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## Contracting for Performance: Restructuring the Private Prison Market

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CONTRACTING FOR PERFORMANCE: RESTRUCTURING  
THE PRIVATE PRISON MARKET

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## INTRODUCTION

Since the burgeoning of the private prison industry in the 1980s, the practice of contracting correctional services to private companies has received sharp criticism for incentivizing corporate advocacy of harsher crime policy and ensuring cost minimization at the expense of the prisoners' safety and capacity for rehabilitation. Many scholars have recoiled at the practice of privatizing the government's capacity to restrict the liberty of its citizens.<sup>1</sup> Yet in the literature's response to the wave of prison privatization that has characterized recent decades, these scholars have failed to offer substantive solutions beyond simply abolishing the practice. While discussing the premise of his recent book, *That Used to Be Us*,<sup>2</sup> Thomas Friedman observed that the incentives of contemporary politics are misaligned with the will of the people and eloquently captured the need for reform: "Move the cheese; move the mouse. Don't move the cheese; mouse doesn't move."<sup>3</sup> This blunt but sage observation reflects the economic axiom that "people respond to incentives"<sup>4</sup> that policy analysts and scholars of all hats too often overlook.<sup>5</sup> In the extensive literature on prison privatization, critics clearly recognize the perverse incentive structures the private prison industry creates but nevertheless fail to move the cheese,<sup>6</sup> instead proposing simply to kill the mouse.<sup>7</sup> This Note serves as an attempt to begin filling this gap in the literature by establishing a theoretical and practical

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1. See, e.g., Lucas Anderson, *Kicking the National Habit: The Legal and Policy Arguments for Abolishing Private Prison Contracts*, 39 PUB. CONT. L.J. 113 (2009).

2. THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, *THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK* (2011).

3. *Thomas Friedman on 'How America Fell Behind,'* NAT'L PUB. RADIO (Sept. 6, 2011, 4:43 PM), <http://www.npr.org/2011/09/06/140214150/thomas-friedman-on-how-america-fell-behind>.

4. STEVEN E. LANDSBURG, *ARMCHAIR ECONOMIST: ECONOMICS AND EVERYDAY LIFE* 3 (1995) ("Most of economics can be summarized in four words: 'People respond to incentives.' The rest is commentary.")

5. WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS*, at xi-xiii (2004) (relating the missteps of development economics to the failure to recognize the keystone economic truism that individuals respond to the incentives they face).

6. See *infra* Parts II, IV.

7. See Anderson, *supra* note 1.

framework for restructuring the private prison market and the incentives corrections companies face.

Proponents of the abolition of privatization,<sup>8</sup> in their haste to oppose the practice, ignore the reality that the private sector, when confronted with the right incentives in a properly conceived market, has the unique potential to improve the rehabilitative capacity of the corrections system. Currently, the language of prison contracts defines the service provided as the provision of prison beds.<sup>9</sup> The concomitant incentive structure created promotes a focus on cost minimization of this service and serves as the foundation of the seemingly unavoidable challenges posed by prison privatization. The private prison market and the service provided by prison companies, however, need not be structured in such narrow terms. In order to reformulate the market and in turn the incentives created, contracting agencies should use performance-based measurements—such as comparative recidivism and employment rates—that would begin to redefine the market as that for rehabilitated prisoners and reformulate the operational philosophy of prison corporations. Although the contours of this system would initially be difficult to define, the ultimate impact of incentivizing cost-efficient rehabilitation and capturing the innovative capacity of the free market to respond to the nation's prison crisis would prove invaluable.

Part I of this Note begins by providing context to the prison privatization debate. Parts II and III respectively continue by grouping the extensive criticism of prison privatization into two categorical deficiencies—the emphasis on cost minimization over quality improvements and the encroachment of the profit motive into sentencing policy and practice. Treating these topics in turn, this Note highlights the utility of reconceptualizing the private market as that for the rehabilitation of inmates rather than simply the provision of prison beds. In order to effect this paradigm shift, Part IV proposes the utilization of a graduated bonus system that evaluates recidivism and employment rates in order to incentivize innovative methods of preparing inmates to return to society.

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8. *See id.*

9. Although contracts often include an ancillary requirement of the provision of certain services, the underlying market is nevertheless for prison beds.

## I. PRIVATIZATION OF PRISONS IN THE UNITED STATES

*A. Getting Tough on Crime: Determinate Sentencing and the Prison Bubble*

Beginning most prominently with Richard Nixon in his 1968 presidential campaign, political candidates across the nation have used crime as a campaign platform, promising tougher measures for fighting crime.<sup>10</sup> The emergence of crime as a political tool accompanied a shift in the operational philosophy of corrections from rehabilitation to incapacitation.<sup>11</sup> This resulted in a wave of determinate sentencing legislation that mandated longer sentences for offenders.<sup>12</sup> The increase in sentence lengths in turn led to an increase in the prison population. By 1986, thirty-eight states were either full or above capacity, and seven states exceeded capacity by more than 50 percent.<sup>13</sup> Courts subsequently began ordering states to reduce overcrowding,<sup>14</sup> further augmenting the dramatic increase in demand for prison beds. In view of this sharp increase in demand, private firms with experience managing detainment facilities began

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10. Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 13-14 (1999).

11. See Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 12 (2003) ("The main justification for the recent 'three strikes' laws and other 'tough on crime' legislation is incapacitation. The theory of incapacitation relies on the assumption that if you take criminals off the street for a longer period of time, the crimes he or she would have committed in that time period will be prevented and the crime rate will drop.").

12. See *id.*

13. See Douglas C. McDonald & Carl W. Patten, *Growth and Development of the Private Prisons Industry*, in SCOTT D. CAMP & GERALD G. GAES, FED. BUREAU OF PRISONS OFFICE OF RESEARCH & EVALUATION, PRIVATE PRISONS IN THE UNITED STATES, app. at 93, 99 (2000).

14. See JOSEPH I. HALLINAN, GOING UP THE RIVER: TRAVELS IN A PRISON NATION 97 (2001) (describing how a court in Alabama ordered jails to provide inmates with a living space of no less than sixty feet); Christine Bowditch & Ronald S. Everett, *Private Prisons: Problems Within the Solution*, 4 JUST. Q. 441, 442 (1987) (stating that by 1985, correctional institutions in thirty-three states were under court order to reduce overcrowding); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 455-56 (2005) ("Eventually, the courts began issuing orders requiring government officials to relieve the overcrowding, and it became apparent that more prisons had to be built." (footnote omitted)). This problem, moreover, has not gone away. The Supreme Court recently upheld a district court order directing California to reduce its prison population to 137.5 percent of design capacity within two years. See *Brown v. Plata*, 131 U.S. 1910, 1943-47 (2011).

to perceive the potential profitability of providing prison services.<sup>15</sup> The Corrections Corporation of America, a Nashville-based firm, was the first to enter the market in 1985<sup>16</sup> and other companies soon followed.<sup>17</sup>

State governments found private prisons attractive primarily because of the reduced cost of operations, faster build times, and politically expedient financing.<sup>18</sup> Due to budget, capital, and labor constraints in the public sector, the private sector can build prisons faster and operate them at a lower cost than government prisons.<sup>19</sup> The Corrections Corporation of America, for example, can build a prison in nine months and have it operational within twelve, whereas a similar government facility would require a three-year window.<sup>20</sup> From a management perspective, private prisons boast the benefit of reduced costs, primarily derived from the use of non-union labor.<sup>21</sup> Because labor represents two-thirds of the operating cost of prisons, private prisons achieve significant savings by

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15. For the two largest private prison companies, the Corrections Corporation of America and Wackenhut, Inc., now the GEO Group, immigrant detainment served as a springboard to entry into the private prison market. See McDonald & Patten, *supra* note 13, at 95-96.

16. See *id.* at 96.

17. This was not the first time, however, that profit motive entered into the realm of corrections. After the Civil War, the enforcement of the black codes led to overcrowding and the private sector seized on a perceived opportunity for cheap labor. Adults and children were leased and subleased to coal mines, railroad companies, sawmills, and other businesses of the industrializing South. See SI KAHN & ELIZABETH MINNICH, *THE FOX IN THE HENHOUSE: HOW PRIVATIZATION THREATENS DEMOCRACY* 75-76 (2005); Dolovich, *supra* note 14, at 450-53. In addition, between 1850 and 1950, Michigan, California, Texas, Louisiana, and Oklahoma utilized private prisons to house state prisoners. See BYRON EUGENE PRICE, *MERCHANDIZING PRISONERS: WHO REALLY PAYS FOR PRISON PRIVATIZATION?* 5 (2006).

18. See Dolovich, *supra* note 14, at 457 (“The help offered took two forms. First, the private sector offered to assist states with the capital financing of prison construction .... Second, private firms offered to take over the day-to-day management of entire penal facilities, pledging to run the prisons at a lower cost than the state would otherwise pay.”).

19. See RICHARD A. MCGOWAN, *PRIVATIZE THIS?: ASSESSING THE OPPORTUNITIES AND COSTS OF PRIVATIZATION* 158 (2011).

20. John Howard, *Private Prison Company Finds Gold in California*, *CAPITOL WKLY.* (Jan. 28, 2010, 12:00 AM), <http://www.capitolweekly.net/article.php?xid=y182yoctf9d1au>.

21. Eric Schlosser, *The Prison-Industrial Complex*, *ATLANTIC MONTHLY*, Dec. 1998, at 15, available at <http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/4669z/>.

avoiding the wage premium imposed by prison guard unions on public prisons.<sup>22</sup>

In addition to the speed and reduced cost of private prison operations, many governments facing debt restrictions were attracted to the lease-payment bond mode of financing, which allowed legislators to circumvent public scrutiny and disapproval of increased expenditure on prisons by incorporating the financing of new prisons into the operating budget rather than the capital improvements budget.<sup>23</sup> Private companies would issue bonds to fund the construction of new prisons and then lease the bonds to the state, which in turn paid for the bonds through its operating budget.<sup>24</sup> Although the taxpayer remains liable for the cost in this scenario, policymakers evade the political fallout of raising taxes for the express purpose of funding prison construction.

### *B. Market Concentration*

As a result of the confluence of interests supporting prison privatization, the private prison industry grew swiftly from its infancy in the 1990s. In 1990, there were 44 private prisons in the United States housing approximately 15,000 inmates.<sup>25</sup> By 2000, there were 264 private prisons, representing 16 percent of all prison facilities,<sup>26</sup> and, by 2005, the number of private facilities increased to 415, or 23 percent of all penal institutions.<sup>27</sup> Of these facilities, approximately two-thirds were under contract with state governments and one-third were under contract with the Federal Bureau

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22. Oliver Hart, Andrei Shleifer & Robert W. Vishny, *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1147 (1997) ("Private prisons are perhaps 10 percent cheaper, per prisoner, than public prisons. The major reason for the lower costs appears to be the roughly 15 percent wage premium for public guards over private guards." (footnote omitted)).

23. See MICHAEL A. HALLET, PRIVATE PRISONS IN AMERICA 67 (2006); Anderson, *supra* note 1, at 115 ("Private prison contracts are intended to alleviate prison overcrowding and reduce corrections expenditures while bypassing the need for bonds, increased taxes, or funding referenda.").

24. McDonald & Patten, *supra* note 13, at 110.

25. *Id.* at 96.

26. JAMES J. STEPHAN, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES 1 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/csf05.pdf>.

27. *Id.*

of Prisons.<sup>28</sup> In 2009, nearly half of all new inmates were sent to private prisons, and private prison beds constituted almost 9 percent of the market.<sup>29</sup> The market is even further concentrated in particular states, as the proportion of prisoners held in private facilities varies widely from state to state. In 2006, nine states held 20 percent or more of their prisoners in private prisons.<sup>30</sup> Conversely, nineteen states did not utilize private prison facilities at all.<sup>31</sup>

### *C. Looking Forward in the Industry*

Although the private prison industry experienced steady growth into the twenty-first century, many states and policymakers facing increasingly severe budget constraints are beginning to look for ways to minimize the costs of incarceration in the wake of the recent economic downturn.<sup>32</sup> Some states are once again starting to recognize the cost-savings potential of rehabilitative corrections and indeterminate sentencing.<sup>33</sup> Along with and in part because of this trend, the state prison population declined in 2009 for the first time in over a decade.<sup>34</sup> Yet as the Corrections Corporation of America and the GEO Group both acknowledge, and as independent market analysis suggests, the decline of determinate sentencing measures and the concomitant shrinking of the prison population represent

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28. *Id.*

29. Kopin Tan, *Private Prison Companies Have a Lock on the Business*, WALL ST. J. (Oct. 25, 2009), <http://online.wsj.com/article/SB125641692049506073.html>.

30. These nine states were, in descending order of percentage, New Mexico (43 percent), Wyoming (38 percent), Hawaii (30 percent), Montana (27 percent), Alaska (26 percent), Idaho (25 percent), Oklahoma (25 percent), Mississippi (23 percent), and Vermont (22 percent). See WILLIAM J. SABOL, TODD D. MINTON & PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2006, at 4, 16 (2008), available at <http://www.bjs.gov/content/pub/pdf/pjim06.pdf>.

31. See *id.* at 16.

32. See BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 238 (2011) (“The Great Recession of 2008 has put severe pressure on the ‘prison bubble’—if that is a fair term—as many states find themselves challenged to service the debt associated with prison building or carry the expenses associated with massive prison populations.”).

33. See Editorial, *Prisons and Budgets*, N.Y. TIMES, Jan. 4, 2010, at A20.

34. See PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR FIRST TIME IN 38 YEARS 1 (2010), available at [http://www.pewtrusts.org/uploadedfiles/wwwpewtrustsorg/Reports/sentencing\\_and\\_corrections/prison\\_count\\_2010.pdf](http://www.pewtrusts.org/uploadedfiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/prison_count_2010.pdf).

the greatest threat to the viability of the private prison industry.<sup>35</sup> Therefore, as the pendulum swings back to a more cost-effective use of indeterminate sentencing and focus on rehabilitation, private prison companies will have to adapt to changing market conditions. The private sector, however, has the unique capacity not only to adapt to the changing market but also to thrive by facilitating the effective and innovative implementation of a rehabilitative corrections framework.<sup>36</sup> In harnessing this capacity through the contractual mechanism outlined below, contracting agencies can address the fundamental deficiencies that have raised grave concerns about the desirability of contracting for prison services. With these concerns assuaged, private prison companies will face less opposition to their services, breathing life into their potential role in the changing marketplace.

## II. REBALANCING COST SAVINGS AND QUALITY IMPROVEMENTS

Accompanying the prison privatization movement has been a consistent stream of opposition to privatizing the fundamental government function of punishing criminals. As testament to the controversial nature of prison privatization, Illinois and New York went so far as to ban the practice entirely,<sup>37</sup> and many states that allow privatization place stringent restrictions on the practice.<sup>38</sup> The most resounding critiques of prison privatization invariably relate either to the positivist concern about the increased weight placed on cost effectiveness over quality improvements<sup>39</sup> or to the normatively problematic encroachment of the profit motive into the public domain of corrections policy.<sup>40</sup> Beginning with the cost-minimization dilemma, this Note responds to each of these criticisms in turn by

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35. Tan, *supra* note 29 (“Any reform that shortens sentences will hurt private prisons.”).

36. *See infra* Part IV.

37. Illinois Private Correctional Facility Moratorium Act, 730 ILL. COMP. STAT. ANN. 140/3 (West 2012); N.Y. CORRECT. LAW § 121 (McKinney 2012).

38. Pam Belluck, *As More Prisons Go Private, States Seek Tougher Controls*, N.Y. TIMES (Apr. 15, 1999), <http://www.nytimes.com/1999/04/15/us/as-more-prisons-go-private-states-seek-tighter-controls.html?pagewanted=all&src=pm>.

39. *See infra* notes 52-54 and accompanying text.

40. *See infra* notes 112-17 and accompanying text.

suggesting the need to reformulate the performance incentives created by the contracting process.

*A. Cost Minimization and the Current Incentive Structure*

In evaluating the impact of privatizing a particular government service, one must consider the disparate incentives facing private and public providers. Advocates of privatization invariably point to the relative incapacity of public providers to innovate. Public employees simply do not have the incentive to improve their service provision because they see only a fraction of the return on their cost reductions or quality improvements.<sup>41</sup> Private contractors, conversely, have the capacity to capitalize on these improvements and therefore serve as desirable agents of innovation for contracting agencies. With respect to cost savings, the ability of a contractor to profit from improved practices is relatively clear—the contract is awarded, and any savings below the contract price represent profit.<sup>42</sup> With quality improvements, however, the connection to profit becomes far more tenuous. In theory, “[b]ecause private prison companies can suggest such innovations to the government and renegotiate their contracts ... they *can* capture some of the gains from quality innovation.”<sup>43</sup> Though this quality improvement capacity appears sound in theory, the practical tension between cost reductions and quality improvements diminishes the potential benefits of investing in quality improvements.<sup>44</sup> The private prison industry illustrates this tension well.

As many have observed, private ownership leads to an increased emphasis on cost savings over quality improvements when providing prison services.<sup>45</sup> This outcome seems relatively intuitive when

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41. See Hart et al., *supra* note 22, at 1129.

42. See *id.*

43. See *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868, 1878 (2002) [hereinafter *A Tale of Two Systems*].

44. See Hart et al., *supra* note 22, at 1129, 1139, 1141.

45. See, e.g., *id.* at 1141 (“Private ownership leads to an excessively strong incentive to engage in cost reduction ... and to moderate—although still too weak—incentives to engage in quality improvement.”); see also Patrick Bayer & David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 554 (2005) (“A for-profit prison operator ... has almost no contractual incentive to provide rehabilitation opportunities or educational or vocational training that might benefit inmates

one considers that the contractor must, *ex ante*, negotiate for a higher price if he endeavors to improve quality.<sup>46</sup> Under the currently predominant method of contracting, the state pays private prison companies a per diem rate for each prisoner and the contractor assumes the costs of maintaining the prison.<sup>47</sup> Any potential profits are thus made by performing the contracted function at a lower cost than the contract price. As a result, private prisons are incentivized to reduce costs by spending less on inmate services or cutting the cost of labor.<sup>48</sup> In practice, private prisons have earned their slim profit margins<sup>49</sup> predominantly by spending less on prison labor.<sup>50</sup> Unfortunately, these cost reductions are not independent of the potential for quality improvements but rather represent competing considerations.<sup>51</sup>

### *B. Criticism*

The private sector's shift of the balance away from quality improvements and toward cost reductions has formed the foundation of much of the criticism directed at the private prison industry.<sup>52</sup> As one commentator bluntly states, "[T]he drive toward

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after release, except insofar as these services act to decrease the current cost of confinement.").

46. See Hart et al., *supra* note 22, at 1129. Certainly, when considering the choice between potential profits from quality innovation and guaranteed profits from cost reduction, one can readily understand why firms choose the latter.

47. Dolovich, *supra* note 14, at 474.

48. *Id.* at 474-76.

49. See HALLINAN, *supra* note 14, at 177-78; Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1218 (2008) ("[T]he prison industry is oligopolistic, not perfectly competitive, so prison firms do make some profit. But their profits are not high: 10% would be a generous estimate of prison firms' profitability.").

50. See Douglas W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1498 n.158 (1986); see also *supra* notes 21-22 and accompanying text.

51. See Hart et al., *supra* note 22, at 1152 ("There are significant opportunities for cost reduction that do not violate the contracts, but that, at least in principle, can substantially reduce quality.").

52. See Anderson, *supra* note 1, at 116 ("[P]rivate prison companies are primarily profit-seeking entities, working to reduce costs wherever possible. Cost-cutting measures promote inferior contract performance, undue safety risks, and poor delivery of inmate services. The profit motive also encourages private prison companies to disregard the principles of inmate rehabilitation and criminal deterrence; if advanced, these principles would undermine profits and reduce the demand for these companies' services." (footnotes omitted)); Dolovich, *supra* note 14, at 460-61 ("In practice, private prison providers have seemed little concerned with

lowering costs ... engenders various other problems.... [P]rivate prisons make money by cutting corners, which means skimping on food, staffing, medicine, education, and other services for convicts. It also means fielding poorly trained, ill-equipped, non-unionized and often brutal guards.”<sup>53</sup> Indeed, the cost-minimizing efforts have led to more than just reductions in prisoner comfort. The emphasis on cutting expenses has resulted in decreased levels of security and a number of high-profile incidents of understaffing and abuse.<sup>54</sup>

### *C. Insufficiency of Increased Input Measures*

One response to many of the concerns outlined above has been advocacy of increased specification of inputs.<sup>55</sup> For example, some contracting agencies have required American Correctional Association Accreditation,<sup>56</sup> while others have independently required the prison

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meeting this challenge. Instead, the anecdotal evidence suggests that contractors have prioritized economy above all else, with disturbing results for the inmates themselves.”); see also Low, *supra* note 11, at 7 (“For-profit organizations have a fiduciary duty to shareholders to maximize profits, so they cannot spend money on improving prison conditions or improving rehabilitation programs unless it will increase their profits. Government contracts provide the almost exclusive source of revenue for private prisons, so these prisons are likely to provide only the minimum contractual requirements, or perhaps slightly less than required depending on the level of oversight and the impact on future bids.”(footnotes omitted)).

53. See Christian Parenti, *Privatized Problems: For-Profit Incarceration in Trouble*, in CAPITALIST PUNISHMENT: PRISON PRIVATIZATION & HUMAN RIGHTS 30, 36 (Andrew Coyle et al. eds., 2003).

54. See Dolovich, *supra* note 14, at 461-62 (detailing the events at the Youngstown, Ohio facility). Esmor is another prominent example. See *id.* at 498; see also John Sullivan & Matthew Purdy, *Parlaying the Detentions Business into Profit: A Prison Empire: How It Grew*, N.Y. TIMES, July 23, 1995, at A1.

55. For a discussion of output and input measurement, see RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 67 (1997) (“‘Output’ emphasizes ends, the means being flexible. ‘Input’ emphasizes means, the ends being by-products which are not exactly unplanned but are certainly subject to redefinition and retrospective rationalization.”). For example, a contract specifying outputs for a remedial literacy class for prisoners might require that participants’ reading skills reach a certain level. By contrast, a contract specifying input measures would describe the extent of services required, such as the minimum hours a teacher must work. See *id.* at 68. Harding notes, “[h]owever, there is a point, relevant to current contractual practices, where these two concepts meet and merge. This middle ground could perhaps be characterized as a category of ‘output-driven inputs.’” *Id.* at 67.

56. See Hart et al., *supra* note 22, at 1149-51 (discussing the accreditation process and the small percentage of accredited prisons).

to offer vocational training or educational programs.<sup>57</sup> These efforts, however, address only the symptoms of the problem rather than its root. Even when prison companies are required to maintain rehabilitation programs, they still have a financial interest in ensuring that the programs are operated at minimal cost and, more importantly, they have no stake in the success or failure of such programs.<sup>58</sup> Ultimately, no level of monitoring or contract specificity can entirely eliminate the cost-minimizing incentives grounded in the practice of contracting for prison beds.<sup>59</sup> Although administrative law requires increased contractual specificity in order to ensure greater accountability,<sup>60</sup> no contract can articulate every detail of the contractor's performance.<sup>61</sup> This phenomenon—deemed an “inevitable incompleteness”<sup>62</sup>—obfuscates the intended purpose of attempts to control private prison inputs, including output-driven inputs,<sup>63</sup> because the incentive for prison companies to minimize costs remains.

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57. See, e.g., FLA. OFFICE OF PROGRAM POLICY ANALYSIS & GOV'T ACCOUNTABILITY, WHILE DMS HAS IMPROVED MONITORING, IT NEEDS TO STRENGTHEN PRIVATE PRISON OVERSIGHT AND CONTRACTS 6 (2008), available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0871rpt.pdf> (“Private prison vendors are required to provide academic [and] vocational ... inmate programs, while also ensuring that between 10% and 30% of inmates enroll in these programs.”).

58. See Ira P. Robbins, *Privatization of Corrections: A Violation of U.S. Domestic Law, International Human Rights, and Good Sense*, HUM. RTS. BRIEF, Spring 2006, at 12, 14-15.

59. See Anderson, *supra* note 1, at 133 (“Increased costs aside, contractual noncompliance cannot be completely remedied by aggressive governmental monitoring and oversight. Private prison companies have an incentive and an ability to conceal information that reflects poorly on their contract performance.”); Dolovich, *supra* note 14, at 478 (“Where the standard of service to be provided can be specified in detail in advance, careful drafting can provide some protection from abuses. But with respect to many key features of prison life that are crucial from the humanity perspective—the use of force, health care provision, inmate classification, discipline, and inmate safety, among others—it can be difficult to specify in advance precisely how they are to be provided.”).

60. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 668 (2000).

61. See *id.*; Hart et al., *supra* note 22, at 1150 (“Although contracts can address some quality issues, in several important areas incompleteness is evident, and could in principle compromise the quality of service delivered by a private contractor. The two crucial areas we consider are use of force and quality of personnel. These areas have been the focus of much of the criticisms of private prisons.”).

62. Dolovich, *supra* note 14, at 478.

63. See *infra* notes 126-29 and accompanying text.

*D. Normative Concerns*

Although the increased weight placed on cost minimization clearly presents economic efficiency concerns, many critics have looked beyond this efficiency analysis to the normative concerns implicated by the privatization of corrections. In her prominent scholarship on private prisons, Professor Sharon Dolovich rejects altogether what she describes as the “comparative efficiency” framework for evaluating prisons.<sup>64</sup> Dolovich argues that focusing on the relative efficiency of private prisons as compared to public prisons obscures the reality that society is failing to meet its normative obligations to those it incarcerates.<sup>65</sup> The shift toward prison privatization, Dolovich posits, importantly reflects “a larger trend toward viewing incarceration in economic terms and regarding prison inmates as the economic units of a financial plan.”<sup>66</sup> By commodifying those it incarcerates, “society becomes less likely to see those it punishes as human beings and more likely to lose a sense of the severity of the burdens punishment imposes.”<sup>67</sup> Given the severe encroachment of state power on the liberty of individuals that characterizes incarceration, Dolovich maintains that the focus on comparative efficiency becomes wholly misguided.<sup>68</sup> After discarding the comparative efficiency analysis of private prisons, Dolovich calls for a shift in focus to the fundamental normative concerns posed by the private provision of prison services.<sup>69</sup>

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64. See Dolovich, *supra* note 14, at 441 (“For the most part, debate on this issue has focused on the relative efficiency of private prisons as compared to their publicly run counterparts and has assumed that, if private contractors can run the prisons for less money than the state without a drop in quality, then states should be willing to privatize.”); see also *id.* at 444-45 (suggesting an alternative framework).

65. *Id.* at 442 (“The conversation as defined by comparative efficiency is thus framed to sidestep, rather than directly engage, the fact that conditions in many prisons—public and private alike—fall far short of satisfying society’s obligations to those it incarcerates.”).

66. *Id.* at 544.

67. *Id.*

68. See *id.* at 441.

69. Sharon Dolovich, *How Privatization Thinks: The Case of Prisons*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 128, 138 (Jody Freeman & Martha Minow eds., 2009) (“[I]f policy deliberation is to take account of the full range of moral issues incarceration raises, we need a genuine commitment to supplementing the language of efficiency with the language of moral obligation.”).

The alternative framework Dolovich proposes is referred to as “liberal legitimacy.”<sup>70</sup> Liberal legitimacy requires that our penal policies and practices be consistent with two basic principles—the humanity principle and the parsimony principle.<sup>71</sup> The parsimony principle instructs that the length of time served fit the crime committed and proscribes excessive sentence lengths. The parsimony principle directly relates to the discussion of the capacity of the prison industry to influence sentencing policy.<sup>72</sup> The humanity principle, on the other hand, proscribes “gratuitously inhumane” punishments and directly relates to the cost-efficiency focus of private prisons just described.<sup>73</sup> Dolovich argues that prisons should be evaluated not based on their ability to minimize costs—as this invariably encourages inhumane punishment—but rather by their adherence to the humanity principle.<sup>74</sup>

Through this proposed alternative analytical framework, Dolovich raises undeniably important concerns that inform the discussion of prison privatization. The pragmatism of her argument, however, seems weaker than its theoretical foundation, as it does not include a politically viable plan for putting her framework into practice. Faced with constrained budgets, legislators will inexorably reject, either tacitly or explicitly, a proposed strategy that does not outline cost-savings potential.<sup>75</sup> Indeed, in the absence of a strong constituency supporting increased expenditure on prison services, the lack

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70. Dolovich, *supra* note 14, at 444-45.

71. *Id.* at 445.

72. *See infra* Part III.B.

73. Dolovich, *supra* note 14, at 445.

74. *See id.* at 514 (“[T]here is a great benefit in shifting the focus of the private prison debate from efficiency to the humanity of conditions of confinement. Doing so allows us to transcend the inadequate baseline of current prison conditions and to consider how the system as a whole, public prisons as well as private, might better measure up against society’s obligations to those it incarcerates.”).

75. Dolovich seems to accept this reality but does not present a mechanism for directly confronting it. *See* Dolovich, *supra* note 69, at 139 (“Whether or not a cost-benefit approach could adequately consider the full set of normative issues incarceration implicates, the fact is that policymakers contemplating the use of private prisons are little concerned with addressing this set of issues, whether through cost-benefit analysis or otherwise. Instead, the efficiency standard actually driving the debate is what can be thought of as cost *minimization*—that is, how to run the prisons at the lowest possible price.... [E]ven if theoretically an efficiency analysis could take adequate account of broader normative concerns, in the case of private prisons there is no meaningful effort on the part of policymakers to do so.”).

of a cost-savings argument will inexorably present an insurmountable barrier.<sup>76</sup> By discussing reforms to the prison privatization scheme in terms of what policymakers are morally obligated to do instead of engaging policymakers in their own arena of economic analysis, Dolovich implicitly concedes that the policies she advocates are not themselves cost effective. In other words, by rejecting an economic analysis of prison utility, Dolovich obscures the possibility that cost-benefit analysis can and indeed should lead to a system that ultimately embraces the humanity principle, without relying exclusively on a normative justification. Accordingly, the liberal legitimacy framework—as with many normative arguments in the prison literature—ultimately falls flat due to its inability to achieve broader reform. Therefore, pragmatic considerations demand an alternative approach to addressing the concerns raised by an adherence to the humanity principle.

### *E. Restructuring the Market*

Past blunders of the corrections system have made it abundantly clear that the baseline standard of evaluation, cost effectiveness of prison bed provision, has proven woefully inadequate.<sup>77</sup> This inadequacy, however, should not tarnish the perceived utility of economic analysis but rather serve as an impetus for restructuring the precise mode of economic analysis. The current framework suffers from an overly narrow consideration of the service provided in the market. The provision of a bed is the most tangible good provided but certainly not the most significant.<sup>78</sup> For better or worse, private prison corporations do not merely act as providers of beds but rather serve as government agents functioning within the broader

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76. See David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1453 (2010) (“Prisoners are the ultimate ‘discrete and insular minorit[y]’; no other group in American society is so completely disabled from defending its rights and interests.”).

77. Dolovich, *supra* note 14, at 442 (“[I]n its drive to assess the relative performance of private prisons, comparative efficiency accepts the current state of public prison conditions as an unproblematic baseline.”).

78. See FED. BUREAU OF PRISONS, INMATE INFORMATION HANDBOOK 44 (2012), available at [http://www.bop.gov/locations/institutions/spg/SPG\\_aohandbook.pdf](http://www.bop.gov/locations/institutions/spg/SPG_aohandbook.pdf) (listing inmates’ rights, including but not limited to, proper bedding and nutritious meals).

framework of the justice system and structuring inmates' behavior until they reenter society.

By conceptualizing the market as that for prison beds, policymakers mischaracterize the prisoner as a static entity, and thereby overlook the broader impact the prison has on the inmate's preparedness to reenter society.<sup>79</sup> In order to properly consider the complexity of the private prison's service either through a cost-benefit or cost-effectiveness analysis, policymakers and contracting agencies must incorporate the cost of recidivism and expand the time frame of their analysis. When one considers the cost of crime<sup>80</sup> and the capacity of prisons to shape inmates' likelihood of recidivating<sup>81</sup> through an expanded longitudinal cost-benefit analysis, the long-term benefit of investing in rehabilitative corrections becomes clear. Likewise, the long-term cost of failing to do so dramatically alters the conceptions of how best to achieve efficiency and makes apparent the dangers of a myopic focus on cutting the immediate costs of corrections.<sup>82</sup>

Although some might conclude that this analysis obviates the need for private prisons because the contractors' short-term cost-cutting function proves unsustainable, this need not be the case.<sup>83</sup> The unique capacity of the private sector to innovate still proves useful, but only after restructuring prison contracts and thereby redefining the market.<sup>84</sup> Currently, quality improvements are ne-

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79. Indeed, the future costs imposed by recidivating inmates—both in the form of the cost of crime and the cost of reincarceration—will ultimately outweigh the present costs of incarceration and therefore merit proportionate consideration.

80. See David A. Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AM. L. & ECON. REV. 295, 296 (2002) ("Life in a crime-laden society is restricted and costly. Considering all facets of the crime burden, including victim expenses, deterrence and health losses, the cost of crime exceeds \$1.7 trillion annually in the United States." (citing David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611 (1999))).

81. See generally Thomas Orsagh & Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. QUANTITATIVE CRIMINOLOGY 155, 157 (1988).

82. Some might argue that this is simply a reformulated argument for a return to a focus on rehabilitation. Indeed, the need to refocus the penal system's efforts on rehabilitation in lieu of incapacitation is one likely takeaway of an adequate cost-benefit analysis.

83. See Anderson, *supra* note 1, at 133 ("Thus, given the overarching financial motivations that impel the actions of private prison companies, the only way to avoid the problems associated with corrections privatization is to prohibit prison administration contracts absolutely.").

84. See discussion of framework *infra* Part IV.

glected by private prison companies faced with an absence of financial incentives. As this Note addresses at greater length in Part IV, states should turn to performance-based contracts that incentivize quality improvements by rewarding positive output. Such a shift will not only rebalance cost minimization and quality improvements in private prisons but will also respond pragmatically to critics' concerns relating to the treatment of prisoners. Moreover, this shift will also prove desirable for the private sector as it faces the need to adapt to changing market conditions that threaten the viability of the private prison market.<sup>85</sup>

### III. DEMYSTIFYING THE PRIVATE SECTOR'S INFLUENCE ON SENTENCING

The second fundamental concern raised by the privatization of corrections is the prison industry's capacity to influence sentencing through lobbying and, more perversely, by actively facilitating prolonged sentences. This Part first considers the demonstrable impact of the prison industry on sentence lengths and then argues that the mere potential for such an influence is acutely problematic.

#### A. *The Impact of Proincarceration Lobbying*

Private prisons operate in a market fueled by the use of incarceration as punishment. In order to retain their small profit margins,<sup>86</sup> prison companies must operate at full capacity.<sup>87</sup> As a result, private prison companies face an incentive structure that encourages efforts to maintain demand. As Professor David Anderson explains, "[T]o expand their markets, private prison operators are exhorted to advance harsh criminal sentencing policies and to dilute early-release."<sup>88</sup> This need to sustain demand, moreover, is not placed in impotent hands.<sup>89</sup>

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85. See *supra* Part I.C.

86. See HALLINAN, *supra* note 14, at 177-78; Volokh, *supra* note 49, at 1218.

87. See *supra* note 47 and accompanying text.

88. See Anderson, *supra* note 1, at 116.

89. For examples of lobbying efforts, see *id.* at 127-29.

The Corrections Corporation of America, for example, draws its management team from the public sector and has brought former state prison wardens, superintendents, corrections commissioners, and one former head of the Federal Bureau of Prisons into the fold.<sup>90</sup> This revolving door phenomenon exists in a number of industries but has the potential to become particularly insidious in the delicate arena of corrections and sentencing in which individual liberty is at stake. Although the connection of prison industry stakeholders to policymakers with a capacity to influence the market does not equate to the presence of inappropriate conduct, the appearance of impropriety and the capacity for such influence nevertheless remains. While it appears clear that strong incentives to affect sentencing policy could prove severely troublesome, the strength of this incentive structure has served as a point of contention in the private prison literature.<sup>91</sup> Notably, scholars have challenged the influence of the private prison industry on sentencing policy from both economic and historical perspectives, each of which will be treated in turn.

In his article on the private prison system, Professor Alexander Volokh argues there is “virtually no evidence” of proincarceration advocacy supported by the private sector.<sup>92</sup> Volokh points out that long before prison privatization took off, actors in the public sector, such as prison guard unions, actively advocated proincarceration policies.<sup>93</sup> Indeed, prison guard unions, which also benefit from increases in incarceration, contribute vastly more money to political campaigns and other lobbying efforts than private prison companies.<sup>94</sup>

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90. Dolovich, *supra* note 14, at 459. As another illustration of the potential for improper influence, the wife of Tennessee governor Lamar Alexander invested heavily in Corrections Corporation of America’s stock before it became involved in the privatization of Tennessee’s prisons with the support of the governor. See Hart et al., *supra* note 22, at 1153.

91. See, e.g., Hart et al., *supra* note 22; Volokh, *supra* note 49.

92. Volokh, *supra* note 49, at 1221 (emphasis omitted).

93. See *id.* at 1197 (“Even without privatization, actors in the *public* sector already lobby for changes in substantive law—in the prison context, for example, public corrections officer unions are active advocates of pro-incarceration policy.”).

94. See *A Tale of Two Systems*, *supra* note 43, at 1872-73. Perhaps the most notable example of such advocacy is the California Correctional Peace Officers Association, which has contributed money directly to support “three strikes” laws and other stiff sentencing measures but has often done so under the guise of supporting victims’ rights. See Laura Sullivan, *Folsom Embodies California’s Prison Blues*, NAT’L PUB. RADIO (Aug. 13, 2009), <http://www.>

Volokh argues that political advocacy is much more likely to be present in the public sector, given the public sector's larger share of the prison market and the alignment of the prison market with the characteristics of a public good.<sup>95</sup> Using the economic theory of public goods and collective action to explain the prison market, Volokh ultimately concludes that the entrance of the private sector into the market may actually have reduced the industry's advocacy of incarceration by creating a collective action problem.<sup>96</sup> As Volokh explains, the key characteristic of his economic model is the conceptualization of industry-increasing advocacy as a public good.<sup>97</sup> Accordingly, privatizing a segment of the industry "introduces a collective action problem: unless everyone in the industry cooperates with each other, they will in aggregate spend less on industry-increasing advocacy than a single firm would if it covered the whole industry, because a portion of their expenditures will benefit their competitors."<sup>98</sup> Volokh's model concludes that the private sector, given its small percentage of the market,<sup>99</sup> will not advocate at all for proincarceration policies.<sup>100</sup>

Volokh's model also suggests that increased privatization may even lead to decreased overall advocacy, reducing it to a certain threshold he labels an "advocacy-minimizing privatization level."<sup>101</sup> This phenomenon will occur because, as the private sector's share of the market rises, the size of the public sector falls, and therefore the aggregate benefits of incarceration for the public sector fall as well.<sup>102</sup>

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npr.org/2009/08/13/111843426/folsom-embodies-californias-prison-blues. To put the strength of this advocacy in perspective, the California Correctional Peace Officers Association contributes more to political campaigns than the teachers' union in California, even though its work force is one-tenth its size—only the California Medical Association contributes more each year. *THE CELLING OF AMERICA: AN INSIDE LOOK AT THE U.S. PRISON INDUSTRY* 134-35 (Daniel Burton-Rose, Dan Pens & Paul Wright eds., 2002).

95. Volokh, *supra* note 49, at 1204.

96. *Id.*

97. *Id.* at 1206.

98. *Id.*

99. *See id.* at 1217-18 ("Of the 1.5 million prisoners under the jurisdiction of federal or state adult correctional authorities in 2004, 7% were held in private facilities. This includes 14% of federal prisoners and 6% of state prisoners.")

100. *Id.* at 1214-15.

101. *Id.* at 1215.

102. *Id.*

Although these effects are true in theory when assuming a stagnant market in practice, the private prison industry has not usurped a portion of the market from the public sector but rather responded to the demands of an expanding marketplace.<sup>103</sup> Accordingly, the public sector has not reduced in size and therefore has retained the same or greater incentives to lobby. Indeed, this caveat extends even to the primary conclusion of Volokh's model that the private sector can, in essence, act as a free rider and need not lobby because of its relatively small share of the market. On the contrary, proincarceration advocacy has an impact at the margins and, therefore, the relative stake in the public good of increased incarceration must be evaluated in terms of the relative benefit of this increase for each sector.<sup>104</sup> In other words, because the private sector holds a greater share of any marginal increase in incarceration lengths, its incentives to lobby are grounded in that share rather than the baseline share of the market as a whole.

In addition to Volokh's public goods argument, other scholars note that proponents of the theory that the private prison industry has a pernicious effect on sentencing fail to take into account the recent history of penal policy.<sup>105</sup> In particular, exponential increases in incarceration rates occurred long before privatization gained momentum.<sup>106</sup> Accordingly, the fundamental point emerges "that governments do not need to be pushed; they jump of their own accord when it comes to introducing policies which will increase imprisonment rates."<sup>107</sup> Although this argument perhaps carries more practical weight than Volokh's public goods model, its contextual strength is lacking just the same. Such an explanation does not likely translate to future policy decisions in which the political climate is less supportive of determinate sentencing and policy-makers, therefore, require a nudge off the ledge. In coming years, the inevitable trend toward indeterminate sentencing will lead to a political environment less apt to support costly determinate sen-

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103. See generally PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2008/one%20in%20100.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf).

104. See *supra* Part I.A.

105. HARDING, *supra* note 55, at 94.

106. *Id.*

107. *Id.* at 95.

tencing measures on its own, thus making private sector lobbying efforts distressingly more relevant.

Although the public goods and historical context arguments raise cautions against overemphasizing the danger of proincarceration advocacy, neither treat, or even recognize, the alternative mode of maintaining incarceration rates by affecting sentence lengths of inmates in private custody. Private prisons can facilitate the imposition of increased sentences both through the increased assignment of infractions that decrease an inmate's likelihood of parole and by maintaining ineffective rehabilitation efforts. As Professor Dolovich recognizes,

The guard writing up the infraction, and in many cases the hearing officer as well, will be employed by a corporation with a direct financial stake—indeed, a paramount interest—in maintaining a high occupancy rate. This arrangement raises the concern that official testimony and judgments rendered at D-hearings will not reflect the treatment that the inmates deserve or that is consistent with the state's interest in imposing only legitimate punishments, but will instead reflect the financial interests of the company running the prison.<sup>108</sup>

In this scenario, Volokh's framework simply does not apply because the individual inmate's sentence length is not a public good but a private good of value only to the company charged with his oversight. Thus, strong incentives remain to adversely affect parole decisions and thereby increase time served.<sup>109</sup>

In addition to the perverse incentive to augment the severity of infractions, private prison companies, to the extent they benefit from high recidivism rates, have an incentive to "eschew rehabilitation programs."<sup>110</sup> Although the public goods model does apply to this scenario, the key difference is that it applies here to evaluate the likelihood of inaction rather than action. Simply put, neglecting rehabilitation programs requires no affirmative action or capital

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108. Dolovich, *supra* note 14, at 520.

109. *See id.* at 518-21; Low, *supra* note 11, at 45 ("Some C.C.A. guards in Tennessee also say ... they are encouraged to write up prisoners for minor infractions and place them in segregation. Inmates in 'seg' not only lose their good time; they also have thirty days added to their sentence—a bonus of nearly \$1,000 for the company.")

110. *See* Anderson, *supra* note 1, at 120.

outlay and, therefore, even if the consequent increase in incarceration rates is a public good divided among those in the prison market, whatever apportioned benefit results nonetheless carries more weight than the nonexistent cost. Given the multiple clear paths for the private prison industry to affect sentences coupled with its powerful incentives to do so, it seems obtuse to maintain firmly that the private prison industry has absolutely no influence on sentencing policy and practice.

*B. The Normatively Problematic Capacity to Influence Punishment*

Given the largely guarded nature of any lobbying efforts or unwritten policies affecting sentence lengths, little empirical evidence exists to support either side, and observers are thus reduced to conjecture based on theory and anecdotal evidence. In this opaque environment, however, Dolovich's normative parsimony principle comes to bear on the analysis. In applying the parsimony principle—which proscribes “gratuitously long” sentence lengths<sup>111</sup>—Dolovich argues that there is a “possible threat to the legitimacy of punishment whenever parties with a financial interest in increased incarceration are in a position to exert influence over the nature and extent of criminal sentencing.”<sup>112</sup> In other words, the mere possibility of encroachment of financial interests into the realm of punishment is deeply problematic.

Although the prison industry is fundamentally distinct from other modes of government contracting, an appropriate analogy is the contracting of private security forces. At the heart of the controversy over private security forces, such as Blackwater Security Consulting, is the reality that they have the capacity to restrict the liberty of individuals on the United States' behalf.<sup>113</sup> Similarly, through incarceration, private prison companies restrict the autonomy of the individual citizen, exercising the state's most oppressive power. If this power is to be exercised legitimately in either instance, “it must be consistent with the priority of the most urgent

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111. Dolovich, *supra* note 14, at 515.

112. *Id.* at 542.

113. See *The Real Blackwater Scandal*, WALL ST. J. (Jan. 3, 2010, 7:47 PM), <http://online.wsj.com/article/SB10001424052748704065404574636170633783890.html>.

interests.”<sup>114</sup> One notable distinction between the two sectors, however, is that private security forces have little financial incentive to act beyond the scope of the state’s power. Conversely, as established above,<sup>115</sup> private prison companies have strong incentives to do just that. Accordingly, whatever the extent of the actual effect of the private sector on sentencing, “the state ought not to foster yet another potentially influential industry that could seek to compromise further the possibility of legitimate punishment to promote that industry’s own financial interests.”<sup>116</sup> In order to remedy the violation of the parsimony principle caused by the encroachment—whether potential or manifest—of financial interest into the realm of sentencing, commentators invariably propose the abolishment of the practice of prison privatization.<sup>117</sup>

Yet, as was true of the cost-minimization dilemma, the more pragmatic solution, both politically and practically, is again to reformulate the dominant conception of the market.<sup>118</sup> If the contracting government body structures the market not for prison beds but instead for rehabilitated prisoners, it could eliminate and, in fact, reverse the incentive for private prison companies to advocate for proincarceration policies and effect longer sentences by influencing the parole process. When the organizational philosophy<sup>119</sup> of prison companies in turn refocuses on the provision of rehabilitative services rather than merely prison beds, the demand for their service will not be increased by longer sentences. In fact, their service will be encumbered by unnecessarily long sentences that will only make releasing an inmate unlikely to recidivate more difficult—in effect, minimizing output.<sup>120</sup> Recognition of the misaligned conception of the market, both by the state and by the prison industry, is a significant and difficult step toward reform. However, this recog-

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114. Dolovich, *supra* note 14, at 532.

115. *See supra* Part III.A.

116. Dolovich, *supra* note 14, at 542-43.

117. *See id.* at 543.

118. *See supra* Part II.E.

119. For a discussion of the importance of organizational philosophy in measuring prison performance, see GERALD G. GAES ET AL., MEASURING PRISON PERFORMANCE: GOVERNMENT PRIVATIZATION & ACCOUNTABILITY 1 (2004) (“An understanding of prison performance should begin by deriving goals and objectives from the mission of the prison system.... [P]rison performance is entirely dependent on one’s expectations about what prisons are supposed to do.”).

120. *See* Orsagh & Chen, *supra* note 81, at 167.

dition immediately creates the succeeding challenge of reformulating the market and restructuring the incentives of the prison industry in order to align with the modified conception of the market—a challenge to which this Note now turns.

#### IV. CONTRACTING FOR PERFORMANCE: REFORMULATING THE MARKET THROUGH CONTRACT

Although abandoning the private sector in favor of a return to public provision of services is a strong option for many of the reasons discussed above, doing so would ignore the potential of prison contracts to harness the unique and powerful benefits of privatization.

##### *A. The Advantages of Outcome-Oriented, Performance-Based Measurements*

Currently struggling to balance their budgets, states continue to look for ways to minimize the costs of incarceration and the burden that the focus on incapacitation has imposed in recent decades.<sup>121</sup> This need for adaptation lends itself well to the private provision of services.<sup>122</sup> By reformulating prison contracts to focus on outcome-oriented rather than process-oriented measurements, contracting agencies can harness the private sector's capacity to innovate while reducing costs, responding to the overcrowding crisis, and, most importantly, assuaging the criticisms of privatization.<sup>123</sup> Currently, the primary mode of contracting for prison services is through a per diem rate per prisoner.<sup>124</sup> In order to adapt the market to properly characterize the broad service provided, contracts should measure gains in performance, including effects on recidivism rates and

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121. *See supra* text accompanying note 32.

122. MCGOWAN, *supra* note 19, at 156-57 (“[C]ontracts put cost-benefit decisions into the hands of those with a direct stake in running an efficient operation .... Additionally, private firms often don't face the same constraints and thus can foster innovations that won't occur under government monopoly.” (footnote omitted)).

123. *See supra* Part II.B.

124. *See supra* text accompanying note 47.

employment trends of former inmates, and reward them accordingly.<sup>125</sup>

Some efforts to reform prison contracts to take into consideration performance-based measures have already been implemented, but thus far they have focused primarily on process-oriented outcomes—or “output-driven inputs.”<sup>126</sup> Beginning to recognize the impact of incarceration on one’s capacity to reenter society, some states have started to require the provision of vocational services in an attempt to respond to the extensive empirical findings that vocational training has a positive effect on an inmate’s ability to reenter society successfully.<sup>127</sup> Unfortunately, even with the inclusion of vocational training requirements, the fundamental incentive structure remains geared toward minimizing variable costs and the organizational philosophy remains focused on incapacitation.<sup>128</sup> Although output-driven inputs are designed as proxies for outputs, “the precise manner in which these inputs are made is a decision for the contractor, and in this sense the fundamental dichotomy remains intact.”<sup>129</sup> As a result, while output-driven inputs are important measurements, they cannot adequately supplant the use of output measurements. In order to capture fully the benefits of the private sector and facilitate the shift from incapacitation to rehabilitation, contracting agencies must utilize direct measures of outcomes in addition to the process-oriented and output-driven input measurement tools already used.

### *B. Graduated Bonus System*

One possible mode of formulating such a contract is a graduated bonus system that compensates private prison companies for de-

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125. Contracting agencies could measure employment through a number of means, but coordinating with the parole system would likely prove easiest.

126. See *supra* note 55.

127. See, e.g., Kerry L. Pyle, Note, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. REV. 151 (1997).

128. See Judith Greene, *Comparing Private and Public Prison Services and Programs in Minnesota: Findings from Prisoner Interviews*, 11 CURRENT ISSUES CRIM. JUST. 202, 226 (1999) (“Participation in education and vocational classes is more likely to be full-time in the public prisons. The public programs are fully licensed, the instructors are more likely to have proper credentials.”). *But see* McDonald & Patten, *supra* note 13, at 95.

129. HARDING, *supra* note 55, at 68.

creases in the recidivism rate or increases in the employment rate of inmates who have reentered society. Given the high cost of incarceration, even a fraction of such cost savings offered as a bonus for each inmate statistically expected to recidivate who did not do so would represent a significant incentive to the private industry as it would carry no post-release responsibility.

An important criticism of weighing output measures too heavily is the volatility and myriad of factors that contribute to these rates.<sup>130</sup> Appropriately rewarding the value added by the private prison company, indeed, is the most important challenge, but a number of measures can be taken that would minimize the risk of unjust deserts.<sup>131</sup> First, a graduated bonus that increased as the particular prison's employment and recidivism rates deviated further and further from the mean would reduce the likelihood that private companies would receive an undeserved windfall—the farther in standard deviations from the mean the private prison is, the more likely a causal relationship that should be rewarded exists.

Second, in light of the reality that many other factors, such as age, prior criminal history, and sex, impact the likelihood of recidivism, the contracting agency could control for these variables when measuring the performance of the prison. Controlling for these factors would also respond effectively to the potential attempts by both the contractor and contracting agency to cherry-pick inmates least likely to recidivate.<sup>132</sup> Although measuring outputs in this manner would require additional administrative costs, these costs would be significantly reduced by the contracting agency's ready access to such information.<sup>133</sup>

Third, the criticism that recidivism ignores the distinction between criminality and conviction<sup>134</sup> can be mitigated by the use of

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130. *See id.* (“[T]he human variables are too volatile for any contractor to be expected to stand or fall by outputs alone, so ‘output-driven inputs’ replace or supplement them.”)

131. That would also respond to the problems of measuring recidivism outlined by Michael Maltz. *See* MICHAEL MALTZ, *RECIDIVISM* 18-26 (1984).

132. Private prisons have already been accused of “cherry-picking” prisoners who will cost the least to house—for example, those without health issues, or nonviolent offenders. *See* MCGOWAN, *supra* note 19, at 166.

133. Indeed, contracting agencies would have ready access to information regarding reoffending inmates and could use tax returns, self-reporting, and, most usefully, the parole system to monitor employment.

134. *See* GAES ET AL., *supra* note 119, at 21 (discussing the distinction between criminality and crime).

employment information<sup>135</sup> and by adjusting for statewide changes in crime rates.<sup>136</sup>

These measures, of course, represent only a platform on which to build rather than a comprehensive plan for restructuring prison contracts. The struggle to create efficient measurement tools while maintaining the requisite incentives to induce prison companies to invest in inmates' future capacity to reintegrate will undoubtedly prove challenging and require delicate calibration. The effort, however, is unquestionably worthy of investment as the benefits of success are diverse and compounding.<sup>137</sup>

### CONCLUSION

The graduated bonus system, of course, represents only one possible mode of effecting a larger reformulation of the market that aligns with the theoretical framework developed above. The bonus system, however, clearly illustrates the heretofore unrecognized capacity of the private sector, when faced with the proper incentives, to overcome the cost-minimization and incarceration advocacy challenges of privatization. The bonus system also has the capacity to play an important role in the larger shift of corrections away from incapacitation to a renewed emphasis on rehabilitation. Fortunately, this reformulation of the market also works in favor of private prison companies, whose profit margins under the traditional structure will likely be threatened in the coming years as

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135. See Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529 (2000) (finding that those offenders who are employed are less likely to engage in criminal behavior).

136. By controlling for fluctuations in crime rate, the contracting agency could ensure that the gap between criminality and crime does not provide a windfall after, for example, a reduction in policing efforts.

137. See GAES ET AL., *supra* note 119, at 6 (“[W]e should hold criminal justice agencies responsible for their contribution to providing incentives and skills to inmates who will then have a better opportunity to make law-abiding decisions upon release from prison. We certainly recognize the importance of other determinants of offending that are typically beyond the control of criminal justice agencies: early childhood influences, the macro social and economic environment, the conditions and norms in neighborhoods. These external factors do not diminish the responsibility of our criminal justice agencies to bring about socially desirable changes in individuals.”).

incarceration rates fall.<sup>138</sup> This benefit, if recognized by the private sector, is perhaps the greatest harbinger of the potential success of utilizing the private market to help restructure the operational philosophy of the corrections system. Another critical gauge of the potential viability of the paradigm shift proposed is its political tractability in the current climate. With regard to corrections policy, political tractability represents the end game. No matter how logical or sound, a particular proposal grounded in purely normative terms will inexorably fall on deaf ears.<sup>139</sup> The theoretical and practical framework this Note has developed, however, is appropriately presented as a cost-savings measure that would take advantage of the unique benefits of privatization while addressing the long-held concerns of opponents to prison privatization, thus proving amenable to a broad spectrum of political interests. Although much work remains, the mutually beneficial nature of the proposed reformulation of prison contracts and the paradigmatic conception of the prison market serves as a strong basis for the investment of energy in years to come.

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138. See Ryan S. Marion, Note, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 233 (2009) (stating that the growth of private prison companies “can be attributed directly to the states’ perceived need for them as a cost effective response to the incarceration of an increasingly higher rate of criminals”); see also *supra* Part I.C.

139. Michael Dukakis’s 1988 presidential campaign represents a seminal example of the political intractability of crime policies that, no matter how logical, appear “soft on crime.” See Andrew Rosenthal, *Bush and Dukakis Trade Accusations over Crime*, N.Y. TIMES, Oct. 21, 1988, at A1.

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