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PRISON

Byron Eugene Price and John Charles Morris, Editors

PRISON PRIVATIZATION

The Many Facets of a Controversial Industry

VOLUME III: The Political Climate of Prison Privatization

Prison Privatization

THE MANY FACETS OF A CONTROVERSIAL INDUSTRY

VOLUME III: THE POLITICAL CLIMATE OF PRISON PRIVATIZATION

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Prison Privatization

Volume I

The Environment of Private Prisons

Volume II

Private Prisons and Private Profit

Volume III

The Political Climate of Prison Privatization

This book is dedicated to my mother, Mabel E. Price, for being my inspiration.

—Byron E. Price

This book is dedicated to my wife, Elizabeth Dashiell Morris, for her love and support.

—John C. Morris

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—Byron E. Price and John C. Morris

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Introduction

The Political Climate of Prison Privatization

Byron E. Price and John C. Morris

The prison privatization debate is just as much a political debate as it is an economic debate. In many respects, the arguments are one and the same, because economics often drive the decision-making processes of political institutions. The economic underpinnings of the debate are grounded in ideology. Arguments made from the economic perspective regarding support for privatization usually claim that privatization saves money: it fosters competition, which facilitates efficiency, and efficiency saves money. In addition to the idea that prison privatization saves money, the following themes drive the discussion about privatization in this volume: the role of advocacy in influencing the privatization decision; incentives to privatize once the coercive power of the state is ceded to a for-profit prison provider; accountability; the creation of a powerful elite that drives policy choices; and the idea that profit and public policy have competing values. Each of the themes will be discussed briefly in this introduction, and each chapter will be briefly summarized to provide a framework for the reader to evaluate the arguments on face value.

Advocacy is as American as apple pie, and all interest groups engage in political advocacy for the purpose of gaining a favorable outcome regarding issues they deem important to their interests. Most citizens see lobbying and political advocacy as a benefit to our pluralistic system in that it is tangible evidence of the ability of Americans to have input into their government. On the other hand, the pro-privatization and pro-incarceration advocacy

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engaged in by for-profit providers of prisons has been deemed harmful by opponents of prison privatization because they see profits being made from the suffering of citizens. Moreover, for many opponents, it is problematic that a prison lobby has developed to advocate for policy favorable to that industry. The prison lobby effort that causes the most concern for opponents of privatization is the lobbying for laws that incapacitate people for longer periods of time for the purpose of ensuring high rates of incarceration—private prisons make money by housing prisoners, and the more prisoners they have, the more money they make. The pros and cons of pro-privatization and pro-incarceration advocacy and the issue of turning over a public function to a private entity that benefits from punishment are recurring threads of debate throughout this volume.

Another theme that courses through the volume is the idea of accountability, a value central to democratic ideals. When a function is public, the public enjoys the benefits and efforts of the function's successes and has a voice in how the agencies manage the functions. Once privatized, however, the deliverer of the service is viewed to be no longer accountable to the public. Thus, accountability—a central tenet to democratic values—is viewed as being lost. This perceived erosion of democratic values creates considerable angst among purists in regards to how government should function. Thus, this debate is a central issue in the decision to consider prison privatization.

Another important theme that appears in this volume is the idea that elite exercise of power manifests itself in elite deviance when the power elite, through lobbying and campaign contributions, convince policy makers to expand the market for private prisons. Based on the disproportionate ability of the elite to influence policy through campaign contributions and lobbying, ordinary citizens believe campaign contributions undermine equitability in the process of having their voices heard. These concerns are concomitant with the accountability concerns that are raised when privatization is embraced.

A final theme in this volume is the belief that private profit and public policy values compete, and when public policy loses out to profit, there is an erosion of accountability, transparency, democracy, and public confidence. As long as profit competes with democratic values, the issue regarding the pursuit of privatization will remain a controversial one.

Chapter 1 of this volume examines the impact of public and private prison lobbies. Volokh examines such questions as, does an increase in private sector advocacy decrease public sector advocacy? This is a critical line of inquiry

given that most research focuses on private prison lobbying and tends to give less attention to lobbying by public interest groups, such as unionized correctional officers. Volokh believes privatization reduces advocacy by public prison lobbies by breaking up the government monopoly of prisons. He contends that this action creates a collective action problem. His chapter offers an interesting look at a rarely considered aspect of prison privatization: that like private prison interest groups, public prison employees also lobby for laws that favor their industry and protect their jobs.

In chapter 2, Heitzeg explores the interests aligned against private prisons. According to Heitzeg, many of these interests are bonded by a shared perception that the prison industry operates in such a way as to systematically discriminate against minority and disadvantaged groups. The author contextualizes her argument by tracing the history of inmate labor exploitation, the development of prison industries, and the inimical impact of pro-privatization and pro-incarceration movements to illustrate how powerful organizations have formed to advocate against private prisons. She concludes that profit, crime, and punishment have been linked throughout history and that all factors have been important in extracting labor from the poor in our society.

Chapter 3 examines whether private providers of prisons inherit the same protections accorded government-run prisons, especially with respect to liability claims that arise from prisoner abuse cases. Gordon and Shelton-Quinn discuss the case law governing the issue of qualified immunity, the idea that government actors are protected from civil suits that arise from frivolous lawsuits. Furthermore, this chapter delves into the legal rights of prisoners, the requirement to indemnify private prisons, and how private providers of prisons are required by the public agencies with whom they contract to protect themselves from frivolous lawsuits.

Chapter 4 builds on the chapter 3 discussion of qualified immunity but examines the issue in terms of constitutional violations and legal accountability concerns. This chapter introduces the idea that profit and public policy have competing values. Hargis considers whether private actors, acting as agents of the government, are shielded from legal accountability when managing a facility for the government. Moreover, this chapter discusses how the issue of qualified immunity emerged using case law to trace the development of this concept.

Inman introduces in chapter 5 the idea that elites influence public policy by using such strategies as lobbying and campaign contributions to get

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policies passed that expand their market share. Furthermore, through the positions they hold in society, elites are disproportionately influential in the political and policy-making arenas, thus raising questions regarding equal representation and citizen voice in a democratic society. The private prison industry appears to enjoy such influential status, and Inman characterizes the practice of lobbying by private prison companies to expand their market share as elite deviance. Because of their ability to be more influential via campaign contributions, the author asserts that public confidence is undermined by elite deviance.

In chapter 6, Blessett also advances the idea that elites benefit from prison privatization and juxtaposes this argument with the issue of prison privatization as a political and economic decision. Blessett argues that politics shape public policy. A brief discussion of the competing values of private profit and public policy is undertaken to place in perspective what many who are against prison privatization believe: that profit undermines the democratic system.

Discussing the grassroots organizations that have formed to antagonize private prisons, chapter 7 explores the perceived vested interests private prisons have to incarcerate. Black also discusses the impact of pro-incarceration advocacy and the grassroots efforts to mitigate the pro-incarceration advocacy. Much of the chapter chronicles the efforts of various community and national groups committed to and working for prison reform. Black makes an argument in this chapter regarding the loss of accountability the public suffers when a prison becomes private. The chapter closes with a brief summary of successful grassroots campaigns that have thwarted the efforts of private prisons to expand their market share.

Another underexplored area regarding the state's transfer of its prison operations and management duties to a private provider involves the constitutional implications raised when coercive power is used by an actor other than the state itself. In chapter 8, Hargis discusses the constitutional implications of using private prisons and looks at inmates' rights under this arrangement. To determine the constitutional implications of private prisons, Hargis researches case law to see where the courts stand on the issue of accountability and whether the government is relieved of responsibility when it contracts out prison operations and management. She asserts that this situation represents shared control and decision making with an outside agency and not the removal of its responsibility. The chapter suggests that

there are three main constitutional implications of private prisons: delegation of public functions to private actors, constitutional rights of inmates, and liability and accountability for private prison employee actions.

Along with several other chapters in this volume, chapter 9 looks at an area in which very little research has been done in order to assess the realities of the competing claims of private and public providers of prisons. Lee-Thomas and Myers attempt to compare education in public prisons to education in private prisons. Implicit in this comparison is the belief that education could help both entities reduce the recidivism rate. The authors find that private prisons provide fewer educational programs than public prisons. The authors conclude with a discussion on the dearth of research regarding recidivism rates as a measure of success.

The crux of the debate surrounding the superiority of prison privatization versus public management of prisons can be found in chapter 10, which discusses subjecting prisons to performance measurement. Many of the claims made by private and public prisons regarding the superior effectiveness of each are baseless, given that very few impartial studies exist that subject either party's claim to adequate scrutiny. This chapter discusses the difficulty of applying performance measurement to corrections and debunks the idea that comparisons of private and public prisons are easily made. Furthermore, Montgomery finds that not only is it difficult to compare performance between the two, but it is also challenging to determine if private prisons actually operate prisons more cheaply. Because states have difficulty in determining the marginal cost to operate a prison, many are not in a position truly to assess whether a private prison can operate more efficiently than a public prison.

Chapter 11 informs the reader of the various kinds of privatization that most agencies pursue. The most used form of privatization, according to McDowell and Morris, is contracting out. This is a popular form of privatization because of the potential cost savings offered by private prisons in comparison to public management of prisons. McDowell and Morris discuss how contracts can provide an accountability mechanism for states who contract out their prisons. One of the main concerns and criticisms of private prisons is that accountability is lost when public prisons become private. Thus, writing a good contract has the potential to mitigate the loss of accountability opponents of prison privatization fear. The authors discuss the elements of a contract and present a case study of the State of

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Mississippi's use of contracts when dealing with private prisons. Finally, the chapter closes with important issues for policy makers to consider when contracting for prison services.

Chapter 12 closes out this volume with a discussion of the future of private prisons. An examination of growth patterns for private prisons at the local, state, and federal levels is reviewed to ascertain whether certain trends lend themselves to future growth of private prisons. Issues such as a changing penal philosophy, immigration reform, the use of private prisons for economic development, and other salient factors are explored to gauge their future impact on private prison expansion. Finally, Price demonstrates that the growth of private prisons could ebb and flow given the right confluence of factors, as was seen in the 1980s with the war on drugs, get-tough-on-crime campaigns, increasingly punitive penal policies, and the drive toward privatization ushered in by President Reagan.

1

The Effect of Privatization on Public and Private Prison Lobbies¹

Alexander Volokh

Private prison firms are often accused of lobbying for incarceration because, like a hotel, they have “a strong economic incentive to book every available room and encourage every guest to stay as long as possible” (Schlosser 1998, 51–64; see also Dolovich 2005; Sarabi and Bender 2000; Shichor 1995). This accusation has little support, either theoretical or empirical. At worst, the political influence argument is backward: privatization will in fact *decrease* prison providers’ pro-incarceration influence. At best, the argument is dubious: its accuracy depends on facts that proponents of the argument haven’t developed.

First, self-interested pro-incarceration advocacy is already common in the public sector—chiefly from public sector corrections officers’ unions. The most active corrections officers’ union, the California Correctional Peace Officers Association, has contributed massively in support of “tough on crime” positions on voter initiatives and has given money to crime victims’ groups, and similar unions in other states have endorsed candidates for their tough-on-crime positions. Private firms would thus enter a heavily populated field and partly displace some of the existing actors.

Second, there’s little reason to believe that increasing privatization would increase the amount of self-interested pro-incarceration advocacy. In fact, it’s even possible that increasing privatization would *reduce* such advocacy. The intuition for this perhaps surprising result comes from the economic theory of public goods and collective action.

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The political benefits that flow from prison providers' pro-incarceration advocacy are a "public good," because any prison provider's advocacy, to the extent that it's effective, helps every other prison provider. When individual actors capture less of the benefit of their expenditures on a public good, they spend less on that good; and the "smaller" actors, who benefit less from the public good, free ride off the expenditures of the "largest" actor.

Today, the largest actor—the actor that profits the most from the system—tends to be the public sector union, because the public sector provides the lion's share of prison services, and public sector corrections officers benefit from wages significantly higher than those of their private sector counterparts. The smaller actor is the private prison industry, which not only has a smaller proportion of the industry but also doesn't make particularly high profits.

By breaking up the government's monopoly of prison provision and awarding part of the industry to private firms, therefore, privatization can reduce the industry's advocacy by introducing a collective action problem. The public sector unions will spend less because under privatization they experience less of the benefit of their advocacy, while the private firms will tend to free ride off the public sector's advocacy. This collective action problem is fortunate for the critics of pro-incarceration advocacy—a happy, usually unintended side effect of privatization.

This is the simplest form of the story, but one can also tell more complicated versions in which privatization doesn't *necessarily* decrease total industry-expanding political advocacy. After presenting my main model, I introduce some realistic complications. Some of them don't change the basic result of the model; others make the effect of privatization ambiguous—increasing private sector advocacy but also decreasing public sector advocacy. Either way, we don't unambiguously predict that privatization increases advocacy. There is thus no reason to believe an argument against prison privatization based on the possibility of self-interested pro-incarceration advocacy—unless the argument takes a position on how lobbying, political contributions, and advocacy work, and why any increase in private sector advocacy would outweigh the decrease in public sector advocacy. Either this argument against prison privatization is clearly false, or it's only true under certain conditions that the critics of privatization haven't shown exist.