1991

Capitalist Punishment: The Wisdom and Propriety of Private Prisons

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Comment

Capitalist Punishment: The Wisdom and Propriety of Private Prisons

TABLE OF CONTENTS

I. Introduction .......................................................... 900
II. Background ............................................................. 901
   A. The Magnitude of Today's Prison Crisis ................. 901
   B. Privatization Defined ........................................ 904
   C. The Private Prison Debate ................................. 905
III. Legal Obstacles to Privatization ............................ 908
   A. Improper Delegation .......................................... 908
IV. Policy Concerns ....................................................... 913
   A. Will Private Prisons Save Taxpayers Money? .......... 913
   B. Dependency on Private Prison Providers ............... 915
   C. The Profit Motive ............................................. 916
   D. Increased Reliance on Incarceration ..................... 918
V. Concerns of Ideology and Propriety .......................... 920
VI. Conclusion ........................................................... 921

I. INTRODUCTION

This session, the Nebraska Legislature will again be considering a bill which, as introduced, gave the Nebraska Department of Correctional Services (DCS) authority to contract with the private sector for incarceration of those persons committed to the Department's custody.\(^1\) The purpose of this Comment is to familiarize the reader with

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1. LB 612, 92nd Leg. 1st Sess., 1991 Nebraska Laws. The bill, as originally introduced, was a very brief permissive grant of authority to the Director of the Department of Correctional Services to contract directly with private parties outside DCS "for the control and maintenance of persons committed to the department ... ." To remedy possible constitutional deficiencies, the bill was later amended by its introducer, Senator Wickersham, to provide, \textit{inter alia}, that the Director of DCS must have the "approval of the Legislature and the Governor" to enter into contracts with private persons for the control and maintenance of persons committed to DCS. LB 612 was amended yet again by the Standing Committee on Government, Military and Veteran Affairs prior to being advanced to General File on March 25, 1991. As most recently amended by the committee, LB 612 gives the Director of DCS the authority to, "upon the approval of the Legislature and the Governor, enter into long-term contracts with any person or political sub-
some of the problems\(^2\) posed by prison privatization in general and point out possible constitutional obstacles facing privatization in Nebraska. Part II of this Comment provides background on the magnitude of today's prison crisis and presents arguments most commonly propounded both for and against private prisons. Part III considers possible constitutional hurdles to privatization in Nebraska, and suggests private prison legislation may well be an unconstitutional delegation of governmental authority. Part IV examines some of the policy implications of prison privatization and submits it would be imprudent to view private prisons as an appropriate solution to the nation's prison crisis. Part V explores the ideological propriety of private prisons and concludes, even absent constitutional problems, the legally-sanctioned restriction of prisoners' liberty must remain wholly in public hands.

II. BACKGROUND

A. The Magnitude of Today's Prison Crisis

The prisons of this country are in the midst of a profound crisis. On a national level, the number of federal and state prisoners reached an all-time high of 710,054 in 1989,\(^3\) an increase of 13.1% over the
number incarcerated in 1988. An alarming 274 of every 100,000 citizens in this country were incarcerated in state or federal prisons in 1989, and the number continues to rise. The 82,466 inmates who were added to federal and state prisons in 1989 translated into a nationwide need for nearly 1600 new prison bedspaces per week. Forty-five states and the federal prison system report operating significantly above capacity, and as a result of this overcrowding almost half the states have been forced to house a total of 18,236 prisoners in local jails or other facilities. Making matters worse, prison systems in nearly every state are under court order to reduce overcrowding yet the public continues to demand more criminals be incarcerated and their sentences lengthened.

4. Id. The increase in the number of prisoners is most likely due to changes in sentencing policies which have increased the probability of incarceration. Id. at 7. Between 1980 and 1988 the number of prison commitments increased by 90%. Id. at 12. Moreover, between 1988 and 1991, the number of inmates incarcerated for drug offenses nearly doubled. Luttrell, The Impact of the Sentencing Reform Act on Prison Management, FED. PROBATION 54, 55 (December 1991).

5. BULLETIN ON PRISONERS, supra note 3, at 1.

6. Id. The cost of constructing new prison facilities is enormous, and has been estimated at an average of $26,000 per bed for minimum security prisons, $46,000 per bed for medium security prisons, and $58,000 per bed for maximum security prisons. C. LOGAN, PRIVATE PRISONS, CONS AND PROS, 8 (1990).

7. BULLETIN ON PRISONERS, supra note 3, at 7. At the end of 1989, it was estimated state and federal prisons were operating at somewhere between 10%-29% over their capacities. Id.

8. Id. at 5. Despite the fact they are being called upon to ease overcrowding in state and federal facilities, the nation's local jails are experiencing an overcrowding problem of their own. In 1989 there were over 19 million jail admissions and releases, and nationwide jail occupancy was 108% over capacity. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN JAIL INMATES 1 (1989) [hereinafter BULLETIN ON JAILS]. In 1989 it was estimated one in every 469 adult residents in the United States was in jail. Id.

9. LOGAN, supra note 6, at 8 (at least 42 states and the District of Columbia were under court order to reduce prison overcrowding in 1987). See also Robbins, Privatization of corrections: defining the issues, 69 JUDICATURE 325, 325 (1986). At least one private prison firm has promised in a marketing brochure that contracting for its services will reduce court pressure to reform and upgrade prison facilities arguing that contracting for the services would demonstrate "good faith effort" to comply with court orders to reduce overcrowding. Comment, Private Prisons, 36 EMORY L.J. 253, 254-55 (1987).

10. Robbins, supra note 9, at 325. The increase in preventive detention, mandatory sentencing, habitual-offender statutes and the abolition of parole in some jurisdictions is evidence of public sentiment that more criminals should be incarcer-
Nebraska's prison system has not remained unaffected by the recent surge in prison population. Roughly one out of every thousand Nebraskans is in prison, and all but one Nebraska adult prison facility is operating substantially over capacity. It is in this atmosphere of overcrowding, court orders and strained budgets, that the concept of privatization attracted the attention of state officials.

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11. BULLETIN ON PRISONERS, supra note 3, at 2.
12. Nebraska's prison system is the seventh most overcrowded in the United States. Lincoln Journal-Star, Nov. 9, 1991, at 1, col. 1. DCS ANNUAL REPORT, supra note 6, at 27-30, reports the following statistics:

- Nebraska State Penitentiary: capacity 488, population 711
- Lincoln Correctional Center: capacity 468, population 759
- Omaha Correctional Center: capacity 240, population 349
- OCC Work-Release Unit: capacity 90, population 100
- Nebraska Center for Women: capacity 84, population 100
- Hastings Correctional Center: capacity 152, population 147

13. Although private prison corporations have only recently emerged, the relationship between the private sector and penal institutions exhibits a long and troubled history. See, e.g., B. MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS, 94, 118, 199-203 (1977)(describing leasing of inmates to private parties in the late nineteenth and early twentieth centuries).

J. DILULIO, PRISONS, PROFITS, AND THE PUBLIC GOOD: THE PRIVATIZATION OF CORRECTIONS, (Criminal Justice Center, Sam Houston State University, 1 Research Bulletin 1, 2-3 (1986)), states as recently as the latter half of this century several states had privately-managed for-profit prisons. For example, in the late nineteenth century Texas leased its prisoners to private individuals as laborers. Worked mercilessly, many convicts committed suicide or maimed themselves in protest and most convicts died within seven years of their incarceration. The Louisiana penal system, prior to 1952, was used by public officials as a "patronage mill" and contracts for inmate labor were awarded to friends, relatives and political supporters. California's prison system began with a private contract which led to abuses and resulted in the two-time dismissal of San Quentin's first warden. In Michigan, Marquette prison was privatized in the 1920s but private involvement ended when it became clear private managers were not interested in controlling contraband.

Interestingly, it was not concern for the prisoners' welfare that motivated society to abandon leasing of inmates for profit, but opposition from labor organiza-
B. Privatization Defined

Privatization has been defined as a "fuzzy concept" and indeed has come to refer to a great range of ideas and policies. In the broad sense, "privatization" is the process by which government-provided functions and services are shifted from the public to the private sector. In the area of corrections, "privatization" embraces a number of concepts, from private prison industries, to contracting with private suppliers for certain services such as medical care, psychiatric care, educational and vocational services, to private financing and construction of new prison facilities. However, the concept of prison

16. Private prison industries, or "factories with fences" as Retired Chief Justice Warren Burger called them, seek to turn inmates into productive members of society by having them work for a respectable wage producing goods that are sold in the marketplace. See W. Burger, Remarks at the University of Nebraska, sponsored by the Nebraska Bar Ass'n (Dec. 16, 1981), reprinted in W. Burger, More Warehouses, or Factories with Fences?, 8 NEW ENG. J. PRISON L. 111 (1982).
17. Nebraska has currently both a state-run prison industry (Cornhusker State Industries) and a private prison industry (Private Venture Project) which is sponsored by the Private Sector/Prison Industry Enhancement Certification Program of the United States Department of Justice. In the private program, inmates work within the confines of the institution for a private company. Inmates are paid with outside funds; a portion of their wages goes to the Nebraska Crime Victim's Compensation Fund, to family support, restitution, room and board, and state and federal taxes. See DCS ANNUAL REPORT, supra note 6, at 17-18.
18. The practice of contracting for professional prison services is quite common and historically has sparked very little controversy. It is analytically distinguishable from turning over the management of the entire prison facility to a private firm in that contracting for professional services does not require the private firm to actually administer punishment by restricting inmates' liberty.
19. Somewhat less drastic than total privatization, and much less controversial, is the concept of contracting with private firms to construct new prison facilities which will then be leased back or purchased by the state. See LOGAN, supra note 6, at 76-81. The traditional method of financing new prison construction is through obligation bonds. Id. at 76. Private financing and construction presents an attractive alternative to legislators who are generally finding it difficult to obtain voter support for the building of new facilities. Id. However, private construction is open to political attack in that it allows state legislators to bypass public approval for the building of new prison facilities. Id. at 77-78. Nonetheless, it is estimated private companies can locate, finance, design and construct prisons more rapidly
"privatization" that has spawned the most controversy refers to government contracting with a private firm for management of an entire prison facility or prison system. It is this last concept of prison "privatization," management of prison facilities by private for-profit firms, which is the subject of this writing.

C. The Private Prison Debate

Prison privatization has generated an ongoing and often heated debate. Proponents, who include not only some corrections professionals, but also major financial brokers who advise clients to invest in private prison corporations, argue government has done a dismal job of running its prisons and jails. Proponents maintain that turning prison operation over to the private sector will save taxpayer dollars than can the government, and for about 80% of what the government pays for construction. Id. at 79.

Even if one accepts that a private firm could finance and construct a new prison more quickly and at less expense, perhaps it is more important to ask whether the construction should have been undertaken in the first place. It has been suggested the debate over private prison construction is best viewed as secondary to the ultimate question of whether we as a society NEED more jail space. See Cikins, Privatization Of The American Prison System: An Idea Whose Time Has Come?, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 445, 461 (1986).

As mentioned earlier, the Standing Committee Amendments to LB 612 expressly provide for private "expansion, construction, or use of facilities" under the jurisdiction of DCS. It remains unclear under present statutory bidding requirements, set out in NEB. REV. STAT. section 83-916 (Reissue 1987), whether the State of Nebraska could finance the construction of a new penal facility through a lease-purchase agreement with a private corporation.


20. The National Governor's Association adopted a resolution in 1985 declaring that states should explore privatization yet cautioning such exploration should be approached with "great care and forethought" since "[t]he private sector must not be viewed as an easy means for dealing with the difficult problem of prison overcrowding." N.Y. Times, Mar. 3, 1985, at 26, col. 3 § 1.

Another proponent of private prisons, the American Correctional Association, has issued a policy advocating a careful examination of the issues and urging that privatization should meet or exceed professional standards and be cost effective when compared to well-managed governmental operations. American Correctional Association, Ratified Correctional Public Policies (Jan. 20, 1985).


22. "The perception that drives the proponents of privatization is that government has become excessively entangled in businesses at which it is not particularly effective or efficient, thereby depleting the finite revenues in the public coffers, not to mention the equally finite tolerance of the public itself for never-ending tax increases or ever growing government budget deficits ...." Brakel, "Privatization" in Corrections: Radical Prison Chic or Mainstream Americana?, 14 NEW ENG. J. CRIM. & CIV. CONFINEMENT 1, 3 (1988).
because if run as a profit-making business, prisons will be operated more efficiently and at less cost to taxpayers. Privatization has been touted as a method of reducing both the size and scope of government, and it is argued that with less bureaucracy and additional flexibility, new correctional philosophies could be implemented quickly. Proponents of privatization insist chronic prison overcrowding could be reduced through the private sector's ability to finance and build new prisons with more bedspace. It has even been suggested that contracting with private firms for the management of prisons will reduce what some see as overly generous public employee pensions and benefits, which burden taxpayers' pocket books.

Opponents of prison privatization, who include the American Civil Liberties Union (ACLU) and the American Bar Association (ABA), respond on many fronts. The ACLU, most noted for its efforts to protect rights of individuals against encroachment by the state, remains vehemently opposed to private prisons and has voiced concern for protection of prisoners' rights, asserting such rights are more likely to be violated in private for-profit prisons than in prisons run by the government. In 1986, the ABA House of Delegates passed a reso-

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23. See Priest, supra note 15, at 1 ("In many cases, government ends can be achieved more effectively by the substitution of a profit motive for the amorphous motives of a government bureaucracy."). It has been estimated that privatization can reduce the corrections tax bill by as much as 25%. See DILULIO, supra note 13, at 2. Others question predicted savings:

Closer examination reveals that some of the claims made by proponents of privatization, particularly in the area of cost, may not be accurate and have been proven wrong on at least two occasions. In 1984, Hamilton County, Tennessee, turned over its jail to a private company in an effort to save money. Due to unanticipated costs, the county wound up spending $200,000 more than it expected under its contract. In 1982, when a private company took over the Okeechobee Reform School in Florida, the company believed it could do a better job for less money. The company quickly discovered that in order to live up to its contract, it would have to expend more money than the state had spent, not less.

Note, supra note 13, at 654-55 [citation omitted].

24. Comment, supra note 9, at 257.

25. Robbins, supra note 21, at 913.

26. See LOGAN, supra note 6, at 41. At least one commentator has suggested prison privatization is the "public sector analogue of the 'runaway shop'." Becker, With Whose Hand: Privatization, Public Employment, and Democracy, 6 YALE L. & POL'Y REV. 88 (1988). Becker argues the trend toward privatization amounts to a deliberate labor relations strategy designed to cut labor costs by circumventing public employees' rights.

27. Those who oppose prison privatization include the American Federation of State, County, and Municipal Employees (AFSCME), the National Sheriffs' Association, the American Civil Liberties Union (ACLU) and the American Bar Ass'n (ABA). See LOGAN, supra note 6, at 10.

28. Id. at 12. See also Cheever, Cells For Sale, NAT'L L.J., Feb. 19, 1990, at 33, col. 2. ("The industry's opponents, including an unusual coalition of state corrections officials, prisoners' rights groups and union leaders, say the introduction of the
lution opposing prison privatization and recommending that "jurisdic-
tions that are considering the privatization of prisons and jails not proceed . . . until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved." Others are concerned that operating prisons with a profit motive provides no incentive to reduce prison populations or explore alternatives to incarceration. In fact, it is argued the incentive would be to build even more prisons and jails.

Foremost among concerns expressed by critics of privatization, and those most often advanced in opposition to the idea, are questions concerning the constitutionality of delegating the incarceration function to private corporations, and the availability of section 1983 as a remedy for violations of prisoners' rights by private correctional companies.

The remainder of this Comment will focus briefly upon legal obsta-

29. See Robbins, supra note 2, at 536.
30. See Robbins, supra note 21, at 913 (private prison companies have no incentive to reduce prison populations, especially if the company is paid on a per-prisoner basis).
31. Id. Robbins warns that "if [the prisons] are built, we will fill them. This is a fact of correctional life: the number of incarcerated criminals has always risen to fill whatever space is available." Id.

Although critics of prison privatization have expressed concern over whether those who operate private prisons will be subject to suit under section 1983 for violations of prisoners' rights, the issue is fast becoming moot. Although beyond the scope of this writing, commentators have been unanimous in concluding that, despite the dearth of case law, actions of private prison operators will be considered "under color of state law" for purposes of section 1983. In addition to a number of federal court decisions finding private contractors for prison services to be acting under color of state law, see, for example, DeVargas v. Mason, 844 F.2d 714 (10th Cir. 1988); Ancata v. Prison Health Services, Inc., 769 F.2d 700 (10th Cir. 1985); Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982); Kelsey v.Ewing, 652 F.2d 4 (8th Cir. 1981); Medina v. O'Neill, 589 F. Supp. 1028 (S.D. Tex. 1984), the United States Supreme Court unanimously held in West v. Atkins, 487 U.S. 42 (1988) that a private doctor's provision of medical services to inmates pursuant to contract with the state constituted 'state action' and 'action under color of state law' for purposes of section 1983. The West decision provides strong support for the conclusion that the activities of a private prison constitute state action. For a scholarly discussion of section 1983 litigation as it is affected by prison privatization, see Robbins, supra note 2, at 577-612; Thomas & Calvert Hanson, supra.

33. The nondelegation doctrine is dealt with only briefly in this note, and is confined primarily to Nebraska law. For a more extensive discussion of the nondelegation doctrine (federal and national in scope) see Robbins, supra note 2, at 544-604.
cles which may face prison privatization in Nebraska, then discuss policy issues raised by private prisons and the propriety of turning over to the private sector the punishment of society's criminals.

III. LEGAL OBSTACLES TO PRIVATIZATION

A. Improper Delegation

The constitutionality of delegating to private corporations the authority to incarcerate convicted criminals has been challenged by many critics of prison privatization. 34 There is not yet case law directly addressing the constitutionality of delegating provision of corrections to the private sector 35 but it is certain that if the prison privatization movement is successful 36 the constitutionality of private incarceration facilities will ultimately be tested in the courts.

At the outset, it is important to note this section will not attempt a comprehensive review of the history or present vitality of the nondelegation doctrine in federal and state courts. 37 Suffice it to say that the

34. See, e.g., Robbins, supra note 21, at 915-50; Note, supra note 13, at 656-60. Even the ABA has questioned the constitutionality of delegating prison operation to private corporations, see supra note 27 and accompanying text.

35. The only case to date, filed by Tennessee inmates and state correctional employees seeking a declaration that the recently enacted statutes providing for private prisons were unconstitutional, was dismissed for lack of standing because neither the prison guards nor the inmates were employed or housed at the facility which was subject to privatization. See Local 2173 Of The American Federation Of State, County, And Municipal Employees v. McWherter, No. 87-34-II, 1987 WL 11762 (Tenn. Ct. App. June 5, 1987).

36. Substantially more than half the states (at least 36) now contract with private firms for the provision of at least one correctional service or program. J. DiLuilio, Private Prisons 1 (National Institute Of Justice, United States Department Of Justice, April, 1988). The most frequent contracts are those for medical and psychological services, community treatment centers, construction, education, drug treatment, staff training and inmate counseling. Id.

Some commentators have suggested that while privatization was gaining momentum in the early 1980s, by 1989 the movement that “promised so much had delivered very little.” Folz & Scheb, supra note 10 at 98-99, 73 Judicature 98, 98-99 (1989). However, the nation's biggest correctional corporation, Corrections Corporation of America (CCA) shows continuing growth (revenues up 79% for the first half of 1990) and reports managing 5152 beds in 18 facilities nationwide. CCA News Release, March 16, 1990. CCA has the dubious distinction of contracting with the U.S. Marshal's Service to operate the nation's first private maximum-security detention facility to be built in Leavenworth, Kansas. CCA Second Quarter Report, 1990.

37. The body of case law on the proper delegation of legislative authority is broad and complex; I do not intend in this brief discussion to attempt a comprehensive analysis. The purpose of this section is merely to alert the reader to possible delegation problems implicated by Nebraska's prison privatization bill (LB 612). See supra note 1 and accompanying text.

For a thorough discussion of the development of the nondelegation doctrine in the state and federal courts as it affects the government's ability to contract for
United States Supreme Court has not invalidated state legislation on nondelegation grounds since 1936, and federal courts have accepted, sometimes without comment, delegation of federal powers to private actors. The nondelegation doctrine has developed differently in state and federal courts, and while the doctrine appears to be alive and well in state courts, commentators regard the development and treatment of the doctrine at the state level as generally unprincipled. Nondelegation will be discussed in this note only to the extent it appears to pose an obstacle to prison privatization in Nebraska. While the Nebraska Constitution nowhere expressly prohibits the legislature from vesting control of penal institutions in private hands, a number of constitutional and statutory provisions suggest such a delegation would be improper.

Nebraska Constitution article IV, section 19 directs that the Legislature is to determine who will manage and control the state's penal institutions, providing that "[t]he general management, control and government of all state charitable, mental, reformatory, and penal institutions is to be vested in the state Department of Correctional Services." Private management of prisons, see Robbins, supra note 21, at 915-50. Robbins notes although the nondelegation doctrine has not been employed by the Supreme Court to invalidate a delegation in more than 50 years, Id. at 919, there is some indication of renewed interest in the doctrine in dissenting and concurring opinions. Robbins concludes it is difficult to predict how the Supreme Court would treat delegation in the prison context because incarceration of criminals implicates life and liberty interests and the court may not apply principles announced in delegation cases which affected only property rights, making the question of constitutionality extremely close. Id. at 915.

38. In Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Supreme Court invalidated a federal statute which made binding on all miners a maximum and minimum wage agreed upon by a majority of miners. The court stated:

This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others ... And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.

Id. at 311.


40. See Robbins, supra note 21, at 914.

41. See D. Mandelker, D. Netsch & P. Salisch, State and Local Government in a federal System 598 (2d ed. 1983), states:

The nondelegation doctrine is alive and well in the state courts. Delegation of power objections are frequently made to state and local legislation, although a review of the state cases indicates that most delegations are upheld. State delegation cases are common but the decisions are unprincipled. Except for the conclusion that some state courts more frequently invalidate delegations of power than others, a principled basis for the application of delegation of power doctrine is difficult to find.

42. See Lawrence, supra note 39, at 647 (noting that nondelegation cases are inconsistent both within states and among states).
stitutions shall be vested as determined by the legislature.”

Pursuant to article IV, section 19, the Legislature has statutorily vested control and management of all penal institutions in the Department of Correctional Services, an independent agency of state government established for custody of and control of sentenced criminals. The express legislative purpose behind the Act which created the Department of Correctional Services was “to establish an agency of state government for the custody, study, care, discipline, training, and treatment of persons” in correctional institutions. It is clear that, to allow for any entity other than the Department of Corrections to maintain custody of convicted criminals, the present statutory scheme must be amended. What is not clear is whether such amendments could be made to harmonize with express legislative directives that the “Department of Correctional Services shall have oversight and general control of . . . all penal institutions.”

As originally introduced, LB 612 authorized the Director of the Department of Correctional Services (DCS) to contract directly with private parties for incarceration of those persons sentenced to serve time in the custody of DCS. As such, the bill contemplated delegating to the Director of DCS the power to determine who (in addition to DCS) would manage and control a penal institution, a power expressly reserved for the Legislature by article IV, section 19 of the Nebraska Constitution. However, this deficiency was corrected when the bill was amended to require the approval of the Legislature (and Governor) before allowing the director of DCS to enter into a contract for the private custody and maintenance of prisoners.

The primary delegation issue raised by prison privatization is the constitutionality of delegating to a private corporation the authority to manage and control a penal institution. The Nebraska Constitution, statutes and case law suggest the punishment of society’s criminals, achieved through restriction of their liberty, is a function which must be administered solely by the state.

Article XII, section 1 of the Nebraska Constitution provides in relevant part:

No corporations shall be created by special law, nor their charters be extended, changed or amended, except those corporations organized for . . . penal or reformatory purposes, which are to be and remain under the patronage and control of the state.

Thus, the Nebraska Constitution directs that if the legislature creates

43. NEB. CONST. ART. IV, § 19.
44. See NEB. REV. STAT. §§ 83-171, 83-901 (Reissue 1987).
45. NEB. REV. STAT. § 83-901 (Reissue 1987)(emphasis added).
46. See NEB. REV. STAT. § 83-906 (Reissue 1987).
47. See supra note 1.
48. NEB. CONST. ART. XII, 1.
a corporation for penal or reformatory purposes, such corporation is to remain under the control and patronage of the state. Clearly, private prison legislation is not an attempt to create a corporation but rather empowers the state to contract with an existing private-sector corrections firm for incarceration of state prisoners. Nonetheless, article XII, section 1 stands as a clear policy statement that those corporations which exercise penal or reformatory functions are to be and remain under the control and the patronage of the state. To the extent legislation is passed allowing private correctional firms to operate prison facilities outside the exclusive control of the state, such legislation may well contravene public policy concerns underlying article XII, section 1 of the Nebraska Constitution.

Further indicating that public policy requires the administration of punishment to remain solely with the state, the Nebraska Supreme Court has held unconstitutional a statute which had the effect of delegating to private persons the punishment to be assessed for a crime. In State v. Goodseal, the court determined the Nebraska Self Defense Act was an unconstitutional delegation of power to private persons because the Act did not fix the amount of force which could be exercised when resorting to justifiable self-defense, and thus had the effect of delegating to those asserting self-defense the power to determine the proper amount of force to be used. The court explained:

"The Legislature has delegated the fixing of the punishment to the person asserting self-defense which it cannot do. . . . Any attempt to delegate . . . such powers to private persons with the excesses that naturally flow when crime or punishment are placed elsewhere than with the state, is violative of the powers placed exclusively with the Legislature by our state Constitution."

Admittedly, private prison legislation does not delegate to private persons the authority to affix a punishment; however such legislation does delegate authority to administer court-ordered punishment by restricting the liberty of convicted criminals. The concern expressed in Goodseal with "excesses" that naturally flow when punishment is placed "elsewhere than with the state" is equally, if not more, justified in the private prison context, and strongly suggests public policy

49. Id. "Patronage" is defined as: "the control of or power to make appointments to government jobs or the power to grant other political favors". THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1058 (1981). It is clear a private prison corporation under contract to manage and control a prison facility is not under the "patronage" of the state, because, among other things, the state does not have power to appoint those who work for the private company.
51. Id.
53. State v. Goodseal, 186 Neb. at 367, 183 N.W.2d at 263.
54. Id. at 367-68, 183 N.W.2d at 263 (emphasis added).
55. See supra note 13.
concerns require the punishment of society's criminals be administered solely by the state.

Despite the Nebraska Supreme Court's general distaste for delegating the administration of punishment to private persons, there is case-law support for the proposition that contracting with the private-sector to fulfill a governmental duty does not, in all instances, offend the Nebraska Constitution. In *State ex rel. Creighton University v. Smith*, the Nebraska Supreme Court held: "The Nebraska Constitution does not prohibit the state from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose." At first blush, this language appears to end the inquiry into whether private prisons are constitutionally permissible in Nebraska, as the management of prisons is undoubtedly a governmental duty which further a public purpose. However, because *Creighton v. Smith* dealt only with the propriety of legislative appropriations to a private university, the holding may well be too narrow to have any applicability in the private prison context.

In *Creighton*, the court dealt with article VII, section 11 of the Nebraska Constitution, which provides in relevant part:

Notwithstanding any other provision in the constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof . . . .

The court determined article VII, section 11 did not prohibit the state from contracting with a private university for purposes of conducting cancer research, reasoning that payments for contracted services did not amount to appropriating public funds to a private school, and as such did not violate the constitutional prohibition against such appropriations.

The conclusional language in *Creighton* ought not quell doubts surrounding the constitutionality of contracting with the private sector for the incarceration of state prisoners since the court in *Creighton* did not confront the propriety of delegating a traditional governmental function to a private party. In fact, the court was not required to address delegation at all. Rather, the court considered whether payments made under a contract between the government and a private institution amounted to appropriating public funds to a private institution.

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57. *NEB. CONST.* art VII, § 11.
59. *Id.* at 690, 353 N.W.2d at 269.
60. There is a discernable difference between government contracting for private cancer research and contracting for private incarceration of state prisoners. While both further a public purpose, cancer research is by no means a function which historically has been performed by the state, and therefore simply fails to
While a perfunctory recitation of the language in Creighton would seem to provide support for the conclusion that private prisons are constitutionally permissible in Nebraska, such a conclusion might well be misplaced. Incarceration of criminals implicates fundamental life and liberty interests, and, if called upon to consider the propriety of private incarceration, the Nebraska Supreme Court may be unwilling to apply principles announced in a case addressing only the propriety of legislative appropriations to a private university for cancer research.

In short, private prison legislation in Nebraska is constitutionally suspect on a number of grounds. Not only is it subject to criticism as constituting an improper delegation of authority to administer court-ordered punishment, it may also be attacked as contravening express public policy by delegating an inherently governmental function, the incarceration of society's criminals, to private parties.

Even a finding that prison privatization does not offend the Nebraska Constitution should by no means be interpreted as an indication that it is wise to transfer the administration of punishment to private hands. As one commentator concluded: just as the prisoner should be obliged to know day by day, minute by minute he is in the custody of the state, perhaps too the state should be obligated to know that it alone is its brothers' keeper.

IV. POLICY CONCERNS

A. Will Private Prisons Save Taxpayers Money?

The most frequent, and possibly the most salient, claim made by proponents of prison privatization is that private prisons will be more efficient and less expensive, thereby saving taxpayers money. While there is a dearth of empirical data with which to support or refute this claim, even staunch supporters of privatization admit private prisons will not necessarily save taxpayers money or be less expensive to operate than prisons run by government.

The costs involved in corrections are relatively fixed. Inmates must be housed, fed and provided with appropriate medical care; guards must be trained and equipped; prison facilities must be main-

61. See Part IV infra.
62. Robbins, supra note 9, at 331.
63. See LOGAN, supra, note 6, at 76.
64. See, e.g., LOGAN, supra note 6, at 117 ("Private prisons will not necessarily be less expensive than those owned and run directly by the government.")
65. See Dilulio, supra note 13, at 3.
tained and kept extraordinarily secure. Many have commented that the tasks involved in corrections do not appear to be the type that allow for major innovations in technique, leaving little room for cost savings through improved efficiency. In fact, because labor costs generally represent more than 60% of a prison’s operating budget, some suggest that, in order to turn a profit, staff in private prisons must be cut dramatically.

In practice, the switch to private prisons has proven less costly for some and more costly for others. Examples of cost savings and cost overruns in both public and private prisons make it exceedingly clear that the performance of public prisons has not been invariably bad, and the performance of privately-run prisons has not been invariably good. At best, the public should remain skeptical of claims that private prisons will save taxpayers money. What data there is provides absolutely no basis from which to conclude private prisons will operate any more efficiently or at any lower cost to taxpayers than public prisons.

66. Id.
67. See Dilulio, supra note 13, at 3; Privatization Of Corrections: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 99th Cong., 2d Sess. 25 (1985)(statement of the American Federation of State, County and Municipal Employees):

Different correctional systems over the past decade have tapped every available source of correctional expertise, as well as the management skills of prestigious accounting firms and consulting sources like the Wharton School of Business to streamline manning rosters, limit posts, and contain overtime. All for naught. The fundamental business of corrections is supervision. Technical gadgetry and computerized scheduling have done little to lower the cost of such supervision.

69. Some Immigration and Naturalization Service facilities have proven less costly in private hands, with savings cited from 6% to 72%. See LOGAN, supra note 6, at 93. Santa Fe County, New Mexico saved 52% in 1987 after contracting with a private corrections corporation to run its jail. The savings were attributed to better use of the facility (the private firm leased unused space in the large jail facility to other jurisdictions). Id. Bay County Jail in Florida reported a 12% savings after going private. Id. Butler County Prison saved 5%—10% when it was privatized; savings were attributed to reduced overhead as the result of eliminating of 15 employees. Id.
70. Although some privatized Immigration and Naturalization Service (INS) facilities reported savings, the per diem cost of operating INS facilities was actually lower for those INS facilities operated by the federal government. Id. at 95-96. The Director of the Federal Bureau of Prisons reported it cost 40% more to house Youth Corrections Act offenders in the privately-operated facility than in its three public facilities. Id. at 96. In 1985, Alabama decided not to contract with private prison operators after a study of Florida’s privately-managed youth facility concluded that “privatization of correctional facilities in Alabama would significantly raise costs, not reduce them.” Id.
B. Dependency on Private Prison Providers

Even more discouraging than unpredictable cost savings is the possibility that a private prison firm will obtain contracts by "low balling" to procure a contract, and then operate the facility at a loss for a few years in order to establish governmental dependence on the private sector.\(^7\) Once dependency is established, the private firm is free to recover losses through cost overruns and increased charges\(^7\).2

Those who doubt the extent to which a private contractor for public services can successfully overrun costs, need only look as far as today's headlines for proof such overruns regularly occur.\(^7\)3 The defense industry, notorious for budget overruns, recently cancelled development of the A-12 aircraft; the project was eighteen months behind schedule and $1 billion over the contractually-fixed budget.\(^7\)4

Proponents of prison privatization respond to the issue of eventual dependency and potential cost overruns by pointing out that, if a private provider has performed unsatisfactorily or privatization becomes overly expensive, government is free to cancel the private prison contract when renewal time rolls around.\(^7\)5 Such a response ignores the realities of corrections and illuminates the numerous logistical problems raised by cancellation of a private prison contract. For instance, who maintains custody and control of inmates while the state switches from one private prison operator to another? What if, as a result of dependency upon a private provider, the state no longer has capacity to hold and care for prisoners? What if, due to the state's obviously inferior bargaining position (too many prisoners and no prison guards), it is unable to secure a contract with another private correctional firm for a reasonable fee? What does the state do with inmates if the prison facility is not only operated but also owned by the private prison corporation with which the state has canceled its contract? In short, the logistical nightmare of switching private prison

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\(^7\) The National Law Journal explains that private prison firms have been operating at a loss amounting to millions of dollars, and are expected to increase their rates dramatically once states get accustomed to having private firms handle the overcrowding crisis. Cheever, Cells For Sale, NAT'L L.J. Feb. 19, 1990 at 33, col. 2.

\(^7\)2 See Porter, The Privatisation of Prisons in the United States: A Policy That Great Britain Should Not Emulate, 29 HOW. J. CRIM. JUST. 65, 76 (1990)(reporting British study of U.S. private prisons concluded "Private companies are not, at the present time making profits from privatisation . . . they are clearly in a "loss leader" situation. . . . The object appears to be to establish the respective state's dependence on the private sector and then to increase charges.") See also supra note 23 (citing two examples of cost overruns by private correctional firms).


\(^7\)4 Lincoln Journal-Star, Jan. 8, 1991, supra note 72.

\(^7\)5 See LOGAN, supra note 6, at 221-29.
operators midstream, not to mention the cost of such a switch, may
discourage conscientious contract enforcement and encourage states to
renew contracts with private prison corporations in spite of significant
cost increases.

To the extent dependency on private prison operators does occur,
and even supporters of prison privatization concede the possibility,76
concerns about private operators going bankrupt become very real.77
Perhaps even more worrisome is the realization that, even if the pri-
ivate firm never files bankruptcy, the company could effectively use
the threat of bankruptcy to gain governmental concessions. Also
troublesome is the fact that if bankruptcy is filed, the “automatic stay”
provision78 would prevent inmates from filing lawsuits against the
debtor-company and would stay any such suits already instituted at
the time of the bankruptcy filing, effectively foreclosing inmate reme-
dies against the private company for civil rights violations.

Prison operation is not a short-term business. Privatization of
prison facilities generates reliance on the private sector which not
only weakens the government’s bargaining position in subsequent ne-
gotiations, but threatens public coffers by making it impractical to
sever the relationship with the private provider in the event privatiza-
tion proves more costly than publicly-operated facilities.

C. The Profit Motive

Doubtless there is money to be made from the incarceration of the
nation’s criminals—roughly $10 billion dollars worth79. The nation’s
biggest private prison contractor, Corrections Corporation of America
(operating twenty-one facilities nationwide)80, reports an expected an-
nual revenue of $4 million dollars from a 256-bed minimum-security

76. See LOGAN, supra note 6, at 229: “It is not inevitable that the government will
become dependent on contractors . . . but it can happen.”
concern over prisoners’ fate should a private prison file bankruptcy). See also In
re A & D Care, Inc., 90 B.R. 138 (Bankr.W.D.Pa. 1988)(In that case, the private
prison contractor of a minimum security prison facility in Pennsylvania filed
bankruptcy. The Bankruptcy court permissively abstained on grounds that the
propriety of private prisons had not been litigated in Pennsylvania courts nor had
the question of delegation of authority to parties other than the prison board been
litigated and it was not certain what result would be reached by the state
supreme court.); Coughlin, THE NEW YORK EXPERIENCE, DOES CRIME PAY?
American Federation of State, County, and Municipal Employees (1985) p.32.
Coughlin reports that in 1978, the New York Department of Mental Retardation
contracted with a private agency to run a substantial part of a large facility.
Three years later the company was $17 million in debt and filed bankruptcy.
79. Comment, supra note 9, at 254. See also Private prisons record most profitable
facility in Mason, Tennessee,\textsuperscript{81} in excess of $5 million annually from a 610-bed medium-security facility in Winnfield, Louisiana,\textsuperscript{82} and more than $6 million annually from a 640-bed medium-security facility in Nashville, Tennessee.\textsuperscript{83}

While the motivation of those who punish may be irrelevant to the effectiveness of the punishment\textsuperscript{84}, the profit motive is certain to have an effect on both the cost and quality of incarceration as well as the rate at which we as a society incarcerate those who violate our laws. Although it has been suggested the negative response to private prisons stems more from a growing distaste for incarceration than from disapproval of the profit motive\textsuperscript{85}, many opponents of private prisons are concerned private prison companies are "more interested in doing well than doing good."\textsuperscript{86} Fueling that concern are statements like the following, made by a private prison official: "We'll hopefully make a buck at it. I'm not going to kid any of you and say that we're in this for humanitarian reasons."\textsuperscript{87} While the honesty of the statement is to be admired, the unseemliness of profiting from punishment is difficult to shake—and perhaps with good reason.

Incentives created by for-profit prisons are not necessarily compatible with furthering sound correctional policy or the public interest. For example, operating prisons with a profit motive creates no incentive to reduce overcrowding, especially if prison contractors are paid, as they often are, on a per-prisoner basis.\textsuperscript{88} Private prison contractors have a vested interest in assuring there are plenty of prisoners to house. Such an interest leads to concerns that, in the interest of profit, a private prison lobby will launch and support campaigns designed to make a public which is already in favor of more and longer sentences even more fearful of crime.\textsuperscript{89}

Of additional concern to those who oppose privatization is the possibility that, in the interest of profit, private prison operators will cut costs at the expense of humane treatment, carefully keeping conditions of confinement to only the minimal standards required by law.

\textsuperscript{81} CCA News Release, Mar. 16, 1990.
\textsuperscript{82} CCA News Release, Feb. 22, 1990.
\textsuperscript{83} CCA News Release, Oct. 8, 1990.
\textsuperscript{84} See LOGAN, supra note 6, at 71-72 ("Strictly speaking, the motivation of those who apply a punishment is not relevant either to the justice or to the effectiveness of the punishment.").
\textsuperscript{85} See LOGAN, supra note 6, at 72.
\textsuperscript{86} Robbins, supra note 9, at 326.
\textsuperscript{87} Robbins & Crane, supra note 19, at 38.
\textsuperscript{88} See Comment, supra note 9, at 259.
\textsuperscript{89} Proponents of prison privatization have responded to the lobbying concern with a casual "so what?," arguing that even if such lobbying took place it would do nothing more than demonstrate responsiveness to the public's demand for more and longer sentences. See, e.g., Savas, Privatization and Prisons, 40 Vand. L. Rev. 889, 898 (1987).
While it is true private prison operators will be concerned about upholding contractual requirements and maintaining constitutional conditions to avoid expensive inmate litigation, there are an endless number of potential savings for the entrepreneur seeking to reduce marginal costs and increase profits, many of which would be extremely difficult to observe and monitor in a private facility where public access is limited and visibility reduced. Fear that those who operate private prisons are motivated only by profit and lack concern for inmates' well-being is accentuated by proposals, like one made by a private firm in Pennsylvania, to build a 720-bed medium-security facility on a toxic-waste site that had been purchased for one dollar.90

The profit motive may also be incompatible with the laudable goal of decreasing recidivism. Is a "successful" private prison one that is always full, or one that is empty? If a successful prison is an empty prison, then private prisons would be in the paradoxical position of constantly striving to put themselves out of business91. Such is unlikely to be the case because, after all, private prison corporations must answer to investors. Full prisons translate into good investments; the pertinent question, however, is for whom?92

D. Increased Reliance on Incarceration

The United States has the dubious distinction of being the number one incarcerator in the world, with a larger share of its population behind bars than any other country.93 Nationwide, per capita spending on incarceration at state and local levels has grown faster in the past twenty-five years than government spending in most other areas, including public welfare, health care, police, and not surprisingly, education94. The United States Sentencing Commission projects new sentencing guidelines and tougher penalties for drug-law violations will result in a 119% increase in the federal prison population by 1997.95 In light of the rate at which we as a country incarcerate and the amount of money we spend doing so, the concept of prison privatization should

92. It is interesting to note that as incarceration rates have increased in Nebraska, so has the rate of recidivism. See NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ADULT STATISTICAL REPORT 1, 102 (1990). While this is not necessarily indicative of an empirical relationship between incarceration and recidivism, it does raise questions about the ultimate effect on society of incarcerating so many offenders, rather than utilizing alternative forms of punishment.
94. See LOGAN, supra, note 6, at 9.
95. Lincoln Journal-Star, supra note 93, at col. 5.
not be judged without also exploring its impact on public willingness to utilize sentencing alternatives.

While incarceration effectively incapacitates would-be offenders, it is by far the most expensive form of punishment both from a financial and social standpoint. Americans pay more than $17 million a day to operate prison facilities, with estimates ranging up to $60 a day per inmate. Incarceration has high social costs not only to offenders who are separated from their families and jobs, but also to the public welfare system which is called upon to support dependents of those who are incarcerated. The rehabilitative potential of incarceration has proven weak, and the same sentencing policies which have served to make us the world’s leading incarcerator have also failed to make us a safer nation. One must question, in light of these statistics, the wisdom of continuing to rely so heavily upon imprisonment as the punishment of choice.

The prison privatization industry is driven by profit and an admitted desire to further expand its operations. By its very nature, prison privatization increases reliance on incarceration by providing more prison bedspace and making it feasible to incarcerate more criminals. To the extent society continues to rely on incarceration, and privatization serves only to increase that reliance, it fails to utilize sentencing alternatives which are less expensive, and perhaps more effective than traditional incarceration.

It goes almost without saying that the clamor for privatization

97. See Robbins, supra note 9, at 325.
98. In a 1981 address at the University of Nebraska entitled More Warehouses, or Factories with Fences?, Warren E. Burger suggested too many prisons serve only as human “warehouses” which make a high rate of recidivism inevitable. See supra note 16 at 111, 114-15. See also supra note 91.
99. Rep. John Conyers of Michigan, chairman of the House Government Operations Committee, stated: “We’ve got to stop jailing and start rehabilitating . . . . We can build all the jails we think we need and slam the doors down on thousands of people, but it won’t make a bit of difference until we address the fundamental causes of crime.” Lincoln Journal-Star, supra note 92, at col. 4.
100. In its 1989 Annual Report, the Correction Corporation Of America makes an ominous statement: “Doubling our beds is there for us to accomplish.” CCA 1989 ANNUAL REPORT 9.
101. For example, the average cost per day of incarcerating an offender in Nebraska is $44.74, while the average cost per day for placing an offender on probation is $1.04. NEBRASKA JUSTICE FELLOWSHIP FACT SHEET (compiled with information from DCS). While it costs nearly $15,400 a year to incarcerate a prisoner in the Omaha Correctional Center, it costs only $9190 to house a prisoner in the Omaha Correctional Center Work-Release Unit. DCS ANNUAL REPORT, supra note 6, at 29. See also Lincoln Journal-Star, supra note 93, at col. 6 (“Alternative punishments are less costly than imprisonment.”).
102. See Porter, supra note 71, at 77 (“[Privatization] is a distraction from what should
would subside if the nation's reliance on incarceration decreased. With the number of criminals incarcerated continually on the rise, it may be that the real solution to the present prison crisis does not lie in the privatization of corrections, but in rethinking our entire approach to punishment. By its very nature, prison privatization is inconsistent with such a solution.103

V. CONCERNS OF IDEOLOGY AND PROPRIETY

While the focus thus far has been on the questionable constitutionality of prison privatization and some of the policy problems it presents, this section explores briefly the philosophical concerns underlying prison privatization. Philosophical concerns often go unaddressed in the privatization debate, yet they likely contribute to the general uneasiness which surrounds the prospect of placing custody and control of prisoners in private hands. Even if, contrary to the earlier discussion, private prisons could operate at substantial savings to the public without compromising prisoner's rights or correctional goals, one must still ask whether private prisons are proper or desirable as a matter of principle.

It has been said it is less difficult to persuade people that prison privatization is philosophically wrong than to first persuade them such philosophical questions have any place in the privatization debate at all.104 Many simply reject the importance of philosophy and ideology, believing such exercises are best left to those who exist in academia rather than reality. The prison privatization debate, however, ought not take place outside the realm of principle, for central to the debate itself are questions of where government gets the power to punish and whether punishment is legitimate when exercised by an entity other than government.

John Locke posited that, in the state of nature, individuals have the inherent right to punish their aggressors.105 Because disagreements occur over interpretation and application of natural law,106 people 'contract' to form a state, thereby turning over to the state their

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103. Id. ("The relatively high rates of imprisonment... have already been mentioned, and the creation of increased capacity may be seen as a discouragement to finding alternatives to incarceration.").

104. Dilulio, supra note 13, at 4.

105. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, Chapter II, 5-6 (J.W. Gough ed. 3d ed. 1966). Locke explains that in the state of nature, "every man hath a right to punish the offender, and be executioner of the law of nature." Id. at 6. See also LOGAN, supra note 6, at 52 (discussing Locke's contract theory).

106. "[T]he end of civil society [is] to avoid and remedy those inconveniences of the state of nature which necessarily follow from every man's being judge in his own case..." J. Locke, supra note 105, at 45.
inherent power to create and enforce rules in return for the state's promise of protection.\textsuperscript{107} Under this social contract theory,\textsuperscript{108} members of society agree to accept the laws of the state and allow the state to punish them for violations.

The power of punishment, therefore, has been placed in the hands of the state through social contract, and once an entity other than the state seeks to punish for an offense, the social contract is violated.\textsuperscript{109} To remain legitimate, the power to administer punishment and thereby restrict the liberty of those who violate society's laws must remain solely in the hands of public authorities.\textsuperscript{110}

Interestingly, although the profit motive has relevance when discussing the wisdom of prison privatization, it is irrelevant to the question of whether private prisons are proper in principle. Philosophical questions of whether it is proper for government to delegate the administration of punishment to the private sector do not turn on whether those who administer punishment ought to profit therefrom. Accordingly, even if a private prison corporation were to offer its services for free, the philosophical case against prison privatization would remain unaltered.\textsuperscript{111}

The creation and enforcement of laws and the punishment of those who violate the law are perhaps the primary \textit{raisons d'être} of government.\textsuperscript{112} Simply put, it is philosophically improper for government to abdicate its fundamental responsibility, the administration of justice, to private parties.

\section*{VI. CONCLUSION}

Privatization is an issue which has energized in part because we, as a society, continue to demand that more criminals be incarcerated and their sentences be lengthened, while simultaneously refusing to support legislative attempts to appropriate funds to provide for the result-

\begin{footnotes}
\item[107.] Locke states: "And thus the commonwealth comes by a power to set down what punishment shall belong to the several transgressions which they think worthy of it, committed amongst the members of that society (which is the power of making laws) as well as it has the power to punish any injury done unto any of its members . . . ." \textit{J. Locke, supra} note 105, at 44.
\item[109.] As Locke explains, the legislature can not transfer the power of making and enforcing laws "to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others." \textit{J. Locke, supra} note 105, at 72. \textit{See also Neb. Const. Art. I Sec. 1}, providing in relevant part that to secure the rights enumerated in article I section 1, "governments are instituted among people, deriving their just powers from the consent of the governed."
\item[110.] \textit{See Dilulio, supra} note 13, at 5.
\item[111.] \textit{Id.}
\item[112.] \textit{See Cikins, supra} note 18, at 458 (citing \textit{National Institute of Justice, United States Department of Justice, The Privatization of Corrections} 72 (1985)).
\end{footnotes}
ing onslaught of prisoners. Unfortunately, our reliance on incarceration is unlikely to diminish in the near future, and our prison system is in a state of crisis. While the clamor for privatization demonstrates an awareness that conditions in the nation’s prisons are unacceptable, it is imperative that prison privatization not be misunderstood as prison reform.

Prison privatization, with its questionable constitutionality and difficult policy problems, will not reform our troubled prisons. With numbers of incarcerated criminals increasing annually, solutions to the prison crisis lie not in privatization of corrections, but in rethinking our entire approach to punishment. Relinquishing management of our prisons to the private sector is not only unwise and improper, but it serves to mask the true source of the crisis—which is not overcrowding, but overreliance on incarceration.

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113. See supra note 10.