1997); UTAH CODE ANN § 64-13-26 (1995).; VA. CODE ANN. § 53.1-265 (Michie 1996); W. VA. CODE § 25-5-14 (1996); WYO. STAT. § 7-22-112 (1996). At least five additional states (Hawaii, Idaho, Kansas, Minnesota, and Missouri) have placed prisoners in private custody without any express statutory authorization. *See infra* Section IV.A.3. Further, one state, Illinois, has prohibited private prisons altogether. *See* ILL. REV. STAT. ch. 730 para. 140/1 to 140/4 (1995).

constitutionally control adjudicatory or rulemaking processes (such as discipline or parole hearings) that affect individual inmates' liberties. Although private firms may contract to manage prison facilities, basic procedural fairness requires that private prison companies not assume power to adjudicate or make rules in circumstances that might tempt them to disfavor inmates' individual rights. Unfortunately, most of the country's current privatization statutes disregard the need for due process and allow private prison contractors to wield sweeping authority over inmates' liberties. In their rush to cut costs, governments across the country have short-changed due process.

In Part I, I briefly discuss the growth of the private prison industry. In Part II, I then examine the general due process concerns raised by delegations of governmental power to private entities. In particular, I argue that due process prohibits financially-biased private parties from making administrative decisions concerning individuals' liberties. In Part III, I apply this constitutional norm of disinterestedness to the specific context of private prisons, detailing the procedural protections required to make prison privatization comport with the Due Process Clauses of the Fifth and Fourteenth Amendments. Finally, in Part IV, I examine in depth the many state and federal provisions that now authorize private corrections. Based on this analysis, I conclude that most of the nation's private prison systems violate due process, because they do not adequately limit private operators' discretionary authority over inmates' liberties.

I. The Rise of the Private Prison Industry

Only a decade ago, prison privatization was little more than a theoretical concept. Although privately-managed prisons were once common in the nineteenth century, widespread abuses led reformers to abolish private incarceration by the middle of this century.[9] During the Reagan era, however, private prisons re-emerged as part of a larger movement favoring privatization.[10] Believing that private markets could provide services more efficiently

[9] *See generally* Ward McAfee, *Tennessee's Private Prison Act of 1986: An Historical Perspective with Special Attention to California's Experience*, 40 VAND. L. REV. 851 (1987) (historical overview of private prisons in U.S. over past two centuries).

[10] *See, e.g.*, Field, *supra* note 6, at 649 (discussing rise of prison privatization movement).

than any government, conservative thinkers suggested that private corporations could provide better, less costly correctional facilities—an alluring vision for governments that face soaring deficits and overflowing inmate populations. By the mid-1980s, a vigorous academic and political debate had erupted over the merits of prison privatization, and one state, Tennessee, passed legislation authorizing a real-life test of the idea.[11]

Today, private prisons are "big business." Twenty-five states and the federal government have passed statutes authorizing prison privatization,[12] and as many as 74,000 inmates reside in private detention facilities, with an annual growth of 35% expected in the foreseeable future.[13] Riding this wave, the Corrections Corporation of America (CCA), which got its start in Tennessee, has grown so quickly that it is now listed on the New York Stock Exchange,[14] and "recession-proof" U.S. prison companies have attracted investors from around the world.[15] At the same time, local

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11 *See generally* W.J. Michael Cody & Andy Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829 (1987) (recounting political and policy history of Tennessee prison privatization). However, a Kentucky facility actually became the first privately-owned prison in modern times. *See* CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 24 (1990).

12 *See* statutes cited *supra* note 8.

13 *See* sources cited *supra* note 2; *see also* CHARLES W. THOMAS & DIANNE BOLINGER, PRIVATE ADULT CORRECTIONAL FACILITY CENSUS (9th ed. 1996).

14 In fact, the CCA is but the largest of seven private prison companies that are now publicly traded. *See, e.g.*, Fields, *supra* note 2, at 3A; Joseph Epstein, *Wackenhut and CCA; Convicts R Us*, FINANCIAL WORLD, Mar. 25, 1996, at 24 ("The two best plays in this industry are Wackenhut Corporation and Corrections Corp. of America, which together control more than 70% of the beds already privatized. With $207 million in revenues and a 47% share, CCA is the larger of the two, managing almost 29,000 beds in 39 facilities."); *see also Wackenhut Corrections Stock Soars 17 Percent*, MIAMI HERALD, June 6, 1996, at C1; Virginia Munger Kahn, *Investing It; How To Make Money From Those Aging Baby Boomers*, N.Y. TIMES, June 16, 1996, Sec. 3, at 3 (predicting annual earnings growth for CCA of 40 to 50% over next five years, with annual growth of 74% in 1996); Ivan Cintron, *Tennessee-based Stocks Flying High*, MEMPHIS BUS. J., Nov. 27, 1995, Sec. 1, at 24 (CCA); *Wackenhut Plans To Turn More Prisons Into Profit*, SUN-SENTINEL, Mar. 18, 1996, at 15A. For an interesting description of Wackenhut's eccentric founder, see Andrew Billen, *A Man Called Wackenhut*, THE GUARDIAN, Nov. 3, 1996, at 6.

15 *See, e.g.*, *Widows Cell-Buy Date*, SCOTTISH DAILY RECORD, Dec. 10, 1995, at 29 (Scottish widows fund buying stock in CCA). Some U.S. prison companies have even opened facilities in foreign countries. *See, e.g.*, Butterfield, *supra* note 1, at 1; Alan Travis, *U.S. Firm Takes Over First British Jail*, THE GUARDIAN, Dec. 11, 1996, at 6. For a sample of the privatization debate in other countries, see, e.g., MICK RYAN & TONY WARD, PRIVATIZATION AND THE PENAL SYSTEM: THE AMERICAN EXPERIENCE AND THE DEBATE IN BRITAIN (1989).

communities have cashed in on the privatization movement by encouraging the construction of private facilities to house both in-state and out-of-state prisoners.[16] In fact, both intra- and inter-state "commodity" trading in inmates[17] have become so profitable that one state, West Virginia, has officially declared prison privatization to be "an economic development opportunity for local communities."[18] Without a doubt, the private prison industry has now arrived.

Given the enormous population pressures on the U.S. penal system over the last decade, the rise of private corrections is easy to understand. For years, "get-tough" politicians have responded to the public's anti-crime sentiment by increasing the number of felony offenses and lengthening criminal sentences.[19] As a result of these policies, the nation's prison population has exploded.[20] In 1985, the nation's penal system housed a half million men and women.[21] Today, the U.S. penal system holds more than a million and a half inmates,[22] and "truth-in-sentencing" and "three-strikes" laws promise to enlarge this population still further.[23] As one writer has recently observed:

The [total] cost of confining inmates in the United States al-

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16 *See, e.g.*, Associated Press, *Jailhouses Rock Small Rural Towns; Despite Security Fears, Economies Get a* Boost, CHICAGO TRIBUNE, Jan. 26, 1997, at 6C; *Some In Town Eager To Get Private Prison*, ATLANTA CONSTITUTION, Oct. 29, 1996, at 6B (small-town Georgia residents welcoming new private prison jobs); John Pruitt, *Prisons Could Mean Big Business for City*, VIRGINIA-PILOT, June 15, 1995, at 6 (Suffolk seeking growth from private prison); Anne Scita, *Currituck Takes Steps to Bring Private Prison to the County*, VIRGINIAN-PILOT, Nov. 8, 1995, at B2 (quoting local officials describing private prison construction as "gold mine"); Jack Deutch, *Southern W.VA. Considers New Jail; Officials Study Economic Benefits of Private Prison Plan*, CHARLESTON DAILY MAIL, July 3, 1995, at A1.

17 *See generally* Ian Fisher, *Bartering Inmate Futures*, N.Y. TIMES, Oct. 29, 1995, Sec. 4, at 3 (describing "commodity" trading of inmates between states, in which private prisons compete to house states' excess inmates).

18 W. VA. CODE § 25-5-2 et seq (1995); *see also* Deutch, *supra* note 16, at A1.

19 *See, e.g.*, Carl Mollins, *Prisons for Profit; America's Crackdown on Crime Fuels a Jailhouse Boom*, MACLEAN'S, June 5, 1995, at 34; Emily Wilkerson, *Edgar's Privatization Plan Let Him be Tough on Crime*, STATE JOURNAL-REGISTER, Aug. 28, 1995, at 5.

20 *See, e.g.*, Mollins, *supra* note 19, at 34; Wilkerson, *supra* note 19, at 5.

21 *See, e.g.*, Jerry Kopel, *Our Prisons are Overflowing*, DENVER POST, Dec. 15, 1995, at B6.

22 *See, e.g.*, David Lamb, *Main Street Finds Gold in Urban Crime Wave; Once-Struggling Rural America Sees Economic Salvation In One Of The Nation's Fastest-Growing, Most Recession-Proof Industries——Prisons*, L.A. TIMES, Oct. 9, 1996, at A1 (stating that prison population has tripled since 1980, reaching 1.6 million inmates).

23 *See, e.g.*, Mollins, *supra* note 19, at 34; Wilkerson, *supra* note 19, at 5.

> most doubled in the past five years, reaching $50 billion annually, or $33,334 per inmate, per year. Estimates show that one 700-bed jail and one 1,600-bed prison need to be opened every week just to meet the rising demand. The projected annual cost of this [new construction] is $5.98 billion.[24]

With swelling inmate populations stretching prison budgets to their limits, governments at all levels have looked to the private sector to provide correctional services at a lower cost.[25]

While the jury is still out on the efficacy of private corrections, empirical studies have increasingly suggested that private prisons can provide both fiscal and qualitative improvements over government-run facilities.[26] Two recent studies, for example, have demonstrated that private prisons in Tennessee and New Mexico produced significant cost savings for their respective state governments,[27] primarily through "purchasing flexibility and administrative efficiencies."[28] Sur-

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[24] Simon Hakim, *Privately Managed Prisons Go Before the Review Board*, AMERICAN CITY & COUNTY, April 1996, at 40.

[25] *See, e.g.*, Jeff Garth & Stephen Labaton, *Prisons for Profit: A Special Report; Jail Business Shows Its Weaknesses*, N.Y. TIMES, Nov. 24, 1995, at A1 (describing Clinton administration's support of prison privatization as response to overcrowding and cost concerns); Larry Daughtry, *This is no Brier Patch, Br'er Don*, TENNESSEAN, Sep. 10, 1995, at D1 (describing privatization as result of governor's get-tough policy); John Dvorak, *States Urged to Try Private Prisons; Competition Helping To Spur Savings of 10%, Legislators Told*, KANSAS CITY STAR, July 19, 1995, at C6; Mark Tatge, *Ohio Prison Spending Poses A Fiscal Threat*, PLAIN DEALER, Jan. 16. 1997, at 5B; *Don't Ignore Prison Crunch*, DENVER POST, Dec. 24, 1996, at B6.

[26] *See* Schichor, *supra* note 5; *see also* PRIVATIZING CORRECTIONAL INSTITUTIONS (Gary Bowman et al ed., 1993) (collection of empirical and theoretical analyses).

[27] *See* Butterfield, *supra* note 1, at 1 (Tennessee); Charles Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577 (1992) (New Mexico). Note that most studies have found that private contractors save only a few cents or dollars per prisoner per year. When aggregated for several thousand prisoners, however, such savings can be substantial. *See, e.g.*, Butterfield, *supra* note 1, at 1.

[28] *See, e.g.*, Charles Mahtesian, *Dungeons for Dollars*, FLORIDA TREND, Oct. 1996, at 80; Hakim, *supra* note 24, at 40. Private corrections companies' fiscal savings stem primarily from their freedom from government procurement and employment regulations. Private prison firms can move quickly to change sources for the products and services that they provide to their inmates. They also can avoid paying state retirement, medical, and overtime benefits. *See, e.g.*, Mahtesian, *supra*, at 80; Hakim, *supra* note 24, at 40. Contractors may also save money both because new, more modern facilities are more efficient and require less maintenance and because well-treated inmates cost less to monitor (and to litigate against). *See, e.g.*, Mahtesian, *supra*, at 80; Hakim, *supra* note 24, at 40. Additionally, contractors often reduce their litigation costs by providing independent lawyers to assist prisoners with their grievances. Such practices reduce litigation costs both because such lawyers help prisoners to resolve

prisingly, private facilities in Tennessee not only achieved savings themselves but also spurred competing public facilities to reduce their expenses.[29] Additionally, private prisons in Tennessee and New Mexico accomplished more with less; both provided inmates with more compassionate staff, better food, and greater safety than did comparable publicly-operated facilities.[30] So far, most empirical studies have reached similar conclusions about private prisons throughout the country.[31] Much as privatization theorists predicted, market pressures to win and retain prison contracts now appear capable of producing both cost-savings and qualitative improvements when private prisons are closely monitored by government officials.[32]

Yet, there is still reason for concern about the ultimate impact of the prison privatization movement. Governments can mandate reductions in cost,[33] but these cost-savings may sometimes come at the expense of prison quality. Already, a few privatization efforts have run into trouble. At a private detention facility in New Jersey, for instance, the Esmor company's mismanagement and corruption sparked a costly riot that forced the Immigration and Naturalization Service (INS) to reassume control.[34] Shockingly, Esmor's ill-paid and ill-trained staff physically abused detainees, stole their property, and served inedible food in dilapidated, unsanitary facilities.[35] Following the INS's revocation of Esmor's contract, two Esmor guards were actually indicted for bribery and for conspiracy to smuggle illegal immi-

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their claims more quickly and because the lawyers (unlike *pro se* prisoners) have an ethical obligation not to file "frivolous" claims. *See, e.g.*, Mahtesian, *supra*, at 80; Hakim, *supra* note 24, at 40.

29 *See* Butterfield, *supra* note 1, at 1.

30 *See id.*; *see also* Logan, *Well Kept*, *supra* note 27. Private operators may in fact have strong incentives to achieve high quality correctional services, both in order to convince governments to renew their contracts and in order to reduce their inmate monitoring and litigation costs. *See* Mahtesian, *supra* note 28, at 80.

31 *See generally* Schichor, *supra* note 5.

32 For this reason, I generally support prison privatization, as long as such privatization conforms with the constitutional mandates I discuss below.

33 Many state statutes in fact make cost-savings a precondition for any state contract with a private correctional company. *See, e.g.*, TEX. GOV'T CODE ANN. § 495.003 (requiring "savings of not less than 10 percent").

34 *See, e.g.*, John Sullivan & Matthew Pardy, *A Prison Empire: How It Grew——A Special Report; Parlaying the Detentions Business Into Profit*, N.Y. TIMES, July 23, 1995, Sec. 1, at 1.

35 *See, e.g., id.* ("Poorly paid, ill-trained guards physically and verbally abused detainees, shackling them with leg irons, roughing them up and waking them without reason in the middle of the night. Women were sometimes denied sanitary napkins. Detainees were restricted to one pair of clean underwear a week.").

grants into the country.[36] Elsewhere, allegations of mismanagement and even fraud have embarrassed a handful of correctional companies around the country. Out-of-state prisoners, for example, rioted in Tennessee to protest their confinement in private prisons far from their families,[37] while guards at yet another privately-managed immigration center found themselves inadequately prepared when inmates attempted to set fire to their cells.[38] Perhaps even more alarmingly, officials at the U.S. Corrections Corporation and several other prison firms have been accused of illegal influence peddling and bribery.[39] Together, these worrisome examples demonstrate some private administrators' inclination to favor profits over sound correctional policies.[40]

To make matters worse, government officials may find it difficult (and expensive) to monitor private prisons' day-to-day operations.[41]

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36 *See, e.g.*, Van Natta, *supra* note 2, at 24.

37 *See, e.g., N.C. Inmates Riot at Private Tenn. Prison*, CHARLESTON GAZETTE, Oct. 30, 1995, at A2; Shirley Downing & Bartholomew Sullivan, *Prison Riot Unleashes Questions, Yet Many in Tipton Don't Fret*, COMMERCIAL APPEAL, Nov. 13, 1995, at 1B.

38 *See, e.g.*, Valerie Alvord, *Failed Jail At Miramar Was Costly*, SAN DIEGO UNION-TRIBUNE, Oct. 26, 1996, at A1. This unfortunate episode took place in the brig of the Miramar Naval Air Station in San Diego, California, which had been leased to U.S. Corrections Corp. to house illegal immigrants. *See id.* In contrast, CCA guards were apparently better prepared to handle a recent riot at a low-security federal facility in Texas. *See* Allan Turner, *Feds To Review Handling Of Riot At Texas Prison*, HOUSTON CHRONICLE, Aug. 23, 1996, at 33.

39 *See, e.g.*, Nick Cohen, *Private Prison Firm Hit by Fraud Inquiry*, INDEPENDENT, Sep. 17, 1995, at 11; Deborah Yetter, *Frey Admits Trying to Cover Payments*, COURIER-JOURNAL, Nov. 8, 1995, at B2; Robert Draper, *The Great Texas Prison Mess*, TEXAS MONTHLY, MAY 1996, at 126 (discussing fall of Texas prison system supervisor Andy Collins); Deborah Yetter, *Official Quits U.S. Corrections After Arkansas Indictment*, COURIER-JOURNAL, Apr. 20, 1996, at 7A; Jeanne F. Brooks, *Guard Firm Former Boss Sentenced*, SAN DIEGO UNION-TRIBUNE, Mar. 30, 1996, at A19 (discussing illegal payments made to state corrections department official in exchange for lucrative prison contract).

40 *Cf.* Douglas Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475 (1986) (arguing that "a balance must be struck between profitability and integrity of administration"). Some critics have also worried that privatization might hurt the poor and members of racial minorities, because they believe that private companies would be less likely to hire members of these communities. *See, e.g.*, Peter Mantius, *Privatizing Services Bad For The Poor, Study Says*, ATLANTA CONSTITUTION, Dec. 20, 1996, at 7F (discussing study by Southern Center for Studies in Public Policy at Clark-Atlanta University). *But cf.* Narma Adams-Wade, *Paul Quinn College Joins Venture With Black-Owned Corrections Firm*, DALLAS MORNING NEWS, June 22, 1996, at 34A (discussing joint venture between black-owned private corrections firm and historically black college to provide improved "education, job training, and substance-abuse treatment" for inmates).

41 *See, e.g.*, James Theodore Gentry, Note, *The Panopticon Revisited: The Problem of*

Because fiscally-strapped governments face enormous political pressure to expand prison space, there is reason to worry that officials will ignore some contractors' corner-cutting in a rush to privatize. In fact, several governments have proved willing to overlook even the Esmor company's failures,[42] and the Esmor debacle is not expected to affect the overall private prison market.[43]

Finally, the very novelty of the private prison industry may sometimes lead to dangerous gaps and loopholes in state and federal privatization laws. The recent story of several Texas escapees exemplifies this problem. Faced with overcrowding in Oregon prisons, Oregon corrections officials decided to contract with the CCA to house 240 sex offenders in Texas.[44] Texas, however, has no law requiring private corrections firms to notify the state when they bring in out-of-state prisoners,[45] despite the fact that Texas's private prison system is by far the largest in the country.[46] As a result, Houston officials and residents were rather surprised (indeed shocked) when they learned that two Oregon sex offenders had escaped from what Houstonians had thought was a minimum-security facility.[47] To make matters worse, Houston prosecutors soon discovered that the re-arrested escapees

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Monitoring Private Prisons, 96 YALE L.J. 353 (1986) (examining possible schemes for monitoring the cost and quality of private correctional services).

42 *See, e.g.*, Robert Schiller, *County OK with Prison Company's Past*, TAMPA TRIBUNE, Oct. 1, 1995, at 1 (discussing Esmor's successful relocation of its corporate headquarters to Florida).

43 *See, e.g.*, Frederick Kunkle, *More Prisons May Go Private; No Impact Seen from Esmor Plot*, RECORD Sept. 3, 1995, at A1. In fact, the center recently re-opened under new private management, albeit with greater monitoring by the INS. *See, e.g.*, Ronald Smothers, *New Managers and Promises, as Immigrant Detention Center Reopens*, N.Y. TIMES, Jan. 21, 1997, at B5; Matthew Purdy & Celia Dugger, *Legacy of Immigrants' Uprising: New Jail Operator, Little Change*, N.Y. TIMES, July 7, 1996, Sec. 1, at 1.

44 *See* Associated Press, *Private Prisons Shackle Texas With Confusion; State Laws Haven't Caught Up With New Phenomenon*, CHICAGO TRIBUNE, Nov. 7, 1996 at 34 [hereinafter *Private Prisons Shackle Texas*].

45 Joan Thompson, *Laws Lag Behind Booming Private Prison Industry; Crime: Texas Jails Draw Criticism After Police Are Called To Quell Riots and Track Down Escapees, Who May Not Be Prosecuted*, LOS ANGELES TIMES, Dec. 1, 1996, at A28; Christy Hoppe, *Oregon Inmates' Escape From Houston Jail Raises Questions; Private Units Don't Have To Announce Out-Of-State Prisoners*, DALLAS MORNING NEWS, Aug. 10, 1996, at 1A; Joe Holley, *What Do Private-Prison Officials Have Against The Public's Right To Know?*, TEXAS MONTHLY, Jan. 1997 (discussing contractors' refusal to release information concerning their facilities and contracts on grounds that such information is "proprietary").

46 *See* Walt, *supra* note 2, at 1; *Private Prisons Shackle Texas*, *supra* note 44 at 34.

47 *See* Hoppe, *supra* note 45; *Private Prisons; Inmate Escapes Signal Need For Toughened Rules*, DALLAS MORNING NEWS, Aug. 30, 1996, at 24A [hereinafter *Private Prisons; Inmate Escapes*].

had technically committed no crime under Texas law, because private prison guards are not public officials under Texas's privatization statutes.[48] At the same time, Oregon prosecutors could not charge the two men under Oregon law, because the breakout did not occur within Oregon's geographic jurisdiction.[49] Although Texas legislators are now likely to close the particular loopholes involved in the Oregon sex offenders' case,[50] this episode highlights the need for carefully-drawn privatization statutes that do not leave critical decisions, such as local government notification, to contractors' discretion.

Looked at as a whole, the nation's recent experience thus demonstrates both the real promise and the real danger of prison privatization. When carefully monitored, private prisons can deliver both cost-savings and quality improvements, but, when contractors' profit motives are unrestrained or privatization statutes are not tightly drafted, private prisons can result in disaster. Applying this lesson, this Article will look past the cost-savings and quality-of-service debates to ask whether the state and federal governments have sufficiently limited for-profit operators' control over administrative decisions concerning inmates' liberties.

II. The Demands of Due Process

By definition, the privatization of prisons entails the delegation of public power to private entities. While privatization is not per se unconstitutional, it poses the danger that private parties will misuse public power to serve their own ends. In this Part, I begin

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[48] *See Private Prisons; Inmate Escapes, supra* note 47, at 24A. The Oregon escapees, however, were charged with assault because they attacked a private guard as they escaped from the facility. *See Private Prisons Shackle Texas, supra* note 44, at 34. A similar escape in Kentucky resulted in a Kentucky Appeals Court ruling that it was a crime in that state for a convict to breakout of a legal private facility. *See* Phipps v. Commonwealth of Kentucky, 933 S.W.2d 825 (1996); *see also Private Jefferson Jail Is A Legal Jail, Court Says*, COURIER-JOURNAL, July 27, 1996, at 3B.

[49] *See Prison Brake; Texas Needs More Scrutiny of Private Prisons*, HOUSTON CHRONICLE, Sep. 3, 1996, at 18A.

[50] *See id.* Texas legislators have pledged to close the statutory loopholes exposed by this episode. *See* Jo Ann Zuniga, *Officials Urge Changes In Prison Laws*, HOUSTON CHRONICLE, Aug. 15, 1996, at A29; *Private Prisons; Inmate Escapes, supra* note 47. The CCA has also voiced support for changes in the relevant Texas laws. *See* Thompson, *supra* note 45. Escapes from private correctional facilities have also provoked controversy in other states. *See, e.g.*, Pamela Manson & Guy Webster, *Governor Demands Answers On Escape; 6 Fled Private Prison*, ARIZONA REPUBLIC, Oct. 22, 1996, at A1 (discussing political firestorm surrounding breakouts from CCA facility in Arizona).

by rejecting the nondelegation doctrine as a guide to the constitutionality of prison privatization. I then argue that the due process guarantees of the Fifth and Fourteenth Amendments require careful limits on private prison contractors' exercise of governmental power.

A. *Dismissing the Nondelegation Doctrine*

Although the Constitution does not explicitly restrict Congress's ability to delegate its powers, the United States Supreme Court has relied on Article I's statement that "All legislative Power herein granted shall be vested in a Congress of the United States"[51] to hold that Congress may not delegate its legislative powers to any other entity.[52] In principle, this "nondelegation" doctrine requires Congress and the President to adhere to the Constitution's "separation of powers"; the executive branch is to implement, not legislate, policy. Despite the doctrine's potentially rigid formulation, however, the Court has required only that Congress enunciate an "intelligible principle" to direct the President's enforcement of each statute.[53]

To date, the few scholars who have criticized the constitutionality of prison privatization have focused their analyses on the nondelegation doctrine.[54] These commentators have argued that prison privatization is unconstitutional because it entails the delegation of a "core" government function, incarceration, to non-government corporations.[55] Just as the Congress may not delegate legislative power to the President, these privatization opponents have argued, so the state and federal governments may not delegate their power of incarceration to private corporations.[56]

Such criticism, however, has proven easy for privatization proponents to answer, because the nondelegation doctrine is mori-

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51 U.S. CONST. art. I, § 1.

52 *See* Field v. Clark, 143 U.S. 649, 692 (1892) (establishing nondelegation doctrine).

53 *See* J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

54 *See, e.g.*, Field, *supra* note 6. Those that have defended the constitutionality of private prisons have therefore also focused on the nondelegation issue. *See, e.g.*, John DiPiano, *Private Prisons: Can They Work? Panopticon in the Twenty-First Century*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171 (1995).

55 *See, e.g.*, Field, *supra* note 6.

56 *See, e.g., id.*

bund.[57] Early in this century, the Supreme Court did occasionally rely on the doctrine to invalidate significant legislation,[58] and individual scholars[59] and Justices[60] still sometimes call for its revival or reformulation. Nonetheless, the federal courts have long ceased invoking the nondelegation doctrine, because they have recognized that the modern regulatory state cannot function without broad rulemaking and adjudicative powers for executive bureaucrats.[61] Instead of striking down legislation, a deferential Supreme Court has thus responded to intermittent concerns about the breadth of particular delegations only by narrowly construing agencies' rulemaking and adjudicative powers.[62]

Since a consensus of academic commentators and Supreme Court Justices view the nondelegation doctrine as a dead letter,[63] it

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57 *See, e.g.*, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, §3 (1990); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. & ECON. ORG. 81 (1985).

58 *See, e.g.*, Carter v. Carter Coal, 298 U.S. 238, 311 (1936) (invalidating law delegating power to set wages and hours to majority of private coal producers and miners); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (invalidating section of National Industrial Recovery Act authorizing President to promulgate competition codes upon recommendation by industrial groups); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (invalidating section of the National Industrial Recovery Act permitting President to prohibit interstate transfer of petroleum products).

59 *See, e.g.*, David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985).

60 *See, e.g.*, Indus. Union Dep't v. American Petroleum Instit. (the Benzene case), 448 U.S. 607, 685-86 (1980) (Rehnquist, J., concurring) (arguing that Occupational Safety and Health Act's delegation of regulatory authority lacked adequate standards directing extent to which hazardous substances should be regulated); McGautha v. California, 402 U.S. 183, 275-80 (1971) (Brennan, J., dissenting) (arguing discretion of jury in imposing death penalty constituted overly broad delegation). In addition, state courts have sometimes embraced the nondelegation doctrine as a way to enforce a separation of powers at the state level. *See* DAVIS, *supra* note 57, at § 3:14; Gary Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567 (1994).

61 *See, e.g.*, DAVIS, *supra* note 57, at § 3:2. The Court has also upheld a number of delegations of rulemaking and adjudicative powers to private parties. *See* discussion *infra* in notes 103-09 and accompanying text.

62 *Cf.* Industrial Union Dep't v. American Petroleum Inst. (the Benzene case), 448 U.S. 607, 611 (1980); National Cable Ass'n v. United States, 415 U.S. 336, 340-42 (1974) (narrowly construing FCC's authority to set licensing fees to avoid unconstitutional delegation of power to tax). On the state level, courts still occasionally rely on the nondelegation doctrine to invalidate legislation, but their efforts have been largely unprincipled and haphazard. *See* Davis, *supra* note 57, at § 3:14; *see also* Greco, *supra* note 60.

63 *See, e.g.*, Davis, *supra* note 57, at § 3; MASHAW, *Prodelegation*, *supra* note 57, at 82.

offers a poor foundation for constitutional analyses of prison privatization.[64] Moreover, even if the doctrine were viable, it would appear that most governments have furnished the mere "intelligible principle" for private contractors that the nondelegation doctrine allegedly requires: Private prisons are to provide governments with cheaper correctional facilities.[65] In the following Section, I therefore ground my analysis of private prison statutes in the more firmly established procedural demands of constitutional due process.

B. *Private Power and Due Process: The Principle of Financial Disinterestedness*

While the Court has allowed the nondelegation doctrine to fade, it has not hesitated to enforce a basic procedural norm central to the idea of due process:[66] Those who wield government power must be financially disinterested. In a wide range of cases, the Court has insisted that persons who control government power must be free from financial bias. In particular, the Court has consistently invalidated state and federal statutes that have tempted private parties to misuse government power for their own ends.[67]

In this Section, I discuss constitutional limits on the use of government power by financially-interested parties. Although the Supreme Court has never attempted to set out in any one opinion an anti-financial-bias rule for all government activities, a series of Court precedents, as well as accepted legislative and executive practices, amply demonstrate that financial disinterestedness is a universally-accepted, if sometimes implicit, principle of due process. After examining the application of this due process norm in such diverse areas as criminal procedure, professional licensing,

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64 *See generally* DiPiano, *supra* note 54.

65 *See generally id.*

66 The constitutional principle of "due process" is enshrined in both the Fifth and Fourteenth Amendments. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV (mandating that no state shall "deprive any person of life, liberty, or property without due process of law").

67 *See* David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 659 (1986). Besides its obvious implications for public policy, such illicit use of governmental authority strikes at the heart of the government's legitimacy: At its base, democratic acceptance of governmental coercion rests on the perception that government officials exercise their power in a disinterested fashion. *See id.* at 661.

and administrative rulemaking, I therefore conclude in this Section that impartial government officials must control adjudicative and rulemaking decisions concerning inmates' rights within for-profit prisons. In offering this analysis, I hope to refocus the constitutional debate about prison privatization away from sweeping discussions of the nondelegation doctrine and toward particularized due process analyses of private prison contractors' administrative authority over inmates' liberties.[68] I apply the due process principle of financial disinterestedness to the specific context of private prisons in Parts III and IV.

Turning first to the context of adjudication, the Supreme Court has long condemned the exercise of governmental powers by financially-interested parties, whether such entities be public officials or private persons. In the seminal case of *Tumey v. Ohio*,[69] for example, a bootlegger challenged a state law that appointed Ohio's mayors as judges of criminal Prohibition trials. Because the mayors' cities would have benefited financially from any fines the mayors imposed, the bootlegger complained that the law violated his due process right to a disinterested fact-finder.[70] The Court agreed and invalidated the statute, warning that:

> [I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.[71]

In reaching this decision, the Court did not consider whether, as an empirical matter, Ohio's mayors were good judges, or whether the

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68 On a more generalized level, Harold Abramson has similarly suggested that nondelegation and due process questions regarding private uses of government power be treated separately:

> A court analyzing a private regulatory action should consider the following questions: (1) Does the case involve a private actor? (2) Does the private actor make law and/or adjudicate disputes? (3) Is there an unconstitutional delegation of federal lawmaking or Article III judicial power? (4) Does the action by the private regulator constitute state action? (5) Does the state action comply with due process?

Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators And Their Constitutionality*, HASTINGS CONST. L.Q. 165, 210 (1989).

69 273 U.S. 510, 514 (1927).

70 *See id.* at 512.

71 *Id.* at 523.

particular defendant in *Tumey* was actually guilty.[72] Instead, the Court emphatically declared that defendants were constitutionally entitled to financially disinterested judges as a matter of due process.[73] By doing so, the Court affirmed that the Constitution's Due Process Clauses protected centuries-old common law notions of procedural fairness.[74]

Extending the disinterestedness principle in the years following *Tumey*, the Court insisted, in cases such as *Ward v. Village of Monroeville*[75] and *Aetna Life Insurance Co. v. Lavoie*,[76] that judges avoid even the appearance of financial bias. In *Ward*, the Court again rejected *Tumey*-style mayoral courts and held that "the test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the state and the accused . . . .'"[77] Going even further in *Lavoie*, the Court vacated a state supreme court decision in which a judge had had a financial interest and warned that "[t]he Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, justice must satisfy the appearance of justice."[78] Cases such as *Ward* and *Lavoie* thus demonstrate the breadth and force of the due process principle of disinterestedness in adjudication—a norm that today is strictly defined in the Model Code of Judicial Conduct.[79]

The Court has also steadfastly applied the disinterestedness principle to the "private" use of adjudicative powers. In *Gibson v. Berryhill*,[80] for example, the Court threw out a state optometry board's

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72 *See generally id.*

73 *See id.*

74 *See, e.g.*, Dr. Bonham's Case, 77 Eng. Rep. 638, 646 (1610) (upholding disinterestedness principle); *see also* John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947) (stating that "[t]he common law, unlike the civil law, was clean and simple: a judge was disqualified for direct pecuniary interest"); Susan E. Barton, *Judicial Disqualification in the Federal Courts*, 1978 U. Ill. L.F. 863, 865 (1978) (discussing common law norm of financial disinterest).

75 409 U.S. 57, 61 (1972).

76 475 U.S. 813, 824-25 (1986).

77 *Ward*, 409 U.S. at 60 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

78 *Lavoie*, 475 U.S. at 825 (internal quotations and citations omitted).

79 *See* ABA MODEL CODE OF JUDICIAL CONDUCT § 2E (1990) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," including circumstances in which a judge or related party has a financial interest).

80 411 U.S. 564, 579 (1973).

condemnation of optometrists employed by corporations, because the board was composed entirely of private practitioners with a financial stake in eliminating their corporate competition.[81] Citing *Tumey*, the Court firmly restated the principle that judges must be disinterested:

> It is sufficiently clear from our cases that those with a substantial pecuniary interest in legal proceedings should not adjudicate these disputes. . . . [T]he financial stake need not be as direct or positive as it appeared to be in *Tumey*. It has also come to be the prevailing view that most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.[82]

Similarly, the Court in the seminal civil procedure cases of *Fuentes v. Shevin*[83] and *Sniadach v. Family Finance Corp. of Bay View*[84] refused to allow private parties to commandeer public power to serve their own ends.[85] In *Fuentes*, the Court struck down a Florida prejudgment replevin statute that authorized private complainants to use state power to seize contested property before defendants had any opportunity to appear before disinterested judges.[86] In *Sniadach*, the Court employed analogous reasoning to invalidate a law that authorized private parties to garnish defendants' wages before the defendants had an opportunity to respond in court.[87] Together, cases such as *Berryhill*, *Fuentes*, and *Sniadach* amply demonstrate that due process prohibits governments from giving private parties authority to co-opt government adjudicative powers to serve their own financial interests.

Beyond adjudication, the due process norm of financial disinterestedness has also long applied in the context of administrative rulemaking. As a leading author on disqualification of administrative rulemakers has written, "disqualification in rulemaking is plainly appropriate in those circumstances . . . that involve present[,] significant

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81 *See id.* at 579.

82 *Id.* (internal quotations and citations omitted) (second ellipsis in original).

83 407 U.S. 67 (1972).

84 395 U.S. 337 (1969).

85 *See Fuentes*, 407 U.S. at 97; *Sniadach*, 395 U.S. at 343. The Court in *Fuentes* and *Sniadach* did not cite the *Tumey* line of cases, instead grounding its decision directly on the basic fairness principles embodied in the concept of due process. *See Fuentes*, 407 U.S. at 97; *Sniadach*, 395 U.S. at 343. Both *Fuentes* and *Sniadach*, however, clearly reflect the Court's fundamental concern with private abuse of governmental power. *See generally* Lawrence, *supra* note 67, at 659, 661; Abramson, *supra* note 68, at 204.

86 *See Fuentes*, 407 U.S. at 80-83.

87 *See Sniadach*, 395 U.S. at 339-42.

risks of present financial self-dealing."[88] Indeed, the principle that even "political" officials should not participate in government decisions concerning matters in which they have a financial interest appears to be universally accepted. Thus,

> If one searches outside the administrative and judicial realms for indications of conduct or associations regarded as disqualifying from participation in government [rulemaking] action, one finds broad agreement that personal financial interests are disqualifying .... [T]he provisions of the United States Code dealing with bribery, graft, and conflicts of interest prohibit paying (or receiving payment) for the assistance of governmental officials at all levels, and prohibit government employees from personal and substantial participation in a "particular matter in which, to his knowledge, he, his spouse, minor child, partner, [or] organization in which he is serving . . . has a financial interest."[89]

In fact, even federal Senators and Congressmen are subject to (self-imposed) rules forbidding their participation in matters that might directly affect their personal financial interests.[90] If a financial conflict of interest would disqualify an elected legislator or executive official, then procedural "fairness" and "impartiality" should surely prevent mere administrative regulators from participating in rulemaking decisions in which they have a personal financial stake.[91]

Although the Court has not had much opportunity to examine private use of government rulemaking powers (because most legislative and executive activities are already subject to the statutory restrictions discussed above),[92] it has struck down several laws that

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88 Peter L. Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 1048 (1980); *see also* JERRY L. MASHAW ET AL, ADMINISTRATIVE LAW 534 (1992) (discussing bias in rulemaking and citing Strauss with approval); DAVIS, *supra* note 57, at § 19.7.

89 Strauss, *supra* note 88, at 997 (quoting 18 U.S.C. § 208 (barring federal employees from participating in matters in which they have a financial interest)).

90 *See* Strauss, *supra* note 88, at 998.

91 *See id.* at 997 ("If particular conflicts of interest would or should be regarded as disqualifying even in a legislator or executive official . . . they should be disqualifying for a rulemaker, however political we may regard his function to be."); *see also* 45 Fed. Reg. 46776 (1980) (codifying the recommendations of the Administrative Conference of the United States concerning "Decisional Officials' Participation in Rulemaking Proceedings").

92 Published opinions concerning due process and financial biases of administrative rulemakers are quite rare. Because federal and state ethics laws prevent agency officials from participating in matters in which they have a financial interest, there has

empowered private parties to impose rules advancing their own financial interests. In *Eubank v. City of Richmond*,[93] for example, the Court invalidated a local ordinance that authorized a majority of landowners fronting a street to impose set-back requirements on their neighbors.[94] Likewise, in the landmark nondelegation case of *A.L.A. Schechter Poultry Corp. v. United States*,[95] the Court invalidated a portion of the National Industrial Recovery Act that authorized private groups to impose codes of competition across entire industries.[96] Although the Court's opinion focused on Congress's delegation of legislative powers to the President,[97] the Court also clearly disapproved of the Act's creation of rulemaking procedures that allowed private groups to use government power to disadvantage their business competitors.[98] Three months after *Schechter*, in *Carter v. Carter Coal*,[99] the Court similarly applied the disinterestedness principle to strike down provisions that allowed a majority of private coal producers and miners to fix wages and hours for their industry.[100] In the Court's view, the use of such power by "private persons whose interests may be and often are adverse to the interests of others in the same business" was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment. . . ."[101] While the Court long ago abandoned the nondelegation concepts that largely animated these cases,[102] it has never upheld any rulemaking or legislative procedure that gave such unlimited power to private parties.

Still, the private use of government rulemaking and adjudicative

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been little need for courts to consider constitutional due process limits on rulemakers' biases. *Cf. supra* notes 88-91 and accompanying text (discussing ethics laws).

93 226 U.S. 137 (1912).

94 *See id.* at 144; *see also* Washington *ex rel* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928) (invalidating ordinance prohibiting construction of retirement homes without approval of neighbors).

95 295 U.S. 495 (1935).

96 *See id.* at 542.

97 *See id.* at 537. Unfortunately, the Court's few opinions concerning delegations of rulemaking power to private parties have often blurred separate nondelegation and due process issues. *See* Abramson, *supra* note 68, at 208-10 (discussing this doctrinal confusion).

98 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).

99 298 U.S. 238, 311 (1936).

100 *See id.* at 311 (stating that "one person may not be entrusted with the power to regulate the business of another, and especially of a competitor").

101 *Id.*

102 *See supra* notes 57-63 and accompanying text.

powers is not per se unconstitutional. As long as private authority is fully subordinate to that of government officials, the Supreme Court has allowed private participation in "government functions." In *Sunshine Anthracite Coal Co. v. Adkins*,[103] for example, the Court sustained the Bituminous Coal Act's delegation of price-fixing powers to mining industry representatives, because, unlike in *Carter Coal*, industry officials functioned "subordinately" to a public commission.[104] By the same token, the Supreme Court has also upheld several laws that conditioned their enforcement on particular private parties' consent,[105] reasoning that such private vetoes merely waived statutory restrictions without allowing private persons to impose new rules.

Outside the rulemaking and adjudicative contexts, moreover, the Court has made it clear that the state and federal governments can constitutionally contract with private parties to implement government policies. As a general matter, the Court has left policy-making to the executive and legislative branches,[106] allowing "political" leaders wide discretion in choosing how to implement their policy decisions.[107] Thus, for example, in *Berman v. Parker*[108] the Supreme Court held that Congress could use private companies to implement its urban redevelopment policy, explaining that:

> Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. . . . The public end may be as well or better served through an agency of private enterprise

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103 310 U.S. 381 (1940).

104 *See id.* at 399; *cf.* Butte City Water Co. v. Baker, 196 U.S. 119, 126-27 (1905) (upholding statute giving legal effect to local claim rules developed by miners). Similarly, the Court in *Sniadach* and *Fuentes* did not absolutely prohibit prejudgment replevin or garnishment but instead required that defendants have opportunities to resist such actions before a judge, who could guard against private abuse of state powers. *Cf.* Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337, 339-42 (1969); Fuentes v. Shevin, 407 U.S. 67, 80-83 (1972).

105 *See, e.g.*, United States v. Rock Royal Coop., 307 U.S. 533, 577-78 (1939) (upholding law that prevented administrative price-fixing for milk unless approved by two-thirds of local producers); Currin v. Wallace, 306 U.S. 1, 15-16 (1939) (upholding law conditioning tobacco inspection requirements on support from two-thirds of local producers); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917) (upholding statute allowing majority of property owners to remove zoning restriction).

106 See generally Baker v. Carr, 369 U.S. 186 (1962) for a foundational discussion of the "political question" doctrine.

107 *See generally id.* (discussing history of political question doctrine).

108 348 U.S. 26 (1954).

> than through a department of government—or so the Congress might conclude.[109]

Since the Congress was not using the private contractor in *Berman* to escape the Constitution's restrictions on government activity, the Court found no constitutional fault with Congress's choice of "means" to implement its redevelopment policy.

Given precedents such as *Adkins* and *Berman*, it thus seems clear that the due process norm of disinterestedness is not so broad as to prohibit all delegations of government power to interested parties, as long as such private entities' authority is sufficiently subordinated to prevent misuse of government authority. Unfortunately, though, the Supreme Court has not articulated precise standards for delegations of government rulemaking and adjudicative authority to private parties. Instead, the Court has simply required, in a broad range of cases from *Fuentes* to *Adkins*, that private delegatees' adjudicative and rulemaking authority be completely subordinate to that of some reviewing government official. Thus, in *Fuentes* and *Sniadach*, for example, the Court did not condemn all private replevin and garnishment powers, but rather insisted that such powers be subject to pre-enforcement review by a disinterested judge who could ensure a fair opportunity for all sides to be heard. In a similar vein, the Court in *Adkins* upheld private rulemaking authority under a statute that subjected all

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109 *Id.* at 33-34. On a cautionary note, however, the Court might apply closer scrutiny to laws that give some private parties power over others' "liberty interests." To date, all of the Supreme Court's decisions addressing the private use of governmental authority have dealt only with private power over "property." In dicta, though, some members of the Court have suggested that they would hold delegations affecting liberty interests to a higher standard:

> If . . . "liberty" is to be regulated, it must be pursuant to the law-making functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen . . . are involved, we will construe narrowly all delegated powers that curtail or dilute them.

Kent v. Dulles, 357 U.S. 116, 129 (1958) (dicta); *see also* United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring). The Court's precedents upholding private delegations of power over property may in fact reflect the Court's post-*Lochner* reluctance to interfere with economic regulations. *See* Lawrence, *supra* note 67, at 673. The Court, however, has been considerably less cautious about intruding on the prerogatives of the "political" branches when citizens' liberty interests have been at stake. *See id.* Since rulemaking and adjudication in the prison context may often involve inmates' core liberty interests, the Court might subject private prison systems to more rigorous scrutiny than it has employed in the property-related private delegation cases discussed in this Section.

privately-authored rules to government inspection and approval prior to their promulgation.

This balanced interpretation of the disinterestedness norm receives further support from the lower federal courts. Although no federal circuit has articulated due process standards specifically tailored for private prisons, the circuit courts have developed guidelines, known as the "*Todd* standards," that could apply by analogy in the private prison context. Articulated most clearly in the Third Circuit case of *Todd & Co. v. S.E.C.*,[110] the *Todd* standards developed out of a series of cases concerning the federal Maloney Act,[111] which gives both regulatory and adjudicatory power over securities markets to private securities associations.[112] Upholding the Maloney Act, the circuits have identified three critical factors that keep the Act within constitutional bounds. First, all privately-written rules must receive the approval of the federal Securities & Exchange Commission (SEC) before they can go into effect.[113] Second, all private judgments of rule violations and penalty assessments are subject to mandatory SEC review; the SEC cannot shirk its duty to review all of the Act's private adjudications.[114] Finally third, all private adjudications are subject to a de novo standard of review. Under the Act, the SEC must draw its own factual and legal conclusions in each case;[115] the agency may even take such additional evidence as it deems necessary.[116] Operating in the shadow of forceful due process precedents such as *Tumey*, the *Todd* standards again make clear both that private delegations are not per se unconstitutional and that private decision-making authority must be subject to exacting government control. Due process requires that government officials strictly control rulemaking and adjudicative decisions concerning citizens' liberty, but the state and federal governments are free to delegate general policy implementation to private corporations.[117]

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110 557 F.2d 1008 (3d Cir. 1977).

111 *See, e.g., id.* at 1012; *see also* R.H. Johnson & Co. v. SEC, 198 F.2d 690 (2d Cir. 1952).

112 *See* 15 U.S.C. § 780-3 (1997).

113 *See* Todd & Co. v. SEC, 557 F.2d 1008, 1012 (3d Cir. 1977).

114 *See id.*

115 *See id.*

116 *See id.*

117 The due process concerns raised by private prisons should thus be seen as separate from questions about whether privatization, in the aggregate, can achieve substantive policy goals.

III. Due Process Standards For Private Prison Statutes

Prison privatization involves the suspect combination of private profit and government coercion. In this Part, I first explain why delegations of correctional power to private corporations merit close scrutiny. I then detail the particular forms of private correctional authority that governments must avoid in order to comply with due process.

A. *The Need for Close Scrutiny*

The financial biases of private prison operators and the critical liberty interests involved in criminal confinement together mandate close scrutiny of private prison arrangements. As the Sixth Circuit recently observed when denying "official immunity" to a private prison guard:

> [W]hile privately employed correctional officers are serving the public interest by maintaining a correctional facility, they are not principally motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security. . . . [E]ntrepreneurial jailers benefit directly, in the form of increased profits, from every dime not spent.[118]

Within private prison systems, contractors' financial biases take two basic forms. First, and most importantly, private prison contractors have obvious financial incentives to keep their facilities filled as close to capacity as possible. Private prison operators are paid on a per diem basis,[119] so empty prison beds pose a direct threat to correctional companies' bottom lines. Because each prisoner release entails a revenue loss, private operators have a financial bias toward minimizing releases and maximizing sentences.

Second, private contractors have a clear financial interest in minimizing the cost of their facilities' internal management.[120] Inmates'

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118 McKnight v. Rees, 88 F.3d 417, 424 (1996) (internal quotations and citations omitted), *cert. granted*, __ U.S. __, 117 S. Ct. 504 (1996).

119 *See* Kenneth L. Avio, *Remuneration Regimes for Private Prisons*, 13 INT'L REV. L. & ECON. 35, 36-45 (1993); *see also infra* note 257 (discussing inviability of alternatives to per diem payment system); *infra* note 183 (discussing inadequacy of contractual approaches to due process issues).

120 *Cf.* Gentry, *supra* note 41.

privileges within a prison are often costly, whether that cost stems from the need for equipment or for (expensive) supervisory personnel.[121] Even if government inspectors closely monitor contractors' general provision of correctional services (to control costs or quality-of-service), private operators may misuse their rulemaking and adjudicatory powers in order to restrict inmates' privileges within the correctional system.

In a series of opinions, the Supreme Court has indicated that prisoners have significant "procedural due process" rights regarding both of the areas in which private prison contractors have financial biases. First, the Supreme Court has repeatedly stated that prisoners have a due process right to fair and impartial decisions regarding their release. In the early leading case of *Wolff v. McDonnell*,[122] for instance, the Court insisted that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime."[123] Although the Court emphasized the need for balance between "institutional needs" and "constitutional rights of general application,"[124] it ruled that once a state created a right to a form of early release[125] and

> itself recogniz[ed] that its denial is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.[126]

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121 *Cf. id.*

122 418 U.S. 539 (1974).

123 *Id.* at 555-56.

124 *Id.* at 556.

125 *See id.* at 561-71. In *Wolff*, the Court specifically addressed whether a state prisoner had a due process right to minimum procedural protections when prison officials took disciplinary actions that would reduce his "good-time" credits towards parole. *See id.* Because such credits could affect the date of the prisoner's release, the Court ruled that the prisoner had a constitutional right to minimum procedural protections necessary for a "fair hearing," including adequate notice and the opportunity to present witnesses in his defense. *See id.* at 567-71. However, because "for the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee," the Court did not require prison officials to provide as extensive a set of procedural protections for disciplinary hearings as it had earlier required in *Morrisey* for parole revocation hearings. *See id.* at 560-61; *compare* Morrisey v. Brewer, 408 U.S. 471 (1972).

126 Wolff v. McDonnell, 418 U.S. 539, 557 (1974). The Court went on to state that:

> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of the govern-

Even as the Court has recently moved to scale back some inmate rights,[127] it has continued to endorse *Wolff*'s basic holding that governments may create release-related "liberty interests" protected by the Fourteenth Amendment.[128]

Beyond the release context, inmates' due process rights to particular privileges *within* correctional facilities are less clearly defined. Prior to 1995, the Court recognized a fairly broad definition of the in-prison "liberty interests" for which the Constitution requires procedural protections. Through examinations of both the severity of particular deprivations and the nature of prison rules governing those deprivations, the Court attempted to ensure that inmates received "fair" opportunities to protest and prevent significant changes in their conditions of confinement. As part of this effort, the Court required states to provide inmates with a variety of procedural safeguards before taking such actions as involuntarily committing them to mental hospitals,[129] transferring them to out-of-state prisons,[130] or segregating them from the general inmate population.[131]

> ment . . . . Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.

Id. at 558 (citations omitted).

127 *See generally* Deborah R. Stagner, *Sandin v. Conner: Redefining State Prisoners' Liberty Interest And Due Process Rights*, 74 N.C. L. REV. 1761 (1996); Richard J. Pierce, *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996); James E. Robertson, *The Decline of Negative Implication Jurisprudence: Procedural Fairness In Prison Discipline After Sandin v. Conner*, 32 TULSA L.J. 39 (1996); Michelle C. Ciszak, *Sandin v. Conner: Locking Out Prisoners' Due Process Claims*, 45 CATH. U.L. REV. 1101 (1996); Philip W. Sbaratta, Note, *Sandin v. Conner: The Supreme Court's Narrowing Of Prisoners' Due Process And The Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744 (1996); Note, *Prisoners' Rights—Punishments Imposed By Administrative Proceedings*, 109 HARV. L. REV. 141 (1995).

128 *See* Sandin v. Conner, __ U.S. __, 115 S. Ct. 2293, 2300 (1995). In upholding the lower court's decision to refuse damages to a prisoner who had been wrongly placed in solitary confinement, the *Sandin* Court emphasized that prison officials had expunged the prisoner's record so that his unwarranted confinement would have no effect on his good-time or parole. *See id.* at 2301-02.

129 *See, e.g.*, Vitek v. Jones, 445 U.S. 480 (1980) (involuntary commitment to mental hospital); *see also* Washington v. Harper, 494 U.S. 210 (1990) (involuntary administration of anti-psychotic drugs).

130 *See, e.g.*, Olim Wakinekona, 461 U.S. 238 (1983) (interstate transfers); *see also* Meachum v. Fano, 427 U.S. 215 (1976) (intrastate transfers).

131 *See, e.g.*, Hewitt v. Helms, 459 U.S. 460 (1983); Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam); Baxter v. Palmigiano, 425 U.S. 308 (1976).

In 1995, however, the Court dramatically cut back the scope of the Due Process Clauses' protections for inmates' "liberties" within prison. In *Sandin v. Conner*,[132] prisoner DeMont Conner sought damages for time that he had spent in solitary confinement before disciplinary charges against him were dismissed on appeal. According to Conner, his unwarranted segregation from the general inmate population had impinged on constitutional "liberty interests" that should have received greater procedural safeguards than the state provided. A five-member majority of the Court, however, rejected Conner's argument and held that he had not been deprived of any liberty worthy of constitutional protection. Although the Court affirmed *Wolff*'s protection of state-created liberty interests, it expressed concern that courts had become too involved in the "day-to-day management" of the nation's prisons.[133] In an attempt to achieve a more "sensible" balance, the Court thus ruled that due process only required such procedural safeguards as were necessary to prevent "restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[134] Finding that Conner's solitary confinement did "not present a dramatic departure from the basic conditions of Conner's indeterminate sentence," the Court ruled that such confinement did not come within the zone of liberty protected by the Fourteenth Amendment.[135] Under *Sandin*, prisoners apparently still enjoy some constitutional protections against arbitrary deprivation of their in-prison privileges, but they now must show that any loss of privileges is quite severe before triggering the procedural protections of "due process."[136]

Given prisoners' rights to fair procedures for determining their release and in-prison rights, private prison contractors' financial bi-

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132 __ U.S. __, 115 S. Ct. 2293, 2300 (1995).

133 *See id.* at 2299.

134 *See id.* at 2300 (citations omitted). The *Sandin* Court further emphasized the need for courts "to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Id.* at 2299.

135 *See id.* at 2302.

136 It is also important to recognize that the Supreme Court's due process doctrine serves as a floor, rather than a ceiling, for state prisoners' procedural rights. In interpreting their own state constitutions, state courts are free to adopt stricter protections for inmates' in-prison privileges than those the Supreme Court has articulated in *Sandin*.

ases go to the heart of due process. In a long line of cases such as *Tumey*, the Supreme Court has condemned the use of government authority by persons with a "direct, personal, substantial, pecuniary interest" at stake.[137] Yet, private prison contractors have powerful financial incentives to disfavor prisoners' liberty interests, whether those interests take the form of rights to release or in-prison privileges. Of course, no court has yet examined the special implications of "procedural" due process for private prison systems. Nonetheless, the Supreme Court has both endorsed the due process norm of financial disinterestedness and insisted that prisoners enjoy significant due process rights. Together, these principles plainly require that privatizing governments limit contractors' adjudicatory and rulemaking authority.

The presence of private financial interests within a private prison system, however, does not mean that all aspects of prison privatization are unconstitutional. As noted above, the Supreme Court has upheld interested parties' use of government power when such authority has been carefully circumscribed. In *Adkins*, for instance, the Court found that mining companies could participate in rulemaking because their actions were subject to plenary control by government officials.[138] In addition, the day-to-day provision of correctional services is a matter of policy implementation, and the Court has clearly indicated in cases such as *Berman* that the state and federal governments can constitutionally delegate such implementation to private entities.[139] Although private prison conditions could potentially involve justiciable rights if they fell below the Eighth Amendment's "cruel and unusual punishment"[140] standards, general allocations of resources within detention facilities are policy matters that do not affect individual inmates' due process rights. Thus, the constitutional norm of financial disinterestedness should prohibit private contractors from making ultimate decisions concerning individual inmates' liberties, but private contractors should be able to manage day-to-day prison operations so long as their decisions concerning individual inmates' rights are subject to plenary review by disinterested government officials.[141]

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137 *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927).

138 *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399 (1940).

139 *Cf. supra* notes 108-109 and accompanying text.

140 *Cf.* U.S. CONST. amend. VIII (forbidding infliction of "cruel and unusual punishments").

141 Of course, governments can still *choose* to ban private prisons within their juris-

B. *Due Process Standards for Private Prisons*

Given private operators' financial interests, due process requires that prison privatization statutes strictly limit contractors' authority to restrict inmates' liberties.[142] As I argued above, the due process norm of disinterestedness demands that prison contractors not have authority to make adjudicatory or rulemaking decisions that might allow them to disfavor inmates' individual liberties. To satisfy due process, private prison systems must do more than simply require in some formal sense that private contractors render "objective" rulings concerning inmates' rights. As the Supreme Court has emphasized in its cases concerning financial bias, "justice must satisfy the appearance of justice," even when one might hope that a decision-making official could look beyond his "actual bias" in order "to weigh the scales of justice equally."[143]

Specifically, I argue in this Section that private prison companies' financial biases should bar them from assuming power to determine release dates, to write disciplinary rules or make final disciplinary decisions, to set security classifications, or to control work assignments or work credits.[144] In these crucial areas, a disinterested government official should have actual and final control over all decisions. In some cases, it might be constitutionally permissible for contractors to play some role, especially in emergen-

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dictions. One state, Illinois, has actually prohibited private corporations from operating detention facilities within the state (on nondelegation-like grounds):

> The General Assembly hereby finds and declares that the management and operation of a correctional facility or institution involves functions that are inherently governmental. The imposition of punishment on errant citizens through incarceration requires the State to exercise its coercive powers over individuals and is thus distinguishable from privatization in other areas of government. . . .

§ 730 ILL. REV. STAT. ch. 730, para. 140/2.

142 Alternatively, privatizing governments might address due process issues through judicially-enforceable administrative regulations. No privatizing government, though, has taken such a regulatory approach. In addition, privatizing governments might also attempt to protect inmates' due process rights through contractual provisions. A purely contractual approach, however, could not adequately address the due process problems discussed in this Article. *See infra* note 183.

143 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986); *see also supra* notes 75-79 and accompanying text.

144 These categories should be seen as examples rather than as constituting an exhaustive list. Any other adjudicative or rulemaking processes that affect inmates' individual release rights or in-prison privileges (rising to the threshold established by *Sandin*) must also receive due process protection.

cies. Private prison operators might sometimes propose new rules subject to a government official's inspection and approval, for example, or they might isolate a violent inmate temporarily until a government official could assess his guilt or innocence and assign an appropriate penalty. In other cases, private contractors' participation can have no legitimate place[145] or would be needlessly duplicative.[146] Always, however, contractors' actions within these critical areas must be subject to the sort of real plenary control described in Section II.B.: (1) all privately-written rules must receive pre-enforcement inspection and approval from a government official;[147] (2) all private adjudications must receive mandatory government review;[148] and (3) all government reviews of private adjudications must be based on a de novo standard of review.[149]

1. Release

First and foremost, no private operator should have authority to determine any inmate's date of release. Since prison contractors have strong financial incentives to keep their prison cells occupied, they may improperly disfavor inmate releases. At the very least, private contractors' financial interest in keeping their facilities occupied would create the appearance of a "possible temptation to the average man as a judge"[150] that the Supreme Court has declared to violate due process.

The disinterestedness principle has several specific implications for contractors' authority over inmates' release. First, private prison contractors should not have the authority to calculate inmates' release dates. Even though the length of inmates' sentences

145 For example, private contractors should not play any authoritative role in parole hearings. *See infra* notes 155-57 and accompanying text.

146 For example, private contractor participation in release date calculations would be senselessly duplicative, since government officials must independently perform such calculations. *See infra* notes 151-53 and accompanying text.

147 *Cf.* discussion *supra* in notes 103-117 and accompanying text.

148 *Cf.* discussion *supra* in notes 103-117 and accompanying text.

149 *Cf.* discussion *supra* in notes 103-117 and accompanying text. Note that if the government did not exercise such de novo review, then private contractors would have untrammeled discretion to favor their financial interests over inmates' rights, up until the point where such distortions reached whatever threshold of error was established by a different standard of review.

150 Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972); *see also* Tumey v. Ohio, 273 U.S. 510, 523 (1927). Recall that even the appearance of a financial bias should disqualify a judge. *See supra* notes 75-79 and accompanying text.

is set in post-trial hearings, prisons must have policies for calculating precisely when those sentences have expired.[151] Such calculations often require quite complicated evaluations of inmates' disciplinary records, work assignments, good-time awards, rehabilitation efforts, and "time served" prior to conviction.[152] Because private contractors have an interest in maximizing their inmate populations, they have an incentive to write release-calculation rules that disfavor prisoners. By the same token, private operators also have an incentive to interpret release rules in ways that lengthen inmates' sentences. Private operators should not be given opportunities to let their financial prejudices influence the writing or application of release calculation rules.[153]

Second, private operators should not have the power to calculate, award, or revoke inmates' good-time credits toward release. Such credits can dramatically affect the length of convicts' sentences by hastening or delaying their eligibility for parole,[154] so contractors have an obvious interest in minimizing good-time awards. Much as with the calculation of inmates' release dates, the disinterestedness principle requires that contractors not have opportunities to write or adjudicate good-time rules.

Third, contractors should not have the authority to make recommendations to parole boards.[155] From the perspective of prison contractors paid on per diem, parole presents an immediate threat to the corporate bottom line. If parole boards are to be fair and disinterested,[156] private operators cannot have powers that make

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151 *See, e.g.*, James B. Jacobs, *Sentencing By Prison Personnel*, 30 UCLA L. REV. 217, 227 (1982).

152 *See, e.g., id.* (stating that "[i]n many states, it is very difficult to determine how much good time a prisoner is entitled to because prisoners may be eligible for different amounts depending on their offense, sentence, tenure, discipline and work records."); NEIL COHEN & JAMES GOBERT, THE LAW OF PROBATION AND PAROLE 104-05 (1994).

153 However, when release calculation rules are purely formulaic, allowing no room for contractor discretion or interpretation, it is probably not necessary to prohibit operators' involvement in such calculations.

154 *See, e.g.*, Jacobs, *supra* note 151, at 218-19; COHEN & GOBERT, supra note 152, at 107; *see also* Wolff v. McDonnell, 418 U.S. 539, 561-71 (1974); Sandin v. Conner, __ U.S. __, 115 S. Ct. 2293, 2301-02 (1995).

155 For descriptions of the parole decision-making process in public prisons, see generally Holly Harrison, Note, *Violations of the Double Jeopardy Prohibition Under the Federal Parole Release System*, 63 B.U.L. REV. 673, 676-87 (1983); COHEN & GOBERT, *supra* note 152, at 92-157.

156 *Cf.* Morrisey v. Breer, 408 U.S. 471, 480-90 (1972) (requiring procedural protec-

them part of the parole decision-making process, while inmates are left as mere supplicants. Although parole boards should be able to review prisoners' written files (in order to evaluate discipline records, rehabilitation, etc.),[157] financially-interested correctional companies must be excluded from any authoritative role in the parole process.

Finally, private operators should not have the power to decide whether a prisoner is eligible for or receives a furlough. Once again, furloughs may impose significant revenue losses on private contractors. Although furloughed prisoners do not completely exit the prison system (as parolees do), their extended absences may again impact contractors' per diem revenues. As a result, private operators have a financial incentive to disfavor prisoner furloughs.[158] Private operators thus should not have authority over furlough decisions, just as they should not have power over release calculations, good-time awards, or parole hearings.

2. Discipline

Allowing private operators to write disciplinary rules for inmates would again taint the correctional process with the potential for bias. First, such a system could directly affect inmates' release dates, because good-time credits and parole are conditioned on prisoners' adherence to disciplinary rules.[159] Second, privately-written rules would impact inmates' rights within the prison system by determining when private administrators could revoke individual inmates' privileges, such as recreation, work, or education.[160] Given the costliness of many inmate privileges,[161] private operators

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tions in parole revocation hearings); *see also Wolff*, 418 U.S. at 561-71 (requiring procedural protections in disciplinary context).

157 For further discussion of the relationship between parole boards' use of private contractors' disciplinary records and limits on contractors' authority over disciplinary decisions, see *infra* note 218 and the accompanying text.

158 It would possible for governments to eliminate this incentive by continuing to pay contractors on per diem while inmates are on furloughs. However, contractors might attempt to take advantage of such a practice by furloughing undeserving inmates, allowing such contractors to continue to receive per diem payments without incurring corresponding supervision costs.

159 *See, e.g.*, Jacobs, *supra* note 151, at 234-35.

160 *See, e.g., id.*

161 *Cf. supra* notes 120-21 and accompanying text (discussing contractors' incentives regarding inmates' in-prison privileges).

would be tempted to write rules favoring their profits over inmates' rights (and public policy).

By the same token, private contractors should not have authority to make disciplinary adjudications. Disciplinary actions can affect both inmates' good-time credits (and thus their release dates) as well as their in-prison privileges.[162] In the disciplinary context, prisoners' liberty interests therefore conflict directly with private prison contractors' profit motives. Indeed, private operators' incentives to disfavor inmates' liberties in disciplinary decisions are at least as suspect as the conflicts of interest that tainted the "judges" in *Tumey* and *Berryhill*.[163] While prison guards may have to restrain inmates on an emergency basis, public correctional officials must control all final disciplinary judgments and penalties in order to satisfy due process.[164]

3. Classification

Similarly, prison privatization statutes should protect the inmate classification systems from contractors' financial biases. Inmates can be classified in a variety of security levels (e.g., minimum, medium, or maximum) depending on the jurisdiction. Such classifications determine the security parameters of convicts' incarceration, as well as the maximum good-time credits they may receive.[165] Lower security classifications may entail more privileges, including furlough opportunities,[166] that private operators may wish to minimize. On the other hand, higher-security classifications may require more intensive supervision,[167] forcing private administrators to incur additional personnel expenses. Given pri-

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162 *See, e.g.*, Jacobs, *supra* note 151, at 234-35.

163 *Cf. supra* notes 69-87 and accompanying text (discussing financial disinterest in adjudicatory context).

164 Such temporary, emergency restraint of prisoners pending a final adjudication by a government official would apparently not violate prisoners' rights under *Sandin*. In *Sandin*, the Court found no due process violation where a prisoner had been subjected to solitary confinement while awaiting an appeal of a disciplinary charge, even though the charge was ultimately dismissed. *See* Sandin v. Conner, __ U.S. __, 115 S. Ct. 2293, 2300-02 (1995).

165 *See, e.g.*, Jacobs, *supra* note 151, at 232.

166 *See, e.g.*, JAMES FOX, ORGANIZATIONAL AND RACIAL CONFLICT IN MAXIMUM SECURITY PRISONS (1982); JOHN DILULIO, GOVERNING PRISONS 118-20, 126, 214, 224-25 (1987).

167 *See, e.g.*, FOX, *supra* note 166; DILULIO, supra note 166, at 118-20, 126, 214, 224-25.

vate operators' economic incentives to manipulate these classifications, due process requires that governments not place power to alter inmates' classifications in private contractors' hands.

4. Work

Finally, governments should limit private contractors' discretion in the area of inmate work. Work programs serve several functions within the prison setting. Most often, work is a privilege, for example allowing some prisoners to leave the prison grounds.[168] At the same time, work may also provide prisoners with opportunities to earn good-time credits, to make money, or to learn trade skills.[169] By manipulating prisoners' work assignments, prison administrators can thus determine the release credits and wages that inmates receive.[170] As in the context of disciplinary decisions, the same financial biases that should disqualify private contractors from making release or good-time decisions should also prevent private prison operators from controlling prison labor. In order to honor the due process principle of disinterestedness, prison privatization statutes should not allow contractors to decide the types of work to which individual inmates may be assigned or to determine the credits or other compensation that working inmates receive.

IV. The Failure of Current Prison Privatization Statutes

Today, twenty-five states and the federal government have passed laws authorizing private prisons.[171] In this Part, I argue that most of these statutes fail to satisfy the due process requirements outlined in Section III.B. First, I highlight the complete failure of the federal government and twelve of the privatizing states to place any meaningful due process restrictions on contractors' authority. After criticizing such fundamentally lax approaches to privatization, I then examine the statutory steps that the remaining thirteen privatizing states have taken to control private contractors' rulemaking and adjudicatory discretion. Finally, I conclude this Part with a discussion of statutory models that privatizing govern-

168 *See, e.g.*, Sharon Goodman, Note, *Prisoners as Entrepreneurs: Developing A Model For Prisoner-Run* Industry, 62 B.U. L. REV. 1163 (1982).

169 *See, e.g., id*; Jacobs, *supra* note 151, at 231-32, 234-36.

170 In essence, such credits and wages correspond to the "liberty" and "property" rights for which the Due Process Clauses require procedural protections.

171 *See* statutes cited *supra* note 8.

ments could emulate in order to prevent contractors from violating prisoners' due process rights.

A. *Un-Safeguarded Approaches to Prison Privatization*

Astonishingly, twelve states and the federal government have made no effort in their prison privatization statutes to place due process limits on the private use of correctional authority.[172] In this Section, I begin my discussion of the due process problems posed by most current prison privatization statutes by describing the total failure of the federal government and these twelve states to address due process issues. After analyzing these governments' meager statutes, I also discuss in this Section the danger that some state governments may privatize their correctional facilities without any express statutory authorization.

1. Federal Privatization

The federal government has long shown an interest in privatizing corrections. During the 1980s, in fact, the federal government began privatizing a variety of federal detention facilities. Following the example of privatization leaders such as Tennessee, Congress began authorizing the federal government to contract with private firms to house the nation's inmates,[173] while the executive branch moved to privatize a number of INS detention centers and low-security prison facilities. In 1992, President George Bush further expanded the federal government's commitment to prison privatization by issuing an Executive Order instructing all federal agencies to support state and local governments' privatization efforts.[174] Continuing this trend, the Clinton administration—anxious to reduce the federal budget deficit while looking "tough" on crime—

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172 *See* 18 U.S.C.A. § 4013; ALASKA STAT. § 33.30.031; 1995 CT. ALS 229 (LEXIS); 1995 GA. S.R. 457; KY REV. STAT. ANN. §§ 197.500-197.900; MONT. CODE ANN. § 53-30-106; NEV. REV. STAT. ANN. 209.141; N.H. REV. STAT. ANN. § 21-H:8; N.M. STAT. ANN. §§ 33-1-17, 33-3-1 to 33-3-19; OKLA. STAT. ANN. tit. 57 §§ 41 to 563.3; 1995 Ore. Laws 621 (LEXIS); 61 PA. CONS. STAT. ANN. §§ 390.306, 1081-1085; UTAH CODE ANN § 64-13-26. However, the New Mexico statute authorizing private *jails* does include a provision requiring sheriffs, rather than private contractors, to calculate jail inmates' good-time. *See* N.M. STAT. ANN. § 33-3-9; *see also infra* note 206 and accompanying text (discussing this provision).

173 *See* 18 U.S.C.A. § 4013.

174 *See* 57 FED. REG. 19,063 (codifying Executive Order No. 12,803, entitled "Infrastructure Privatization").

has enthusiastically endorsed the privatization of new federal corrections facilities,[175] despite the original political association of prison privatization with conservatism. Today, federal prisoners are housed in at least twenty-one different private facilities, with more under construction.[176]

Despite its substantial involvement in corrections privatization, however, the federal government has made little effort to limit private contractors' discretionary authority over inmates' liberties. In fact, the only federal statute directly regulating private prisons states merely that:

> (a) The Attorney General, in support of United States prisoners in non-Federal institutions, is authorized to make payments from funds appropriated for the support of United States prisoners for—
>
> . . .
>
> (3) the housing, care, and security of persons held in custody of a United States marshal pursuant to Federal law under agreements with State or local units of government or contracts with private entities
>
> . . .
>
> (b)(1) The United States Marshals Service may designate districts that need additional support from private detention entities under subsection (a)(3) based on—
>
> (A) the number of Federal detainees in the district; and
>
> (B) the availability of appropriate Federal, State, and local government detention facilities.
>
> (2) In order to be eligible for a contract for the housing, care, and security of persons held in custody of the United States Marshals pursuant to Federal law and funding under subsection (a)(3), a private entity shall—
>
> (A) be located in a district that has been designated as needing additional Federal detention facilities pursuant to paragraph (1);
>
> (B) meet the standards of the American Correctional

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175 *See, e.g.*, Peter Robinson, *Taft's Prison a Federal Pilot Program*, STATES NEWS SERVICE, Nov. 30, 1995. The Clinton administration has been an enthusiastic proponent of prison privatization as part of Vice President Gore's "Reinventing Government" program. *See id.*; *see also* Garth & Labaton, *supra* note 25, at A1; James Bornemeier, *Town Caught In Middle Of Federal Prison Debate*, LOS ANGELES TIMES, Dec. 30, 1996, at A1.

176 *See* THOMAS & BOLINGER, *supra* note 13, at 2-21.

> Association;[177]
> (C) comply with all applicable State and local laws and regulations;
> (D) have approved fire, security, escape, and riot plans; and
> (E) comply with any other regulations that the Marshals Service deems appropriate.[178]

Under these surprisingly terse provisions, the United States Marshals enjoy sweeping authority to contract with private companies to operate federal prisons.[179] In effect, the law allows the Marshals to turn federal prisoners over to any contractors that do not violate the most basic health and safety standards.[180] Nowhere in the statute are the Marshals required to consider the due process implications of private prison contracts;[181] nowhere does the statute restrict the Marshals's ability to give private firms control over inmate discipline, work assignments, or any other aspect of prison life affecting inmates' release rights or significant in-prison privileges.[182] What's more, neither the Justice Department nor any other federal agency has promulgated any regulations designed to fill the enormous due process gaps in the federal code. As a result, federal prison officials have no obligation to exercise the de novo review of contractor decisions regarding individual inmates' liberties that the disinterestedness principle requires. Plainly, the federal privatization statute does not meet the due process standards described in Section III.B.[183]

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177 Unfortunately, this accreditation requirement does not provide any meaningful protection for inmates' due process rights. The ACA's minimal accreditation standards focus on quality-of-service issues and do not address any of the due process problems raised by prison privatization. *See generally* AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (3d ed. 1990). In fact, the ACA's standards do not differentiate between private and public correctional facilities. *See generally id.*

178 18 U.S.C.A. § 4013.

179 *See id.*

180 *See id.*

181 *See id.*

182 *See id.*

183 Although the federal government has no regulations requiring federal prison officials to follow the due process guidelines outlined in Section III.B., it could perhaps require private operators to follow such procedures through contractual provisions. Such an approach, however, would not provide inmates with adequate due process protections. First, even if the federal government could bind contractors to submit to control of all rulemaking and adjudicatory decisions by government officials, privatization contracts could not force public administrators (who would not themselves be bound by the contracts) to follow the required due process procedures.

2. Un-Safeguarded State Privatization

Much like the federal government, twelve states have also taken a strikingly lax approach to prison privatization.[184] At the extreme, nine of these states have not made even token attempts to limit the breadth of contractors' powers over inmates' liberties.[185] Montana, for example, has passed a privatization provision that

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Federal prisoners would have no guarantee that private contractors (with their obvious financial biases) were not in practice effectively making rulemaking and adjudicatory decisions on their own. In *Todd*, for example, the Third Circuit emphasized that

> The independent review function is a significant factor in meeting serious constitutional challenges to this self-regulatory mechanism. Since it is a departure from the traditional exercise of enforcement power in the first instance, confidence in the impartiality and fairness of the Association's procedures must be maintained. The S.E.C, therefore, should not cavalierly dismiss procedural errors affecting the rights of those subjected to sanctions but should insist upon meticulous compliance by the private organization.

Todd & Co. v. SEC, 557 F.2d at 1014. Due process does not just require empty formal procedural protections but rather demands careful enforcement by public officials.

Second, if procedural rules were only established as part of a privatization contract rather than through statutes or regulations, then prisoners would likely be unable to enforce those rules in the courts, because they would lack privity.

Third, the inaccessibility of information regarding privatization contracts would make such contractual provisions un-enforceable and un-reviewable. Privatization contracts are not subject to the Freedom of Information Act (FOIA), and contractors routinely refuse to divulge information regarding their contracts and facilities on the ground that such information is "proprietary." *See, e.g.*, Nicole B. Casarez, *Furthering the Accountability Principle in Privatizing Federal Corrections: The Need for Access to Private Prison Records*, U. MICH. J.L. REF. 249 (1995); Holley, *supra* note 45, at 22; *cf.* 5 U.S.C. § 552 (1997) (Freedom of Information Act). Without access to information on privatization contracts, inmates would not be able to learn the full range of their rights (even assuming that they could sue under such contracts), nor would inmates, their lawyers, watchdog groups, or the media be able to ascertain whether private prisons had adequate contractual safeguards in place.

184 *See* ALASKA STAT. § 33.30.031; 1995 CT. ALS 229 (LEXIS); 1995 GA. S.R. 457; KY. REV. STAT. ANN. § 197.510(27); MONT. CODE ANN. § 53-30-106; NEV. REV. STAT. ANN. 209.141; N.H. REV. STAT. ANN. § 21-H:8; N.M. STAT. ANN. §§ 33-1-17, 33-3-1 to 33-3-19; OKLA. STAT. ANN. tit. 57, § 41; 1995 Ore. Laws 621 (LEXIS); 61 PA. CONS. STAT. ANN. §§ 390.306, 1081-1085; UTAH CODE ANN § 64-13-26. None of these states have attempted to fill the due process gaps in their privatization statutes through administrative regulations. However, the New Mexico statute authorizing private *jails* does include a provision requiring sheriffs, rather than private contractors, to calculate jail inmates' good-time. *See* N.M. STAT. ANN. § 33-3-9; *see also infra* note 206 and accompanying text (discussing this provision).

185 *See* 1995 CT. ALS 229 (LEXIS); 1995 GA. S.R. 457; MONT. CODE ANN. § 53-30-106; NEV. REV. STAT. ANN. 209.141; N.H. REV. STAT. ANN. § 21-H:8; N.M. STAT. ANN. §§ 33-1-17, 33-3-1 to 33-3-19; 1995 ORE. LAWS 621 (LEXIS); 61 PA. CONS. STAT. ANN. §§ 390.306, 1081-1085; UTAH CODE ANN § 64-13-26.

simply states that "[w]ithin budgetary limits, the department [of corrections] may also enter into contracts with public or private corporations for the confinement of selected inmates if suitable programs have been established."[186] Similarly, in Nevada "[t]he director [of correctional institutions] may, with the approval of the board, enter into agreements with other governmental agencies and with private organizations to carry out the purposes of this chapter."[187] Even Pennsylvania, which in 1986 passed a law to prohibit private prisons,[188] today is contracting with private correctional firms under a statute that simply states that "[t]he facilities authorized in . . . [the "Prison Facilities Improvement Act"] are exempt from the provisions of the act . . . known as the Private Prison Moratorium and Study Act."[189] Connecticut and Oregon, though, have been even more creative in avoiding placing limits on private contractors' authority. Although neither of these two states has yet passed a statute authorizing in-state private facilities (because of labor union opposition[190]), both have enacted laws allowing their corrections officials to transfer prisoners to private, out-of-state prisons without any due process limitations whatsoever.[191] In all nine of these utterly un-safeguarded states, prison officials are free to sign any private prison contracts that fall within their agencies' budgetary constraints. As a result, in all nine of

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186 MONT. CODE ANN. § 53-30-106.

187 NEV. REV. STAT. ANN. § 209.141.

188 *See* 61 PA. CONS. STAT. ANN. §§ 1081-85.

189 61 PA. CONS. STAT. ANN. § 390.306.

190 *See, e.g.*, Marc Lifsher, *Guards Without Guns In Arizona: Officials Like Privately Run Prisons*, ORANGE COUNTY REGISTER, May 13, 1996, at A15 (Arizona private prison housing Oregon convicts because unions preventing private prisons within Oregon); Christopher Katy, *Prison Privatization Idea Progresses; Panel Votes To Allow State To Seek Proposals*, HARTFORD COURANT, Apr. 2, 1996, at A3 (Connecticut unions opposing prison privatization); *see also* Marc Lifsher, *Lewis' Bill To Enable Private-Prison Operators Fails In Senate; The State Prison-Guards Union Vehemently Opposed The Proposal*, ORANGE COUNTY REGISTER, May 31, 1996, at A24 (California union opposition).

Unions have also tried to use the courts to block prison privatization. *See, e.g.*, Local 2173 v. McWherter, No. 87-34-II, 1987 WL 11762 (Tenn. Ct. App., June 5, 1987) (dismissed for lack of standing); Ohio Patrolmen's Benevolent Ass'n v. Repke, 1995 Ohio App. LEXIS 5876 (1995) (finding that the "[nondelegation] issue is simply not ripe for review at this time"); Delaware County Prison Employees Independent Union v. Delaware County, 681 A.2d 843 (1996) (requiring county to halt privatization while negotiating with union as required by contract).

191 *See* 1995 CT. ALS 229 (LEXIS); 1995 ORE LAWS 621 (LEXIS). Such transfers may make oversight of both due process protections and quality-of-service issues more difficult, even when "exporting" states have strict privatization statutes.

these states private contractors may quite legally attempt to lobby parole boards, impose discipline, reclassify prisoners, or determine individual inmates' work assignments and credits—all of which, of course, violate due process.

Unfortunately, the remaining three states in this group—Alaska, Kentucky, and Oklahoma—have not done a significantly better job of restraining private contractors' authority. Evincing a disappointing indifference to prisoners' rights, Alaska merely mandates in one, catch-all phrase that private facilities provide "custody, care, and discipline similar to that required by the laws" of the state,[192] while Kentucky actually requires, in its only relevant provision, that private operators have "a policy . . . for awarding of meritorious good time."[193] With similar nonchalance, Oklahoma's statute vaguely mandates that private operators "shall meet the [quality of service] standards prescribed by the Board of Corrections" for the general Oklahoma prison system.[194] Surely, it is not enough that private prisons offer something "similar to" due process. None of these vacuous provisions provides the safeguards demanded by the Constitution for inmates' rights.[195]

3. The Danger of Non-Statutory Privatization

Beyond the due process problems posed by the lax statutes discussed so far, the danger also exists that some states may place inmates in the custody of private contractors without even bothering to pass statutes explicitly authorizing private corrections. In fact, at least five states without any privatization statutes have already contracted with private prison operators to house some of their inmates.[196] Of these five states, only Kansas has placed its

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192 ALASKA STAT. § 33.30.031.

193 KY. REV. STAT. ANN. § 197.510(27).

194 OKLA. STAT. ANN. tit. 57, § 561. The Oklahoma statute provides in pertinent part that private prisons "shall meet standards prescribed by the Board of Corrections, including but not limited to, standards concerning internal and perimeter security, discipline of inmates, educational and vocational training programs, and proper food, clothing, housing, and medical care." *Id.*

195 In addition, none of these states have attempted to provide due process for their inmates through administrative regulations. Mere contractual approaches to due process, moreover, would be constitutionally inadequate. *See supra* note 183.

196 *See* THOMAS & BOLINGER, *supra* note 13, at 6 (Kansas); *id.* at 2 (Hawaii), 12 (Missouri); Conrad deFiebre, *Big House On The Prairie Hit Big Time*, STAR TRIBUNE, Jan. 5, 1997, at 1B (Idaho and Minnesota).

prisoners in an in-state facility.[197] The other four, Hawaii, Idaho, Minnesota, and Missouri, have all contracted to send their prisoners out-of-state,[198] following the examples of Connecticut and Oregon discussed above.[199] Even assuming that privatization without express statutory authorization does not violate state or federal "nondelegation" doctrines,[200] such privatization efforts obviously run afoul of the due process requirements discussed in this Article; prisoners from these states have no assurance that their private jailers will not exercise financially-biased regulatory and adjudicatory authority over their liberty interests.[201]

More subtly, states that have not explicitly authorized private prisons may also run into due process problems when state prisoners are temporarily or permanently housed in non-prison facilities. Of the twenty-five states that have not expressly authorized private prisons, thirteen have enacted laws allowing privatization of local jails[202], juvenile detention centers, and/or community corrections facilities.[203] For the most part, all three types of facilities house

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197 *See* THOMAS & BOLINGER, *supra* note 13, at 6.

198 *See id.* at 2 (Hawaii), 12 (Missouri); deFiebre, *supra* note 126, at 1B (Idaho and Minnesota). Such transfers may make oversight of both due process protections and quality-of-service issues more difficult, even when "exporting" states have strict privatization statutes.

199 *See supra* notes 190-191 and accompanying text.

200 The non-delegation doctrine might assume new force in cases were state executive officials contracted away a critical public function such as custody of convicts without any statutory authorization or guidance.

201 Any number of additional state and local governments may be preparing to follow the example of these five states. In New York, for example, state and city officials have publicly considered privatizing local facilities, even though the state has not enacted a statute authorizing government officials to enter such contracts for private incarceration. *See e.g.*, Margaret Hammersley, *Proposal Eyes Private Facility To Ease Prison Overcrowding*, BUFFALO NEWS, Mar. 1, 1996, at 4C; Rose Kim, *Green Rails Over Jails; Rebukes Rudy For Privatization Bids*, NEWSDAY, Mar. 25, 1996, at A2.

202 Although the terms "prison" and "jail" are often used as synonyms in everyday speech, they actually refer to different types of correctional facilities. A prison is a "state or federal correctional institution for incarceration of felony offenses and terms of one year or more. The words 'prison' and 'penitentiary' are used synonymously to designate institutions for the imprisonment of persons convicted of the more serious crimes, as distinguished from reformatories and county or city jails." BLACK'S LAW DICTIONARY 1194 (6th ed. 1990).

203 *See* CAL. PEN. CODE §§ 2910.5, 6031.6, 6225, 6258 (West 1996); HAW. REV. STAT. § 352-3 (1996); IDAHO CODE §§ 20-504 to 20-536 (1996); IND. CODE ANN. §§ 11-8-3-1, 11-10-6-11, 11-10-8-4, 11-12-1-3, 11-12-3-1 (Michie 1996); IOWA CODE § 356A.1 (1996); ME. REV. STAT. ANN. 34A § 7004 (West 1995); MICH. STAT. ANN. §§ 28.2271, 28.2290(7) (Law Co-op. 1996); MINN. STAT. ANN. §§ 241.021, 242.195 (West 1996);

short-term, minimum-security inmates whose sentences are not tied to good-time or other significant privileges.[204] For such "typical" inmates, privatization poses none of the due process concerns that are the subject of this Article.

Sometimes, however, such facilities may confine other types of inmates, including state and federal felons, either because the surrounding prisons are overcrowded or because such inmates are passing through temporarily as they move toward release.[205] In contrast to the "typical" inmate, such prisoners may well be serving sentences tied to good-time credits, putting private contractors in the position of making discipline, work, or other decisions that could directly affect the length of inmates' confinement. If such contractors are paid on a per diem basis like prison contractors, then their personal financial incentives to maximize their inmate populations would pose the same due process problems that are present when private contractors exercise un-reviewed authority over inmates in private prisons. Unfortunately, only New Mexico and California have enacted statutory provisions dealing with this problem. New Mexico's incomplete provision simply requires sheriffs, rather than contractors, to calculate good-time credits for prisoners in private jails.[206] California's law, however, broadly prohibits the housing of state prisoners in private jails or community corrections facilities.[207]

B. *Other Current Statutory Approaches*

On a more positive note, a number of states have passed privatization statutes that offer some protection for their prisoners' due process rights.[208] Unfortunately, though, most of these efforts have

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MO. REV. STAT. § 217.430 (1995); N.J. STAT. ANN. § 30:4-177.37 (West 1996); N.D. CENT. CODE § 12-44.1-02 (1995); S.D. CODIFIED LAWS §§ 24-11-39 to 24-11-44 (Michie 1995); VT. STAT. ANN. tit. 28, § 353 (1996).

[204] *See, e.g.*, Jacobs, *supra* note 151, at 232-34. Jails, however, do often house prisoners who have been arrested for serious crimes but are still awaiting trial. *See, e.g., id.* at 232 (noting that such pre-conviction "jail time" is typically credited against convicted persons' sentences).

[205] A soon-to-be paroled felon, for example, might live temporarily in a privately-run halfway house before gaining his full freedom from confinement. *See also supra* note 204.

[206] *See* N.M. STAT. ANN. § 33-3-9.

[207] *See* CAL. PEN. CODE §§ 2910.5, 6031.6.

[208] *See* ARIZ. REV. STAT. ANN. § 41-1609.01; ARK. CODE ANN. § 12-50-108; COLO. REV. STAT. ANN. § 17-1-203; FLA. STAT. ANN. § 957.06; LA. REV. STAT. ANN. § 39:1800.5;

been quite limited and incomplete. In this Section, I review in detail the ways in which the remaining thirteen privatizing states' statutes address—and fail to address—the due process issues outlined in Section III.B.

1. Release

A number of states have at least partially restricted private operators' authority over release decisions.[209] Eleven states, for example, bar private operators from "[g]ranting, denying or revoking" inmates' good-time credits, thereby limiting contractors' opportunities to extend inmates' terms in order to maximize per diem revenues.[210] In addition, eleven states prohibit private contractors from calculating prisoners' release dates.[211] Virginia, for instance, prohibits private operators from "[d]eveloping and implementing procedures for calculating inmate release and parole eligibility dates."[212] Finally, nine states bar contractors from making furlough decisions.[213] As with the restrictions on other release-related powers, these furlough provisions prevent private operators from illegitimately holding on to prisoners for their own financial gain.

MISS. CODE ANN. § 47-5-1225; N.C. GEN. STAT. § 148-37; OHIO REV. CODE ANN. § 9.06; TENN. CODE ANN. § 41-24-110; TEX. GOVT. CODE ANN. § 495.004; VA. CODE ANN. § 53.1-265; W. VA. CODE § 25-5-14; WYO. STAT. § 7-22-112. Illinois has also passed a statute that avoids due process problems within private prisons——by banning private correctional facilities altogether. *See* ILL. REV. STAT. ch. 730, para. 140/2.

209 None of these states have attempted to fill the due process gaps in their privatization statutes through administrative regulations. In addition, a purely contractual approach to due process would be inadequate. *See supra* note 183.

210 *See* ARIZ. REV. STAT. ANN. § 1609.01; ARK. CODE ANN. § 12-50-108; COLO. REV. STAT. ANN. § 17-1-203; FLA. STAT. ANN. § 957.06; LA. REV. STAT. ANN. § 39:1800.5; MISS. CODE ANN. § 47-5-1225; OHIO REV. CODE ANN. § 9.06; TENN. CODE ANN. § 41-24-110; VA. CODE ANN. § 53.1-265; W. VA. CODE § 25-5-14; WYO. STAT. § 7-22-112.

211 *See* ARIZ. REV. STAT. ANN. § 1609.01; ARK. CODE ANN. § 12-50-108; FLA. STAT. ANN. § 957.06; LA. REV. STAT. ANN. § 39:1800.5; MISS. CODE ANN. § 47-5-1225; OHIO REV. CODE ANN. § 9.06; TENN. CODE ANN. § 41-24-110; TEX. GOV'T. CODE ANN. § 495.004; VA. CODE ANN. § 53.1-265; W. VA. CODE § 25-5-14; WYO. STAT. § 7-22-112.

212 VA. CODE ANN. § 53.1-265.

213 *See* ARK. CODE ANN. § 12-50-108; COLO. REV. STAT. ANN. § 17-1-203; FLA. STAT. ANN. § 957.06; LA. REV. STAT. ANN. § 39:1800.5; MISS. CODE ANN. § 47-5-1225; TENN. CODE ANN. § 41-24-110; VA. CODE ANN. § 53.1-265; W. VA. CODE § 25-5-14; WYO. STAT. § 7-22-112. Arkansas, for example, prohibits contractors from "[a]pproving inmates for furlough or work release." ARK. CODE ANN. § 12-50-108. Ohio also has a partial provision dealing with furlough. However, the Ohio privatization statute only restricts contractors' control over "work releases" and does not cover any other type of furlough. *See* OHIO REV. CODE ANN. § 9.06.

Notwithstanding these protections, however, only six states currently prohibit private contractors from making parole recommendations.[214] In Wyoming, for instance, prison contractors may not "[r]ecommend that the parole board either deny or grant parole, provided the contractor may submit written reports that have been prepared in the ordinary course of business unless otherwise requested by the parole board."[215] Similarly, in Florida private operators may not "[m]ake recommendations to the Parole Commission with respect to the denial or granting of parole, control release, conditional release, or conditional medical release. However, the contractor may submit written reports to the Parole Commission and must respond to a written request by the Parole Commission for information."[216]

As I argued in Section III.B.1., such statutes are necessary in order to ensure that inmates receive a fair hearing (in which private contractors and their financial biases play no authoritative role), while still giving disinterested parole boards access to critical information (such as disciplinary records).[217] In order for arrangements like those in Wyoming and Florida to strike the appropriate due process balance, however, contractors must not have indirect opportunities to prejudice parole board decisions through disciplinary rulemaking or adjudicative decisions. The constitutionality of parole provisions such as those in Wyoming and Florida thus still ultimately depends on the presence of additional limits on private operators' authority over inmate discipline (discussed in the following Subsection).[218]

Furthermore, it should be remembered that most states have enacted, at best, only partial release-related protections. Although six states have tried to safeguard their parole decisions, for example, nineteen states and the federal government have not.[219] Turn-

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214 *See* COLO. REV. STAT. ANN. § 17-1-203; FLA. STAT. ANN. § 957.06; MISS. CODE ANN. § 47-5-1225; OHIO REV. CODE ANN. § 9.06; W. VA. CODE § 25-5-14; WYO. STAT. § 7-22-112.

215 WYO. STAT. § 7-22-112.

216 FLA. STAT. § 957.06.

217 *See supra* notes 155-57 and accompanying text.

218 Mississippi and West Virginia's privatization statutes do not in fact mandate appropriate safeguards for discipline in private prisons, rendering their parole provisions inadequate. *Cf.* MISS. CODE ANN. § 47-5-1225; W. VA. CODE § 25-5-14; *see* also discussion *infra* Section IV.B.2. ("Discipline").

219 *See* 18 U.S.C.A. § 4013; ALASKA STAT. § 33.30.031; ARIZ. REV. STAT. ANN.

ing a blind eye to contractors' powerful financial incentives to maximize inmate populations, the vast majority of the nation's prison privatization statutes have ceded critical power over releases to unconstitutionally-biased private rulemakers and judges.

To put these states' policies in perspective, it may be helpful to consider again the courts' reactions to public officials with financial biases. Suppose, for a moment, that we could prove that the judge presiding over the Oklahoma City bombing trials would receive a million-dollar bonus if the defendants were convicted. Obviously, such an incentive would violate the defendants' due process rights to impartial adjudications; the Supreme Court has enshrined this basic norm against financial bias in cases such as *Tumey*.[220] Similarly, due process would not tolerate a system in which public officials received twenty-thousand dollar bonuses each time they denied an inmate's parole or reduced an inmate's good-time credits.[221] Today, however, most prison privatization statutes allow private contractors to make decisions that extend inmates' sentences, despite the fact that such contractors reap substantial financial rewards from such extensions.

2. Discipline

Most of the twenty-five states that authorize private prisons have made no significant effort to limit the private operators' disciplinary authority. Perhaps most surprisingly, only five privatizing states prohibit private contractors from unilaterally establishing

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§ 1609.01; ARK. CODE ANN. § 12-50-108. COLO. REV. STAT. ANN. § 17-1-203; 1995 GA. S.R. 457; KY. REV. STAT. ANN. §§ 197.500-197.900; LA. REV. STAT. ANN. § 39:1800.5; MONT. CODE ANN. § 53-30-106; NEV. REV. STAT. ANN. 209.141; N.H. REV. STAT. ANN. § 21-H:8; N.M. STAT. ANN. §§ 33-1-17, 33-3-1 to 33-3-19; N.C. GEN. STAT. § 148-37; OKLA. STAT. ANN. tit. 57, §§ 41 to 563.3; 1995 Ore. Laws 621 (LEXIS); 61 PA. CONS. STAT. ANN. §§ 390.306, 1081-1085; TEX. GOV'T. CODE ANN. § 495.004; UTAH CODE ANN § 64-13-26; VA. CODE ANN. § 53.1-265; W. VA. CODE § 25-5-14; see also the discussion of Hawaii, Idaho, Kansas, Minnesota, and Missouri's privatization efforts without express statutory authorization *supra* in notes 196-201 and accompanying text.

220 *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927); *see also supra* notes 69-74 and accompanying text (discussing *Tumey*). The judge in *Tumey* was the mayor of a city that would have directly benefited from any fines he imposed.

221 *Cf.* Wolff v. McDonnell, 418 U.S. 539, 558-565 (1974) (right to fair and impartial disciplinary hearings regarding good-time); Michael Guzzo, Note, *The Written Statement Requirement of Wolff v. McDonnell: An Argument For Factual Specificity*, 55 FORDHAM L. REV. 943, 950-57 (1987) (same); *see also supra* notes 122-128 and accompanying text (discussing *Wolff*).

their own disciplinary rules for inmates.[222] As one of these five states, Colorado for example forbids contractors from "[d]evelop[ing] or adopt[ing] disciplinary rules or penalties that differ from the disciplinary rules and penalties that apply to inmates housed in correctional facilities operated by the department of corrections."[223] Similarly, North Carolina requires that

> The rules regarding good time, and earned credits, discipline, classification, extension of the limits of confinement, transfers, housing arrangements, and eligibility for parole shall apply to inmates housed in private confinement facilities .... The operators of private confinement facilities may adopt any other rules as may be necessary for the operation of those facilities with the written approval of the Secretary of Corrections.[224]

As I argued above, such provisions serve due process by restricting private operators' power to determine the circumstances under which inmates can receive good-time credits, as well as other privileges related to their liberty interests. However, in most of the privatizing states and under the federal government, contractors' power in this regard is unconstrained.[225] Within this vast majority of private prison systems, the scope of inmates' privileges and punishments depends heavily on private operators' willingness to place inmates' rights (and public policy) above their own bottom lines.

Posing a similar problem, only seven states have enacted any restraints on private contractors' ability to make disciplinary judg-

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222 *See* COLO. REV. STAT. ANN. § 17-1-203; FLA. STAT. ANN. § 957.06; N.C. GEN. STAT. § 148-37; VA. CODE ANN. § 53.1-265; WYO. STAT. § 7-22-112.

223 COLO. REV. STAT. ANN. § 17-1-203

224 N.C. GEN. STAT. § 148-37. Of course, I am assuming that the courts will interpret North Carolina's statute as requiring that contractors must get written, pre-enforcement approval for each rule that they propose for inmates. If, however, this provision was construed to allow contractors to write whatever rules they wished after receiving a general written approval, then it would give contractors unconstitutional authority.

225 *See* 18 U.S.C.A. § 4013; ALASKA STAT. § 33.30.031; ARIZ. REV. STAT. ANN. § 1609.01; ARK. CODE ANN. § 12-50-108; 1995 CT. ALS 229 (LEXIS); 1995 GA. S.R. 457; KY. REV. STAT. ANN. §§ 197.500-197.900; LA. REV. STAT. ANN. § 39:1800.5; MISS. CODE ANN. §§ 47-4-1 to 47-4-5, 47-5-1203; MONT. CODE ANN. § 53-30-106; NEV. REV. STAT. ANN. 209.141; N.H. REV. STAT. ANN. § 21-H:8; N.M. STAT. ANN. §§ 33-1-17, 33-3-1 to 33-3-19; OHIO REV. CODE ANN. § 9.06; OKLA. STAT. ANN. tit. 57, §§ 41 to 563.3; 1995 Ore. Laws 621 (LEXIS); 61 PA. CONS. STAT. ANN. §§ 390.306, 1081-1085; TENN. CODE ANN. § 41-24-110; TEX. GOV'T CODE ANN. § 495.004; UTAH CODE ANN § 64-13-26; W. VA. CODE § 25-5-14; see also the discussion of Hawaii, Idaho, Kansas, Minnesota, and Missouri's privatization efforts without express statutory authorization *supra* in notes 196-201 and the accompanying text.

ments.[226] Four of these states simply ban private administrators from making disciplinary decisions;[227] Tennessee, for instance, forbids contractors from taking "any disciplinary actions."[228] Florida and Colorado, however, allow private administrators to take emergency disciplinary actions, subject to final review by public corrections officials.[229] Specifically, the Florida statute declares that contractors may not:

> Make a final determination on a disciplinary action that affects the liberty of an inmate. The contractor may remove the inmate from the general prison population during an emergency, before final resolution of a disciplinary hearing, or in response to an inmate's request for assigned housing in protective custody.[230]

Although Florida and Colorado's statutes give private contractors considerable emergency powers, they protect inmates' interest in release by ensuring that public officials make all final disciplinary determinations once a crisis has passed.[231] Since such final review by public officials prevents private contractors from assigning any penalties that might affect inmates' release or from restricting inmates' in-prison privileges for any significant time, the Florida and Colorado laws provide the plenary government control of inmate discipline necessary to satisfy due process.

Louisiana's statute, however, gives private contractors a much freer hand over inmate discipline. Louisiana's unique statute gives state judges, rather than corrections officials, sole authority to review private contractors' disciplinary decisions.[232] Specifically, the Louisiana statute provides that:

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226 *See* ARIZ. REV. STAT. ANN. § 1609.01; COLO. REV. STAT. ANN. § 17-1-203; FLA. STAT. ANN. § 957.06; LA. REV. STAT. ANN. § 15:1177; TENN. CODE ANN. § 41-24-110; VA. CODE ANN. § 53.1-265; WYO. STAT. § 7-22-112.

227 *See* ARIZ. REV. STAT. ANN. § 1609.01; FLA. STAT. ANN. § 957.06; TENN. CODE ANN. § 41-24-110; VA. CODE ANN. § 53.1-265.

228 TENN. CODE ANN. § 41-24-110.

229 *See* FLA. STAT. ANN. § 957.06; COLO. REV. STAT. ANN. § 17-1-203.

230 FLA. STAT. ANN. § 957.06.

231 *Cf.* Sandin v. Conner, __ U.S. __, 115 S. Ct. 2293, 2300 (1995). In fact, by ensuring that prisoners will have their records expunged of any unwarranted disciplinary actions or rulings by private contractors, the Florida and Virginia statutes meet the essential test of *Sandin v. Conner*, which found no due process violation where a prisoners' good-time record was cleared months after a public prison took unwarranted disciplinary action against him.

232 *See* LA. REV. STAT. ANN. § 15:1177.

> Any offender who is aggrieved by an adverse decision by the Department of Public Safety and Corrections or a contractor operating a private prison facility rendered pursuant to any administrative remedy procedures . . . may, within thirty days after receipt of the decisions, seek judicial review of the decision only in the Nineteenth Judicial District Court or, if the offender is in the physical custody of the sheriff, in the district court having jurisdiction in the parish in which the sheriff is located . . . .[233]

Unfortunately, Louisiana's statute does not give corrections officials the requisite de novo review authority, but instead forces inmates to take their appeals to state courts,[234] where they must overcome a more difficult standard of review.[235] Because this arrangement in effect gives contractors wide discretion over most disciplinary decisions, the Louisiana statute does not appear to satisfy due process.

3. Classification

Only seven states prohibit private contractors from "classify[ing] inmates . . . in less restrictive or more restrictive custody,"[236] leaving eighteen privatizing states and the federal government without adequate provisions concerning this issue.[237] Thus, most private contractors have significant opportunities to manipulate inmates' classifications, either to restrict the number of good-time credits that inmates may receive or to limit inmates' access to other privileges such as furlough.

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233 *Id.*

234 *See id.*

235 *See, e.g.*, Armistead v. Phelps, 365 So. 2d 468 (La. 1978) (holding that administrative judgments concerning prisoners should only be overturned if "arbitrary or capricious").

236 *See* ARIZ. REV. STAT. ANN. § 1609.01; FLA. STAT. ANN. § 957.06; MISS. CODE ANN. § 47-5-1225; OHIO REV. CODE ANN. § 9.06; TENN. CODE ANN. § 41-24-110; VA. CODE ANN. § 53.1-265; WYO. STAT. § 7-22-112.

237 *See* 18 U.S.C.A. § 4013; ALASKA STAT. § 33.30.031; ARK. CODE ANN. § 12-50-108; COLO. REV. STAT. ANN. § 17-1-203; 1995 CT. ALS 229 (LEXIS); 1995 GA. S.R. 457; KY REV. STAT. ANN. §§ 197.500-197.900; LA. REV. STAT. ANN. § 39:1800.5; MONT. CODE ANN. § 53-30-106; NEV. REV. STAT. ANN. 209.141; N.H. REV. STAT. ANN. § 21-H:8; N.M. STAT. ANN. §§ 33-1-17, 33-3-1 to 33-3-19; N.C. GEN. STAT. § 148-37; OKLA. STAT. ANN. tit. 57, §§ 41 to 563.3; 1995 Ore. Laws 621 (LEXIS); 61 PA. CONS. STAT. ANN. §§ 390.306, 1081-1085; TEX. GOV'T CODE ANN. § 495.004; UTAH CODE ANN § 64-13-26; W. VA. CODE § 25-5-14; see also the discussion of Hawaii, Idaho, Kansas, Minnesota, and Missouri's privatization efforts without express statutory authorization *supra* in notes 196-201 and the accompanying text.

Interestingly, Texas's novel statute bans private operators from placing inmates in less restrictive custody but does not address the possibility that private contractors might improperly move prisoners into more restrictive custody.[238] Specifically, the Texas statute declares that a contractor may not "classify an inmate or place an inmate in less restrictive custody than the custody ordered by the institutional division."[239] Of course, Texas's legislation makes political sense; Texas's statute prevents inmates from receiving greater privileges or furlough opportunities than their convictions should allow.[240] However, Texas's statute leaves substantial room for financially-interested contractors to manipulate the classification scheme to inmates' disadvantage (hardly a political liability); under Texas's law, private operators can increase the restrictiveness of inmates' classifications in order to limit their access to costly privileges or good-time credits, or perhaps to avoid their furlough.[241] The Texas statute thus highlights an unfortunate reality at the heart of most current prison privatization statutes: Faced with a "get-tough" public, politicians have powerful incentives to use privatization to expand prison space, but they have little to gain—and perhaps much to lose—from acting to protect inmates' due process rights.

4. Work

Eleven states bar private operators from deciding the type of work inmates may perform or from determining the credits that working inmates may receive.[242] West Virginia, for instance, prohibits contractors from "[a]pproving the type of work inmates may perform and the wages or good time, if any, which may be given to inmates engaged in such work."[243] As discussed in Section III.B.4., such restrictions are necessary to foreclose contractors from manipulating prisoners' ability to earn good-time release credits or other work-related privileges. Yet, out of the remaining fourteen

238 *See* TEX. GOV'T CODE ANN. § 495.004.
239 *Id.*
240 *See id.*
241 *See id.*
242 *See* ARIZ. REV. STAT. ANN. § 1609.01; ARK. CODE ANN. § 12-50-108; COLO. REV. STAT. ANN. § 17-1-203; FLA. STAT. ANN. § 957.06; LA. REV. STAT. ANN. § 39:1800.5; MISS. CODE ANN. § 47-5-1225; OHIO REV. CODE ANN. § 9.06; TENN. CODE ANN. § 41-24-110; VA. CODE ANN. § 53.1-265; W. VA. CODE § 25-5-14; WYO. STAT. § 7-22-112.
243 W. VA. CODE § 25-5-14.

states that have expressly authorized private prisons, only Texas has enacted a relevant provision regarding prison labor.[244] Texas prohibits private operators from approving work furloughs, but it places no limits on private contractors' power to decide the type of work inmates may perform or the compensation they may receive.[245] Once again, Texas has avoided the political risk that privately-confined inmates might receive unpopular privileges (such as furloughs) but has failed to protect inmates' due process right to unbiased good-time/release decisions.

C. *Assessments and Solutions*

In sum, the vast majority of the nation's prison privatization statutes do not sufficiently insulate inmates' liberties from contractors' financial biases. Of the twenty-five states that have expressly authorized private prisons, only two, Florida and Wyoming, have enacted statutes that adequately protect the integrity of private prisons' rulemaking and adjudicatory processes.[246] In stark contrast to most other privatizing governments, these two states have included in their privatization laws all of the protections concerning release, discipline, security classifications, and work assignments that are necessary to satisfy due process.[247]

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244 *See* TEX. GOV'T CODE ANN. § 495.004.

245 *See id.* The Texas statute declares that contractors may not "approve an inmate for work, medical, or temporary furlough or for preparole transfer." *Id.*

246 *See* FLA. STAT. ANN. § 957.06; WYO. STAT. § 7-22-112; *see also infra* note 247 (quoting Florida statute). Note that Illinois's private prison statute can also be seen as comprehensive, because it absolutely prohibits the operation of private correctional facilities within the state. *See* ILL. REV. STAT. ch. 730, para. 140/2 (quoted in pertinent part *supra* note 141).

247 *See* FLA. STAT. ANN. § 957.06; WYO. STAT. § 7-22-112. Specifically, Florida's privatization law states that:

> A contract . . . does not authorize, allow, or imply a delegation of authority to the contractor to:
> (1) Make a final determination on the custody classification of an inmate. The contractor may submit a recommendation for a custody change on an inmate; however, any recommendation made shall be in compliance with the department's classification system.
> . . . .
> (3) Develop or adopt disciplinary rules or penalties that differ from the disciplinary rules and penalties that apply to inmates housed in correctional facilities operated by the department [of corrections].
> (4) Make a final determination on a disciplinary action that affects the liberty of an inmate. The contractor may remove the inmate from the general prison population during an emergency, before final resolution of

Beyond Wyoming and Florida, unfortunately, the statutory picture is much less bright. Just one other state properly restricts private operators' influence over release-date calculations, furloughs, and parole decisions,[248] while only three adequately control contractors' adoption and application of disciplinary rules.[249] Similarly, only five states besides Florida and Wyoming ban private operators from changing inmates' security classifications,[250] while just nine prohibit contractors from deciding the type of work or work-credits that individual inmates may receive.[251] At the extreme, twelve states and the federal government have passed authorization statutes that place no meaningful limits whatsoever on private operators' powers in these contexts,[252] while at least five

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a disciplinary hearing, or in response to an inmate's request for assigned housing in protective custody.

(5) Make a decision that affects the sentence imposed upon or the time served by an inmate, including a decision to award, deny, or forfeit gain-time.

(6) Make recommendations to the Parole Commission with respect to the denial or granting of parole, control release, conditional release, or conditional medical release. However, the contractor may submit written reports to the Parole Commission and must respond to a written request by the Parole Commission for information.

(7) Develop or implement requirements that inmates engage in any type of work, except to the extent that those requirements are accepted by the commission.

(8) Determine inmate eligibility for any form of conditional, temporary, or permanent release from a correctional facility.

FLA. STAT. ANN. § 957.06. The Wyoming statute employs similar language. *See* WYO. STAT. § 7-22-112.

248 *See* COLO. REV. STAT. ANN. § 17-1-203. Mississippi and West Virginia do have provisions covering all three of these release issues. *See* MISS. CODE ANN. § 47-5-1225; W. VA. CODE § 25-5-14. However, their parole-related safeguards are incomplete, because they do not adequately control contractors' influence over inmate discipline. *See supra* note 218 and accompanying text (discussing these states' parole provisions); *cf. supra* Subsection IV.B.2. ("Discipline").

249 *See* COLO. REV. STAT. ANN. § 17-1-203; N.C. GEN. STAT. § 148-37; VA. CODE ANN. § 53.1-265.

250 *See* ARIZ. REV. STAT. ANN. § 1609.01; MISS. CODE ANN. § 47-5-1225; OHIO REV. CODE ANN. § 9.06; TENN. CODE ANN. § 41-24-110; VA. CODE ANN. § 53.1-265.

251 *See* ARIZ. REV. STAT. ANN. § 1609.01; ARK. CODE ANN. § 12-50-108; COLO. REV. STAT. ANN. § 17-1-203; LA. REV. STAT. ANN. § 39:1800.5; MISS. CODE ANN. § 47-5-1225; OHIO REV. CODE ANN. § 9.06; TENN. CODE ANN. § 41-24-110; VA. CODE ANN. § 53.1-265; W. VA. CODE § 25-5-14.

252 *See* 18 U.S.C.A. § 4013; ALASKA STAT. § 33.30.031; 1995 CT. ALS 229 (LEXIS); 1995 GA. S.R. 457; KY. REV. STAT. ANN. §§ 197.500-197.900; MONT. CODE ANN. § 53-30-106; NEV. REV. STAT. ANN. 209.141; N.H. REV. STAT. ANN. § 21-H:8; N.M. STAT. ANN. §§ 33-1-17, 33-3-1 to 33-3-19; OKLA. STAT. ANN. tit. 57, §§ 41 to 563.3; 1995 ORE. LAWS

states have placed inmates in private custody without any explicit statutory authorization.[253]

If the state and federal governments wished to take due process seriously, corrective action would not be difficult—at least not from a legal standpoint. Governments with the political will to protect their inmates' rights could simply copy the comprehensive statutes that Florida and Wyoming have already enacted.[254] As the continuing growth of private prisons in these model states attests, such reforms would not spell the end of prison privatization. Indeed, Florida is today a leader in the privatization of prisons and jails; Florida not only has the second highest number of private correctional facilities of any state, but is also home to two of the nation's largest private prison corporations.[255] At the same time, private prison contractors in Wyoming have found the state such an attractive location that they are building facilities not only to house Wyoming's prisoners but also to accommodate other states' inmates.[256]

Under the Florida and Wyoming statutory models, disinterested public officials would oversee all final rulemaking and adjudi-

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621 (LEXIS); 61 PA. CONS. STAT. ANN. §§ 390.306, 1081-1085; UTAH CODE ANN § 64-13-26.

253 *See* the discussion of Hawaii, Idaho, Kansas, Minnesota, and Missouri's privatization efforts without express statutory authorization *supra* in notes 196-201 and the accompanying text.

254 *See generally* FLA. STAT. ANN. § 957.06; WYO. STAT. § 7-22-112. Alternatively, the state and federal governments could enact judicially-enforceable administrative regulations mandating the procedural protections found in the model Florida and Wyoming statutes. Such regulations might serve as a practicable stop-gap measure until legislation could be passed. No state has, to date, attempted to fill due process gaps in its privatization statute through administrative regulations, although three states have adopted extensive regulations implementing the provisions of their privatization statutes. *See* FLA. ADMIN. CODE ANN. r. 33-22.001 to 33-32.012 (1996); TEX. ADMIN. CODE tit. 37, § 297.12 (1996); 6 VA. ADMIN. CODE r. 15-45-1710 to 15-45-1390 (1996). Note, however, that a merely contractual approach to the due process issues discussed in this Article would be inadequate. *See supra* note 183.

255 *See, e.g.*, Marc Lifsher, *supra* note 190, at A24. Florida's privatization efforts have been so effective that some California legislators have been citing Florida as a cost-saving model for their state to follow. *See id.* Buoyed by such success, a number of local Florida jurisdictions are looking to privatize their correctional facilities in the near future. *See, e.g., Private Jailers Save Bay Taxpayers, and Inmates Sleep on Satin, to Boot*, ORLANDO SENTINEL, July 15, 1996 (county negotiating for twenty-year contract extension); Kenneth Harris, *Polk Seeks Bids for Jail*, TAMPA TRIBUNE, Feb. 14, 1996.

256 *See* Matthew Daly, *$44 Million in New Spending Sought for Battle Against Crime*, HARTFORD COURANT, Feb. 16, 1996, at A19 (discussing proposal to send Connecticut prisoners to Wyoming private prisons).

cative decisions, but private corporations could still operate their own for-profit prisons.[257] Contractors could continue to provide administrative, nutritional, educational, security, recreational, vocational, and rehabilitative services to governments interested in prison privatization; private operators could manage every aspect of prison life except for adjudicative and rulemaking processes affecting individuals' liberties. With appropriate monitoring of quality standards in place,[258] correctional corporations would have ample opportunity to deliver on privatization's promise of cost-savings,[259] without corrupting private prisons' rules or distorting their administrative judgments.[260]

Of course, the passage of such reforms will depend on the

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257 In theory, another possible solution would be to end the per diem payment system, thereby eliminating contractors' incentives to maximize inmate populations. In practice, however, contractor payments will always have to be tied in some fashion to the size of private facilities' populations. Contractors' costs turn on the number of prisoners they house; it only makes sense for their incomes to vary with inmate populations as well. Neither profit-seeking corporations nor budget-conscious governments are likely to accept a system in which thousand-inmate and hundred-inmate facilities receive the same compensation. Moreover, both academic commentary and current practice support the conclusion that some form of per diem system is inevitable. First, while some commentators have suggested bonuses linked to recidivism and other factors, *see, e.g.*, Avio, *supra* note 119, at 35, no scholar has proposed a payment system divorced from per diem. Second, all of the jurisdictions that currently authorize private prisons compensate contractors on a per diem basis. *See id.* at 36; *see also supra* note 183 (arguing that private prisons' due process problems cannot be solved simply through contractual provisions).

258 *See, e.g.*, Gentry, *supra* note 41. Of course, governments would need to monitor carefully the quality of these services. Several commentators have suggested promising schemes for monitoring the day-to-day quality of private prison services (as opposed to the rulemaking and adjudicative decisions discussed in this Article). *See, e.g., id.* (proposing system of contract-based fines and bonuses tied to recidivism, inmate safety, health care quality, etc.); *see also* Ellen Simon, *Who's Minding the Rights of Inmates When Justices Goes to the Lowest Bidder*, 19 HUMAN RTS. 22 (1992). For a discussion of the basic policy problems associated with private prisons (i.e., cost-savings and quality-of-services issues), see *supra* notes 33-50 and the accompanying text.

259 In fact, governments that enacted Florida and Wyoming's procedural protections might actually save some money, because they would reduce contractors' opportunities to lengthen inmates' sentences (longer sentences costing governments more in per diem payments to private operators). However, states that followed the Florida and Wyoming models might also have to pay somewhat higher monitoring costs.

260 Again, I want to reiterate my support for prison privatization when, as in Florida and Wyoming, it comports with due process (and of course the other specific constitutional provisions protecting individual rights), because of privatization's potential to provide both cost-savings and improved quality-of-service. In the long run, in fact, the prison privatization movement would likely benefit from better protection of prisoners' due process rights, because such protections would reduce the risk of scandal-

political will of the state and federal governments to protect inmates' rights within private prisons. Given the "get-tough" political pressures that have driven the privatization movement to this point, however, it would seem unlikely that many governments will move to safeguard politically unpopular prisoners. If legislators and executive officials lack the will to ensure that prison privatization comports with due process, the state and federal courts should not hesitate to strike down improper private administrative regimes.[261] In the past, the courts have steadfastly rejected rulemaking and adjudicative systems that tempted decision-makers to subordinate individuals' liberties to their own financial interests. The courts should not now allow due process to wither in the context of prison privatization.

V. Conclusion

In order to satisfy due process, the state and federal governments cannot entrust their rulemaking and adjudicative powers to financially-interested parties. Nonetheless, the federal government and dozens of the states have given private jailers sweeping control over inmates' liberties. As a result, many of the 74,000 inmates in private custody find themselves "subject . . . to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against"[262] their individual rights.

Although prison privatization offers the appealing possibility of cost savings and quality improvements, the principle of financial disinterestedness entitles inmates to more than "efficient" government. Due process is not about average results, but rather requires fair decision-making procedures for individuals. The state and federal governments may contract with private corporations to implement correctional policies, but they must not grant financially-interested contractors discretionary rulemaking or adjudicative au-

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ous behavior by some contractors, which might undermine popular political support for prison privatization.

261 In addition to seeking injunctions to block unconstitutional private adjudications or rulemakings, prisoners might seek damages for violations of their due process rights under § 1983. *Cf.* 42 U.S.C. § 1983 (authorizing courts to award damages for violations of constitutional rights under color of state law). However, it would probably be quite difficult for plaintiffs to demonstrate the extent to which private contractors' financial biases had affected any particular decision.

262 Tumey v. Ohio, 273 U.S. 510, 523 (1927).

thority over inmates' liberties. Whether or not prison privatization is living up to its policy promises, this Article has shown that the vast majority of today's private prison statutes are unconstitutional.