

## **The Catch-22 in Prison Privatization: The Problem with the Solution**

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**Abstract:** A step into just about any state prison in the United States reveals an institution plagued by over-population, with just about every prison running at more than 100% capacity. The problem, of course, is not new but one that has received great attention. In the past decade or so the solution has been privatization of state prisons. Proponents of privatization have pushed forth the idea that private institutions are the solution to prison overcrowding. However, by looking to for-profit private institutions as a means to resolving the problems of the penal system, are legislators in fact ensuring that the problems continue? This article will show that there is indeed a “Catch-22.” Prison privatization is the solution to a problem, which if solved would render the need for privatization obsolete. Thus, if private institutions actually solved the prison population crisis there would be no need for privatization and no profits. The end result is that the privatization industry works to ensure the penal system’s problems continue and that they, the private companies, continue to exist as the solution.

## **The Catch-22 in Prison Privatization: The Problem with the Solution**

There was only one catch and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

"That's some catch, that Catch-22," he [Yossarian] observed.

"It's the best there is," Doc Daneeka agreed.<sup>1</sup>

### **I. INTRODUCTION**

The overcrowding plaguing the U.S. penal system has been well documented over the past decade or so.<sup>2</sup> Studies as to the cause of the current crisis have been published and solutions sought.<sup>3</sup> Yet the problem has only worsened with no end to overcrowding in sight.<sup>4</sup> Legislators have thus sought to remedy the problem through the use of a method rooted in western and especially American history. While never used as extensively as in recent years, privatization of various prison operations and at times

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<sup>1</sup> JOSEPH HELLER, *CATCH-22* (Simon & Schuster 1996) (1961).

<sup>2</sup> See Pamela M. Rosenblatt, *The Dilemma of Overcrowding in the Nation's Prisons: What are Constitutional Conditions and What Can Be Done?*, 8 N.Y.L.SCH. J. HUM. RTS. 489 (1991); see also Terrence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313 (1983); *infra* note 19; *infra* notes 76-120.

<sup>3</sup> *Id.*

<sup>4</sup> See *infra* notes 76 -120 and accompanying text regarding the continuing prison population problem.

whole facilities has been a major part of the history of the U.S. penal system.<sup>5</sup> Thus, when overcrowding in prison facilities emerged as a crisis, privatization was not a far fetched potential solution.<sup>6</sup> Those in favor of privatization argued that it would save the government ever stretching resources, made even scarcer by the growing prison population;<sup>7</sup> they argued that privatization would be able to provide higher quality of confinement and ultimately resolve the overcrowding problem.<sup>8</sup> Yet privatization on a whole sale level brings its own issues to the table, many of which have been discussed extensively, including whether privatization does in fact provide higher quality of confinement,<sup>9</sup> whether it is in fact cost efficient, and whether privatization can provide better accountability.<sup>10</sup> Additionally, problems and issues regarding the constitutionality of privatization have been raised though not necessarily answered.<sup>11</sup> There is, however, one particular issue that has thus far received limited coverage. That issue is whether for profit privatization of prisons creates a conflict of interest? Or rather: By allowing for profit privatization is there a “Catch-22”?

I phrase the issue in terms of Joseph Heller’s *Catch 22* because the problem inquires into the circularity of the privatization issue: By looking to for-profit private institutions as a means to resolving the problems of the penal system, are legislators in fact ensuring that the problems continue? This article will show that there is indeed a

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<sup>5</sup> See *infra* notes 14-75 and accompanying text regarding the history of privatization in the United States penal system.

<sup>6</sup> *Id.*

<sup>7</sup> See *infra* notes 76-119 and accompanying text regarding the rationale behind the movement towards prison privatization in modern United States.

<sup>8</sup> *Id.*

<sup>9</sup> See *infra* notes 120-144 and accompanying text regarding issues and problems that accompany prison privatization

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

“Catch-22.” Prison privatization is the solution to a problem, which if solved would render the need for privatization obsolete. Thus, if private institutions actually solved the prison population crisis there would be no need for privatization and no profits. The end result is that the privatization industry works to ensure the penal system’s problems continue and that they, the private companies, continue to exist as the solution.

The first part of this article summarizes the extensive history of privatization in America including the early history and various forms of privatization starting from before American independence. It also discusses the rationale behind the resurgence of prison privatization, specifically the prison population crisis and finally it discusses some of the issues and concerns that accompany the use of privatization.

Part two of this comment makes the point that the privatization industry partakes in the creation of state legislation that increases the prison population. This part of the comment starts by analyzing the prison privatization industry and how it provides an incentive for various institutions within the industry to play a part in the political process. It then specifically looks at the Corrections Corporation of America and its involvement with American Legislative Executive Council in the creation of tough on crime legislation. Finally, part three concludes that for-profit prison privatization does not solve prison overcrowding but in fact ensures that overcrowding continues in order to guarantee its existence.

## **II. BACKGROUND**

Over the past several years the government, both state and federal has sought to outsource its duties of managing the incarcerated criminal population to the private

sector.<sup>12</sup> While the concept is not new, it has become a much more used option in managing prisons, especially for state governments.<sup>13</sup>

a. *History*

The involvement of private enterprises in the American correctional services has an extensive history dating to before American Independence. The persistent use of privatization seemingly stems from an Anglo-American population that found itself in direct conflict with its government's exercise of power, thus breeding skepticism of governmental authority.<sup>14</sup>

The need to transport felons from England to the English Colonies provided an opportunity for private parties to make money. Convicted felons, pardoned on the condition of being sold into servitude arrived shortly after English colonists in 1607.<sup>15</sup> They were transported to America by private entrepreneurs.<sup>16</sup> This means of transporting felons provided the British government with an efficient way to decrease the English penal system's population without having to spend too much.<sup>17</sup>

Prisoners were required to pay for their incarceration in Colonial times, a product of an entrepreneurial system that predominated.<sup>18</sup> Naturally those who were too poor to

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<sup>12</sup> Dana Joel, *A Guide to Prison Privatization*, Heritage Research (The Heritage Foundation, Wash., D.C.), May 24, 1988, available at <http://www.heritage.org/Research/Crime/BG650.cfm>.

<sup>13</sup> *Id.*

<sup>14</sup> James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons*, Bureau of Justice Assistance, 9 (2001). The skepticism of governmental powers was prominently displayed as a result of Great Britain's governing of the American Colonies, which then lead to the American Revolution.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Peter J. Duitsman, Comment, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C.L. REV. 2209, 2210 (1998).

afford their “rent” were forced into a type of slavery, working for the prison so that they could pay off their debts.<sup>19</sup>

By the 18<sup>th</sup> century an alternative to servitude emerged.<sup>20</sup> The American Colonies, which had based much of its penal system on English custom, began to contract supervisory duties to private contractors for a fixed fee.<sup>21</sup> A head-jailer, though employed by the government, was in fact deemed an independent operator since he made profits off of the operation of prison facilities by employing the inmates as laborers and craftsmen.<sup>22</sup> However, while technically employed, the inmates of such facilities rarely received any income.<sup>23</sup>

Payments were extracted for special services, such as better meals or other privileges. Some money was given to the jailer (often the sheriff) for basic services. But it was widely accepted that jailers could charge additional money for virtually any type of special benefits.<sup>24</sup>

In some states where contracts to lease out prison labor existed, companies provided raw materials and inmates produced products that were then sold by private companies.<sup>25</sup> For instance in 1790, in hopes of greater economic profits, the Pennsylvania Walnut Street Jail supervised prisoners as they labored to transform raw materials purchased by private organizations into sellable products.<sup>26</sup> Other states leased

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<sup>19</sup> *Id.*

<sup>20</sup> Austin & Coventry, *supra* note 14, at 9.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> CLAIR A. CRIPE & MICHAEL G. PEARLMAN, LEGAL ASPECTS OF CORRECTIONAL MANAGEMENT 378 (Jones & Bartlett Publishers 2d ed 2004) (1997).

<sup>25</sup> Austin & Coventry, *supra* note 14, at 10.

<sup>26</sup> *Id.* The venture despite its hopes of attaining economic profits was an economic disappointment. *Id.*

their inmates out to private farms or companies.<sup>27</sup> In 1816, under pressure from the New York Legislature to ensure that it was self sufficient, the Auburn Prison “[a]ctively contracted with private companies who willingly paid for the cheap prisoner labor.”<sup>28</sup> Soon after, Louisiana, California, and Texas followed New York’s lead with slight variations.<sup>29</sup>

Thirteen states had contracts to lease out prison labor with private enterprises by 1885.<sup>30</sup> These private enterprises had lobbied and persuaded government officials that prisons would operate at a much more efficient level by such enterprises, which had previous experience with law enforcement.<sup>31</sup> They argued that private entities could run prisons cheaper and that there would be less corruption.<sup>32</sup> They claimed that private institutions would be better at rehabilitation than the government while being financially rewarding at the same time.<sup>33</sup>

Prison overcrowding and the cost of managing prisons had provided an incentive for privatization. In fact by the mid 1880’s Connecticut, Florida, Massachusetts, and Kentucky began to privatize prisons to some degree.<sup>34</sup> Further, Arkansas, Oklahoma, and Michigan have all at one point in time either leased prisons out to private firms or have had prisons run by private firms.<sup>35</sup>

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<sup>27</sup> *Id.* Texas for instance passed legislation in 1860’s allowing inmate labor to be contracted out to the private sector. *Id.*

<sup>28</sup> Duitsman, *supra* note 18, at 2214.

<sup>29</sup> *Id.* Louisiana leased an entire prison to the private sector. *Id.*

<sup>30</sup> Robert D. McCrie, Privatizing Corrections: The Delicate Balance *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 19-32 (G. Bowman, S. Hakim & P. Seidenstat eds., Transaction Publishers 1993).

<sup>31</sup> Austin & Coventry, *supra* note 14, at 10.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *See* Duitsman, *supra* note 18, at 2215.

The lack of any independent oversight or monitoring institutions permitted corruption and bribery to take over the convict lease system.<sup>36</sup> Conditions in private prisons had become horrific,<sup>37</sup> “work[ing] inmates to death, beat[ing] or kill[ing] them for minor rule infractions, or fail[ing] to provide them with the quantity and quality of life’s necessities (food, clothing, shelter).”<sup>38</sup> As a result, investigations into cruelty and mismanagement were conducted by states throughout much of the country.<sup>39</sup> Additionally, public support for rehabilitation of criminals grew, demanding greater efforts towards the use of prisons for reforming prisoners as opposed to merely imprisoning them.<sup>40</sup> Public support resonated with the legislature and in 1905, President Theodore Roosevelt signed an executive order prohibiting the employment of criminal labor on federal projects.<sup>41</sup> The Hawes-Cooper Act in 1929 gave states the choice of banning the importation of inmate products from other states.<sup>42</sup> During the Great Depression, the federal and state governments passed laws curtailing the use of inmates in private enterprises.<sup>43</sup>

By the 1920’s America’s ideology of privatization as a means of managing prisons was replaced with one that believed in greater governmental involvement.<sup>44</sup> The

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<sup>36</sup> *Id.* at 2215-16.

<sup>37</sup> See John J. DiIulio, Jr., Private Prisons 2-3, Nat’l Inst. of Justice Crime File Study Guide No. NCJ-104561, (1988). Meal menus for prisoners included “spoiled beef, maggoty hams, and coarse bread.” Kenneth Lamont, *Chronicles of San Quentin* 45 (1961).

<sup>38</sup> Duitsman, *supra* note 18, at 2216.

<sup>39</sup> See Austin & Coventry, *supra* note 14, at 11.

<sup>40</sup> N. Miller & W. Jensen, *Reform of Federal Prison Industries*, 1 *Justice System Journal* 1, 13 (1974).

<sup>41</sup> See Austin & Coventry, *supra* note 14, at 11.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

end of convict leasing programs was replaced with state-run institutions.<sup>45</sup> American correctional services were almost entirely provided by the government and at the government's expense.<sup>46</sup> Statutes were enacted, delegating administrative functions to government agencies, staffed by government employees.<sup>47</sup> However the financial tolls on the government eventually lead to the privatization of certain prison services.<sup>48</sup> For instance, food preparation, vocational training, inmate transportation, medical services, dental services, and mental health services were contracted out to private non-profit and for-profit institutions.<sup>49</sup>

In the 1970s, privatization of prisons re-emerged as a means of managing correctional facilities.<sup>50</sup> The operation of juvenile correctional facilities were first to be privatized.<sup>51</sup> This was perhaps a response to the Juvenile Justice and Delinquency Act of 1974, which encouraged communities to find alternative, non-traditional means of incarcerating juvenile delinquents.<sup>52</sup> Pennsylvania was the first state to contract the entire operation of a high-security facility housing male juvenile delinquents out to a private institution.<sup>53</sup> Control of the Weaversville Intensive Treatment located in North Hampton, Pennsylvania was given to RCA services in 1976.<sup>54</sup> Florida followed Pennsylvania, but

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<sup>45</sup> *Id.*

<sup>46</sup> See Austin & Coventry, *supra* note 14, at 11.

<sup>47</sup> See Cripe, *supra* note 24 at 381.

<sup>48</sup> See Austin & Coventry, *supra* note 14, at 11.

<sup>49</sup> *Id.*

<sup>50</sup> See Austin & Coventry, *supra* note 14, at 11.

<sup>51</sup> Alexis M. Durham, The Future of Correctional Privatization: Lessons from the Past *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 36 (G. Bowman, S. Hakim & P. Siedenstat eds., Transaction Publishers 1993).

<sup>52</sup> Patrick Boyer & David E. Pozen, The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management, 48 JLECON 549, 550 (2005).

<sup>53</sup> See Austin & Coventry *supra* note 14, at 12; See Duitsman *supra* note 18 at 2217.

<sup>54</sup> See Austin & Coventry, *supra* note 14, at 12.

not until 1982.<sup>55</sup> The trend towards privatizing facilities holding juveniles has continued in the United States.<sup>56</sup>

In the 1980s the United States Immigration and Nationalization Services (INS) also looked to privatization as a means of holding illegal aliens entering into the country.<sup>57</sup> INS had contracts with two private companies for the detention of illegal aliens by the end of 1984.<sup>58</sup> At the end of 1988, there were seven private INS detention facilities and they held almost 30% of illegal aliens in INS custody.<sup>59</sup> One of the private companies with which the INS contracted was the Correctional Corporation of America (CCA), which was incorporated in 1983.<sup>60</sup>

The CCA is the largest private prison corporation and its history outlines much of the growth in prison privatization over the past twenty years, especially since it has been the leader in prison privatization.<sup>61</sup> CCA's initial ventures into privatization thus revolved around immigration facilities and juvenile detention centers.<sup>62</sup> In 1984, for instance, the CCA assumed management of a non-secure juvenile facility located in Memphis, Tennessee.<sup>63</sup> Then in 1989 it designed, built, and managed the Shelby

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<sup>55</sup> Charles Logan & Sharla Rausch, *Punishment for Profit: The Emergence of Private Enterprise Prisons*, JUSTICE QUARTERLY 2(3), 303, \_ (Sept. 1985).

<sup>56</sup> See Austin & Coventry, *supra* note 14, at 12. By 1990 almost 90 percent of states had at least one contract with a nonprofit private corporation and 60 percent of states had at least one contract with a for-profit corporation to operate a juvenile correctional facility. Robert B. Levinson & William J. Taylor, *ACA Studies Privatization in Juvenile Corrections*, 53 CORRECTIONS TODAY 242, 248 (1991)

<sup>57</sup> See Austin & Coventry, *supra* note 14, at 12.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Corrections Corp. of America, <http://www.correctionscorp.com/ccahistory.html> (last visited Dec. 27, 2006)

<sup>61</sup> See Michael A. Hallett, Race, Crime, and For-Profit Imprisonment, PUNISHMENT & SOCIETY 4(3), 369 (2002).

<sup>62</sup> *Id.*

<sup>63</sup> See Corrections Corp. of America, *supra* note 60.

Training Center for juveniles.<sup>64</sup> By the late 1980s and early 1990s CCA had expanded to contracting for the right to manage various facilities, stretching to even medium-security prisons.<sup>65</sup> CCA's Winn Correctional Center, built in 1990, was the first medium-security private prison in the United States.<sup>66</sup> Located in Winn Parish, Louisiana, the center was designed, financed and built by the state.<sup>67</sup> Soon after, CCA was making contracts to not only design and build prisons but to manage maximum security prisons.<sup>68</sup> In 1992, CCA was responsible for the first maximum security private prison facility under direct contract with a federal agency, when it designed and built the 256-bed Leavenworth Detention Center, which the company operates for the U.S. Marshals Service.<sup>69</sup>

The trend towards privatization in the United States is made all the more obvious when looking at CCA. Today CCA is a publicly traded company on the New York Stock Exchange (NYSE) and holds 52 percent of all privatization contracts.<sup>70</sup> It has approximately 69,000 beds in 63 facilities, including 38 owned facilities, under contract for management in 19 states and in the District of Columbia.<sup>71</sup> Additionally there are several other companies similar to CCA that hold the remainder of private prison

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<sup>64</sup> *Id.* (noting that the facility was also located in Memphis, Tennessee).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Corrections Corp. of America, *supra* note 60.

<sup>70</sup> See Hallett *supra* 61 at 376.

<sup>71</sup> See Corrections Corp. of America, *supra* note 60.

contracts.<sup>72</sup> In total, today there are 158 private facilities in the U.S.<sup>73</sup> located in 30 states, Puerto Rico, and the District of Columbia.<sup>74</sup>

*b. Overcrowding and The Rationale for Privatization in Modern America*

Not surprisingly, the very same reasons that lead to prison privatizations earlier in American history led to the resurgence in privatizing prisons again, during the 1980's.<sup>75</sup> The high costs of managing prisons and an increasing problem with prison overcrowding have led to renewed support for prison privatization.<sup>76</sup> Moreover, the public support for prisoner rehabilitation that sounded the death knell for privatization during the 1920s turned into public frustration, as it became more and more obvious that those who had been incarcerated and freed were returning to the prison system within a short period of time.<sup>77</sup>

Claims that the government is incapable of satisfactorily managing prison facilities have also contributed to support for privatization as a solution.<sup>78</sup> The tremendous increase in privatized facilities is rooted in the public discontent with the rehabilitation failures of the penal system during the 1980's.<sup>79</sup> However, the failure to

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<sup>72</sup> See Hallett *supra* 61 at 376.

<sup>73</sup> Austin *supra* note 14 at iii. Of the 158 private facilities, there are currently 43 in Texas, 24 in California, and 9 in Colorado. *Id.* at 4.

<sup>74</sup> C.W. Thomas, *A "Real Time" Statistical Profile*, Gainesville: University of Florida, Department of Criminology, Law and Society, available at <http://www.crim.ufl.edu/pcp/>. Texas has the most private prisons, with 43; and California has the second most with 24. *Id.*

<sup>75</sup> See Douglas W. Dunham, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L.REV. 1475 (1986) (discussing the constitutionality of prison privatization).

<sup>76</sup> See Austin & Coventry, *supra* note 14 at 13.

<sup>77</sup> *Id.*

<sup>78</sup> See Dunham *supra* note 75 at 1477, 1478.

<sup>79</sup> See Austin & Coventry, *supra* note 14 at iii.

rehabilitate is partly due to overcrowding in prison facilities,<sup>80</sup> which additionally creates a greater pull on government resources.<sup>81</sup> Thus, while there are several reasons why privatization has gained support they are mainly rooted in overcrowding.

As of June 30, 1995 the U.S. inmate population was 1,104,074.<sup>82</sup> As of June 30, 2005 the inmate population in both federal and state prisons was 2,186,230.<sup>83</sup> Such an increase has led to prison facilities that are filled to 20% over capacity.<sup>84</sup> Additionally, the United States currently has an incarceration rate of 724 per 100,000 residents, which is most in the world.<sup>85</sup> In fact, in recent years there have been myriad of cases in federal circuit courts that have found prisons in violation of the Constitution due to overcrowding.<sup>86</sup>

The overcrowding of prisons, while a persistent problem in the United States' penal system has only recently become an unmanageable ordeal.<sup>87</sup> There are several

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<sup>80</sup> See *Carty v. Schneider*, 986 F. Supp. 933, 935 (D.V.I. 1997) (requiring the reduction of a prison's population to improve its unconstitutional conditions); *Albro v. County of Onondaga*, 627 F. Supp. 1280, 1288 (N.D.N.Y. 1986) (same); *Gates v. Collier*, 423 F. Supp. 732, 743-44 (N.D. Miss. 1976) (same); see also *Battle v. Anderson*, 564 F.2d 388, 396 (10<sup>th</sup> Cir. 1977) (same).

<sup>81</sup> See *Austin & Coventry*, *supra* note 14

<sup>82</sup> *Id.*

<sup>83</sup> Bureau of Justice Statistics, *Prison Statistics* (2006), available at <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

<sup>84</sup> Paul Van Slambrouck, *U.S. Prisons-Under Pressure-Shows Increase in Violence*, CHRISTIAN SCIENCE MONITOR, August 6, 1998, available at <http://www.csmonitor.com/1998/0806/080698.us.us.2.html>.

<sup>85</sup> The Sentencing Project, *New Incarceration Figures: Growth in Population Continues* 1, <http://www.sentencingproject.org/pds/1044.pdf> (last visited December 22, 2006).

<sup>86</sup> See *Wellman v. Faulkner*, 715 F.2d 269, 274 (7<sup>th</sup> Cir. 1983) (holding that medical care at prison was inadequate by constitutional standards and that prison was unconstitutionally overcrowded); also see *Johnson v. Levine*, 588 F.2d 1378 (4<sup>th</sup> Cir. 1978); *Lareau v. Masnon*, 651 F.2d 96 (2<sup>nd</sup> Cir. 1981) (upholding District Court Judge's finding that the 8<sup>th</sup> amendment had been violated in a Maryland prison warranting judicial direction that overcrowding be eliminated); *Naumi v. Fauver*, 82 F.3d 63 (3<sup>d</sup> Cir. 1996)

<sup>87</sup> See *Duitsman* *supra* note 18, at 2216.

reasons for overcrowding all of which essentially stem from a change in public perceptions of the United States penal system.<sup>88</sup> Mandatory sentencing, cynicism towards prisoner rehabilitation, “truth in sentencing” laws, and overcrowding itself have all contributed.<sup>89</sup>

Lawmakers implement mandatory sentencing laws in order to lengthen the duration of time served by offenders as well as to reduce the ability of judges and parole boards to reduce time served by offenders.<sup>90</sup> Particularly targeted by mandatory sentencing laws have been drug-related crimes.<sup>91</sup> Thus, in 1986 Congress passed the Drug Abuse Act, which created mandatory minimum sentences based on the type of drug and quantity possessed.<sup>92</sup> Mandatory sentencing was brought on by a change in public perceptions rather than an increase in criminal activity.<sup>93</sup>

[T]he nation shifted its focus away from addressing the ‘root causes’ of crime and the rehabilitation of criminals towards making crime penalties more swift, certain and severe. . . California passed the Determining Sentencing Law in 1977, which, among other things, embraced punishment as the purpose of prison, required mandatory prison sentences for many offenses formerly eligible for probation, and dramatically increased the rate at which probation and parole violators were returned to prison. As a result, California’s corrections population sky-rocketed.<sup>94</sup>

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<sup>88</sup> See Austin & Coventry *supra* note 14.

<sup>89</sup> *Id.*

<sup>90</sup> See Hallett *supra* note 61, at 372-73.

<sup>91</sup> *Id.*

<sup>92</sup> Carla I. Barrett, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENGL. L. REV. 391, 396 (2005).

<sup>93</sup> Malcom M. Feeley, *Entrepreneurs of Punishment*, PUNISHMENT & SOCIETY, 4(3) 321, 322 (2002).

<sup>94</sup> *Id.*

Because of the increased implementation of mandatory minimum sentences, inmates remain in prisons longer.<sup>95</sup> Consequently, prisons continue to fill without simultaneously emptying and the prison population continues to rise.<sup>96</sup>

Additionally, the United States has increasingly sought imprisonment as the most desired form of punishment, thus contributing to prison overcrowding.<sup>97</sup> In general an American perception toward the penal system is one of cynicism towards rehabilitation.<sup>98</sup> Therefore, because of populism<sup>99</sup> most U.S. jurisdictions have overhauled their sentencing laws and policies, usually to reduce officials' discretion and make penalties harsher.<sup>100</sup> Furthermore, while the volume of criminal drug activity has not increased, mandatory sentencing has led to longer sentencing terms for drug offenders.<sup>101</sup>

The overcrowding problem is one that feeds off of itself. The tremendous increase in the number of incarcerated individuals have led to horrific conditions within prisons leading to Eighth Amendment violations,<sup>102</sup> and compelling one commentator to observe prison conditions as “shock[ing] the conscience, if not the stomach.”<sup>103</sup> The prison overcrowding problem has created a culture that subjects inmates to a violent,

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<sup>95</sup> See Barrett *supra* note 92 at 396.

<sup>96</sup> *Id.*

<sup>97</sup> See Austin *supra* note 14.

<sup>98</sup> See Barrett *supra* note 92 at 397.

<sup>99</sup> “Populism is a political response that favors popularity over other policy considerations” JULIAN V. ROBERTS, LORETTA J. STALANS, DAVID INDERMAUR & MIKE HOUGH, *PENAL POPULISM AND PUBLIC OPINION LESSONS FROM FIVE COUNTRIES*, 3 (Oxford University Press 2003).

<sup>100</sup> *Id.*

<sup>101</sup> See Hallett *supra* note 61 at 371.

<sup>102</sup> Richard D. Nobleman, *Wilson v. Seiter: Prison Conditions and the Eighth Amendment Standard*, 24 PAC. L.J. 275, 279 (1992). Such violations included insufficient medical treatment, *Estelle v. Gamble*, 429 U.S. at 105-06 (1976), inadequate diet, overcrowding, widespread violence, unprofessional security personnel, and the length of time inmates spent in isolation, *Hutto v. Finney*, 437 U.S. 678, 687-88 (1978).

<sup>103</sup> Ira P. Robbins, Symposium, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 815 (1987).

hostile and anti-social environment; one that often leaves the inmates incapable of dealing with society upon their release.<sup>104</sup> Prison overcrowding is directly linked to prison violence.<sup>105</sup> Cramped conditions result in frustration, restlessness, and short tempers,<sup>106</sup> ultimately resulting in recidivism in various forms, including assault and rape.<sup>107</sup> Courts have even acknowledged the correlation between deplorable conditions and inmate violence.<sup>108</sup> Victim/inmates of certain forms of violence (assault, battery or rape) are more likely to commit crimes after being released.<sup>109</sup> In fact most inmates released from state prisons will be re-arrested within three years; hence as additional persons are incarcerated there are not a proportional amount released and staying out of the prison system.<sup>110</sup>

Public perception of the penal system has also contributed to overcrowding in another way. Originally parole was conceived as a means of releasing prisoners once they had been reformed.<sup>111</sup> However in the past several decades the use of parole has

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<sup>104</sup> Daniel L. Low, *Nonprofit Private Prisons: the Next Generation of Prison Management* 29 N.E. J. CRIM. & CIV. CON. 1, 32 2003.

<sup>105</sup> Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 462-66 (1993) (writing that overcrowded conditions in prisons are a factor in higher rates of physical violence)

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., *French v. Owens*, 777 F.2d 1250 at 1257 (7th Cir. 1985) (highlighting many severe violent acts that occur with “distressing frequency,” including “stabblings, bludgeonings, and homosexual rapes.”).

<sup>109</sup> Prison Rape Elimination Act of 2003, 42 U.S.C. 15601(8) (2000 & Supp. III 2004) (noting, amongst other findings, that “prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released”); see also Barrett, *supra* note 92, at 424 (writing that prisoners who are raped and subsequently do not receive adequate psychological treatment are more apt to commit more serious crimes after being released).

<sup>110</sup> See Barrett, *supra* note 92. One-fourth of all inmates released will be rearrested within six months of being released, while two-thirds will be rearrested within three years. *Id.*

<sup>111</sup> MICHAEL H. TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE, 59 (Oxford University Press 2004)

steadily diminished. Parole boards were given broad discretion to release an inmate if they determined the prisoner had been rehabilitated.<sup>112</sup> But with public perception of legal system as soft, early releases have slowed down since the mid 1980s when “truth in sentencing” laws were created.<sup>113</sup> These laws mandated that offenders serve from fifty to one hundred percent of their sentence as opposed to the forty percent that offenders served on average before.<sup>114</sup> “Analysts say that the “truth-in-sentencing” laws have contributed to the rise in the prison population, exacerbating the overcrowded prison situation.”<sup>115</sup>

Overcrowding has lead to a greater pull on government resources.<sup>116</sup> In a 2001 report, the Bureau of Justice detailed that state expenditures for the maintenance of prison facilities hit 29.5 billion dollars, an increase of five billion from the year before.<sup>117</sup> In 2001, it cost a state \$22,650 to house an inmate in jail for the year.<sup>118</sup> Furthermore, taxpayers in this country pay twenty-one billion dollars annually for the construction and maintenance of penal institutions.<sup>119</sup>

*c. Issues and Concerns with Prison Privatization*

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<sup>112</sup> *Id.*

<sup>113</sup> *See* Barrett, *supra* note 92

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*, at 388-89.

<sup>116</sup> James J. Stephen, State Prison Expenditures, 2001, Bureau of Justice Statistics Special Report, June 2004, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Nadine Curran, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 27 N.E. J. CRIM. & CIV. CON. 225, 233 (2000). *See also* Stephen *supra* note 105, at 234 (explaining that some states, while recognizing the need for new facilities, are unable to afford the high cost of construction and providing as an example the case in Pennsylvania, wherein the state had to “postpone plans to build a courthouse and jail in its capital due to the fact that the \$170 millions needed for construction was not available in the city’s budget.”).

The exorbitant amount of government resources required for maintaining prisons is only increasing, and has led to a belief that prison privatization may be a solution to the problems plaguing prisons.<sup>120</sup> Advocates of privatization claim that private firms build, run, and manage prisons more efficiently in terms of cost.<sup>121</sup> Additional support for privatization comes in term of the quality of confinement.<sup>122</sup> However these claims have thus far not been indisputably proven.<sup>123</sup> In fact there are numerous studies and articles written that both support as well as refute these claims.<sup>124</sup> Some studies have sought to prove cost savings<sup>125</sup> based on a belief that private corporations are not restricted by labor unions or strict purchasing guidelines.<sup>126</sup> However, there is also extensive research proving the exact opposite, that there are no substantive cost savings from prison privatization.<sup>127</sup>

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<sup>120</sup> See Dusitsman *supra* note 8, at 2213 (writing that “because reports establish that Federal correctional facilities are operating at 25% above capacity and that states are struggling between 16% and 25% above capacity, the prison crisis does not appear likely to subside in the near future.”).

<sup>121</sup> Byron E. Price & Norma M. Riccucci, *Exploring the Determinants of Decisions To Privatize State Prisons*, AMERICAN REVIEW OF PUBLIC ADMINISTRATION 35(3) (Sept. 2005).

<sup>122</sup> See Dina Perrone & Travis Pratt, *Comparing the Quality of Confinement and the Cost-Effectiveness of Public Versus Private Prisons: What We Know, Why We Do Not Know More, And Where to Go From Here*, THE PRISON JOURNAL 83(3) (Sept. 2003) (explaining that policy makers have turned to privatization in hopes that prison facilities will be run at a higher level of quality).

<sup>123</sup> *Id.* (stating that when it came to the quality of confinement, some studies found private prisons fared worse in the domain, whereas in others it outperformed the public prison).

<sup>124</sup> *Id.*

<sup>125</sup> See e.g. W. H. Calabrese, *Low Cost, High Quality, Good Fit: Why Not Privatization in Privatizing Correctional Institutions* 176 (G. Bowman, S. Hakim, & P. Seidenstat eds., Transaction Publishers 1993).

<sup>126</sup> E. Montague, *Private Prisons: A Sensible Solution*. Belleville, WA: Washington Policy Center (2001).

<sup>127</sup> See Perrone & Pratt *supra* note 122, at 311- 313 (writing that “The U.S. General Accountability Office (1996) conducted a study involving California, Tennessee, and Washington that found private prison facilities can sometimes be more costly than public facilities.”).

Whether privatization actually does save the government money, privatization companies have attempted to and currently are making a profit,<sup>128</sup> which in turn raises several issues of its own. One of the main concerns is that private corrections companies will cut costs by reducing the quality of programs and services in private prisons and public prisons which rely on some privatized services.<sup>129</sup> What's more, many of the alleged savings that may come about from privatizing prisons may be achieved by hiring non-union employees, who are willing to work for less pay.<sup>130</sup> These are significant savings since labor accounts for about two thirds of the cost of operating an average prison<sup>131</sup> However, the result is that security staffs at private prisons have less experience and higher turnover rates than those at public prisons.<sup>132</sup>

And, despite claims of better quality of confinement, there are questions as to whether it is in fact true. Just as in the case of efficiency there is no definitive proof of private prisons offering better confinement quality per se.<sup>133</sup> "In some studies the private prison fared worse . . . , whereas in others it outperformed the public prisons."<sup>134</sup>

Numerous other issues are raised by privatization. Such issues include a debate over the fundamental responsibilities of governments to provide prison management as a way of maintaining fundamental needs of public safety<sup>135</sup>, environmental protection<sup>136</sup>,

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<sup>128</sup> See *infra* note 227-230

<sup>129</sup> Mathew Zito, *Prison Privatization: Past and Present*, American Legislative Council, Dec. 8, 2003, available at [http://www.ifpo.org/articlebank/prison\\_privatization.html](http://www.ifpo.org/articlebank/prison_privatization.html).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Ira P. Robbins, *Privatization Of Corrections: A Violation Of U.S. Domestic Law, International Human Rights, And Good Sense*, 13 No. 3 HUMRTB 12, 13 (2006)

<sup>133</sup> See Perrone & Pratt *supra* note 122 at 304 – 311.

<sup>134</sup> *Id.* (detailing research conducted by several institutions regarding the quality of prison confinement in private and public facilities).

<sup>135</sup> See Austin & Coventry, *supra* note 14, at 18.

<sup>136</sup> *Id.*

and national security.<sup>137</sup> Many scholars argue that the government is not being responsible when it outsources its duties because punishment is a necessary function of the government.<sup>138</sup> Many argue that it is not because punishment is a necessary function of government and when contracted out to private contractors, it “impoverishes the public sphere and weakens the moral bond between citizen and state”<sup>139</sup>

Additional questions arise over the constitutional permissibility of privately managing prisons and prison facilities.<sup>140</sup> “[P]rivatization raises troubling constitutional concerns as to the extent that proprietary firms can be entrusted to exercise decision making powers that affect the length, term, and conditions of prisoners’ confinement.”<sup>141</sup> The American Bar Association in 1986, thus called for a freeze on privatization until “the complex constitutional issues” are resolved.<sup>142</sup> Thus far, these constitutional issues have not been dealt with.<sup>143</sup>

On the whole prison privatization is an unproven method sought to remedy the traditional problems that have been plaguing the Prison system in the United States. While research has sought to show that it has been a successful venture there are still

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<sup>137</sup> See Price & Riccucci *supra* note 121, at 224

<sup>138</sup> Malcom M. Feeley, *Entrepreneurs of Punishment*, PUNISHMENT & SOCIETY, 4(3) 321, 322 (2002).

<sup>139</sup> *Id.*

<sup>140</sup> See e.g. Charles W. Thomas & Linda S. Calvert Hanson, *The Implications of 42 U.S.C. §1983 for the Privatization of Prisons*, 16 FLA. ST. I. L. REV 933 (1989) (discussing “the immunity defenses that are now available to public sector employees and examines whether private sector employees are likely to have access to any of these defenses.” see also Austin & Coventry, *supra* note 14, at 13 - 15 (questioning whether private prisons that allegedly infringe on individual rights are attributable to actions by the state).

<sup>141</sup> Dunham, *supra* note 75, at 1475.

<sup>142</sup> Joel *supra* note 12 (noting also that in 1986, Pennsylvania enacted a moratorium on prison privatization).

<sup>143</sup> See Austin *supra* note 14.

numerous questions as to whether it truly solves prison problems.<sup>144</sup> Additionally, privatization brings its own set of problems and issues that have not been fully analyzed.

### ANALYSIS

Over the past two decades there have been several problems with the government run penal system.<sup>145</sup> These problems include accountability, cost efficiency, and recidivism however they have all been rooted in overcrowding.<sup>146</sup> The problems are cyclical. High rates of recidivism for instance have led the general public to lose faith in rehabilitation purposes of the penal system.<sup>147</sup> The result has been the passage of laws that provide for more incarceration.<sup>148</sup> As a result, there is even more overcrowding which creates a greater strain on already stressed government resources.<sup>149</sup> This has led to horrific conditions within prisons and a culture of individuals unfit to live in the outside world.<sup>150</sup> These individuals are prone to commit crimes and return shortly after release.<sup>151</sup> Of course the end result is more overcrowding and so the cycle continues.<sup>152</sup> The issues of overcrowding led to privatization.<sup>153</sup> In fact a 1998 survey conducted by

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<sup>144</sup> See *supra* notes 111 – 120 and accompanying text for a discussion on research into prison privatization and issues which research has yet to address.

<sup>145</sup> See *supra* notes 75 – 119 and accompanying text for discussion on the problems with the U.S. penal system and the rationale behind prison privatization.

<sup>146</sup> See *supra* note 63 – 106 and accompanying text for a discussion on issues affecting the government-run penal system.

<sup>147</sup> See Austin & Coventry, *supra* note 14, at 13.

<sup>148</sup> See *supra* notes 70 – 85 and accompanying text for a discussion of recently enacted prison sentencing laws.

<sup>149</sup> See *supra* notes 104 – 107 and accompanying text for a discussion on the financial implications of overcrowding.

<sup>150</sup> See *supra* notes 90 – 97 and accompanying text for a discussion on the impact of overcrowding on inmates.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See Hallett *supra* 61, at 374 (writing about a survey which examined prison administrators' reasons for reinstating privatization and finding that 86% reported that reducing overcrowding was a reason to reinstate privatization). The survey found that the

Abt. Associates Inc. ranking the various “objectives of prison administrators regarding prison privatization” in order of most important, found that reducing overcrowding was indeed the number one objective.<sup>154</sup> The question is therefore whether prison privatization has succeeded in that endeavor?

Legislators have seemingly failed to realize that an industry motivated by profit must have a steady flow of clients to maintain its existence and profits, and in order to become more successful they must increase that clientele. In the prison privatization business, that clientele is the state and public who have looked to privatization as a means to the solution of overcrowding.<sup>155</sup> The CCA recognized this fact in an annual report issued in 2004 entitled “Capitalizing on Our Strength,” in which it stated:

Our company continued to benefit from an environment characterized by growing prison populations and a restricted supply of new prison beds resulting from budgetary constraints. Growth in the nation’s prison population continues to fuel the need for our services among our existing customers and is motivating additional states to consider the merits of partnering with CCA for outsourced corrections management.<sup>156</sup>

Therefore, if the problem of overcrowding was solved institutions like the Corrections Corporation of America would have no future growth potential. The logical conclusion is that the industry created to find the solution for overcrowding will look to ensure its future by facilitating overcrowding, which brings about a conflict of interest.

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reasons given by prison administrators’ for reinstating privatization were: Reducing overcrowding 86% of the time; acquiring additional beds quickly 75% of the time; gaining operational flexibility 61% of the time; construction cost savings 57% of the time; improving caliber of service 43% of the time; reducing legal liability exposure 39% of the time; other 21% of the time.

<sup>154</sup> *Id.*

<sup>155</sup> See Corrections Corporation of America. Capitalizing on Our Strengths: 2004 Annual Report (2004)

<sup>156</sup> *Id.* at 2

Stated plainly, prison privatization institutions are creating demand for their services by ensuring overcrowding continues.

Of course while it is logical for one to believe that a conflict of interest should exist, the question still remains whether a conflict of interest does indeed exist. By looking at the CCA it is clear that it does. The entire industry including the CCA, is ensuring overcrowding persists through two similar means; first, through extensive participation in the creation of laws throughout the country and secondly, through their monetary contribution to politicians throughout the country.<sup>157</sup>

This article supports the conclusion that a conflict of interest exists by inquiring into the corporate environment brought on by prison privatization laws and legislation. I first examine whether the privatization industry has an incentive to exert its influences over the political and public landscape by discussing the prison privatization industry and its current make up in terms of corporate political action theories. This article will then look into how it is that Prison Privatization corporations go about exerting that influence by looking closer at the Corrections Corporation of America (CCA) and its participation in the political system, and the success of such influence. Finally, I will discuss whether Prison Privatization legislation has been successful in solving the problems that gave rise to them. In conclusion, this article answers the question posed earlier: Whether prison privatization has succeeded in curbing the problem of overcrowding in the penal system? This paper argues that private institutions have not merely failed to do what they were sought to do but have now become part of the problem.

*a. The Prison Privatization Industry*

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<sup>157</sup> See *infra* notes 184 – 228 and accompanying text for discussion on the various tactics and the manner in which the privatization industry and specifically, the CCA exerts its political influence.

It is important to discuss and understand the current state of the prison privatization industry in order to understand how it facilitates a conflict of interest. The government has sought solutions to the several persistent problems in the penal system,<sup>158</sup> which has created a potential benefit for prison privatization and so such institutions enter into the political arena in order to take advantage of that potential. Furthermore, because the majority of the market share in the industry belongs to one particular institution<sup>159</sup> and because there are only several viable institutions there is an added incentive for those industries to become politically active.

Public Choice Theory explains how corporate decisions to partake in the political system rely on the circumstances of the industry.<sup>160</sup> It presumes that firms perceiving a benefit in potential government policy enter the political arena to “purchase” that policy.<sup>161</sup> The theory is based on the general view that rational individuals and institutions will act in their best interests.<sup>162</sup> Thus, public choice theory explains political action on the part of institutions when there is some benefit or potential benefit to be exploited.<sup>163</sup> When an industry sees the potential for some body of legislation to become law and where that legislation would benefit the industry, public choice theory would

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<sup>158</sup> See *supra* notes 64 – 67 and accompanying text for a discussion on the government’s search for possible solutions to problems plaguing the penal system.

<sup>159</sup> See *infra* note 172 – 175 and accompanying text for a discussion on the current make up of the prison privatization industry.

<sup>160</sup> Kathleen A. Getz, *Research in Corporate Political Action*, BUSINESS & SOCIETY 36(1), 32 (1997).

<sup>161</sup> *Id.*

<sup>162</sup> Jane S. Shaw, *Public Choice Theory*, The Concise Encyclopedia of Economics, (1993), available at <http://www.econlib.org/library/enc/PublicChoiceTheory.html>.

<sup>163</sup> See Getz *supra* note 160; see also Shaw *supra* note 162.

dictate that the industry partake in the political process in an effort to ensure passage of such legislation.<sup>164</sup>

Within the Private Prison industry, the question then arises whether any potential benefits actually exist in the political system. A look into the history of the United States penal system clearly demonstrates that potential benefits exist today and have existed over the past two decades within the prison privatization context. Prison overcrowding, accountability, expenditures and cost are problems that have been plaguing the penal system for many years and show no signs of slowing down.<sup>165</sup> These factors have led to the potential benefit for politically active prison privatization companies since government policy has shifted towards the need for a viable solution to the problems of the penal system. The need for a solution had led law makers to look to privatization as a means of lowering costs,<sup>166</sup> which in large part increased along with the increase of prison overcrowding.<sup>167</sup>

Crime soared in the 1970s and '80s. The news media devoted headlines and the tops of newscasts to the crack epidemic and gang warfare. Many Americans were alarmed. Politicians from both major parties seized the issue and held on tight. For two decades, a political consensus prevailed: the nation needed tougher sentences, more police, more prisons.<sup>168</sup>

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<sup>164</sup> See Getz *supra* note 160.

<sup>165</sup> See *supra* notes 65 – 108 and accompanying text for a discussion on issues affecting the penal system.

<sup>166</sup> See *supra* note 65 and accompanying text for a discussion on the affect of monetary costs in the privatization decision.

<sup>167</sup> See *supra* note 104 – 107 and accompanying text for a discussion on the monetary costs of overcrowding.

<sup>168</sup> American RadioWorks: Corporate-Sponsored Crime Laws (2006), <http://americanradioworks.publicradio.org/features/corrections/laws1.html> (follow page links at top to view other pages in article).

This in turn has changed the public's ideology on how to take care of prisoners and those who commit crimes.<sup>169</sup> A “lock ‘em up and keep ‘em of the street” mentality has taken precedent over the past two decades.<sup>170</sup>

The Prison Privatization industry has taken advantage of the potential that has emerged from the failure of government run prisons. Recidivism is a continual problem for various reasons, including the failure of rehabilitation programs and the general lack of sanitary conditions in government run prisons.<sup>171</sup> The result has provided the potential for manipulating the current prevailing notions through the purchase of tough on crime policy. Yet merely because there exists a social and political atmosphere that would benefit the prison privatization industry, in order for political action to be profitable there must be certain circumstances within the industry itself.

The current make up of the privatization industry is dominated by one corporation while several others hold much smaller shares.<sup>172</sup> The Corrections Corporation of America (CCA) controls 51.4 % of total private prison capacity in the United States.<sup>173</sup> In contrast the firm controlling the second most in prison capacity is the Wackenhut Corrections Corporation (WCC), which controls 25% of total private prison capacity.<sup>174</sup> What is most surprising however is that in total there are only twelve institutions within the United States' private prison industry,<sup>175</sup> of which half control less than one percent

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<sup>169</sup> See Austin & Coventry, *supra* note 14, at 1.

<sup>170</sup> *Id.*

<sup>171</sup> See Joseph E. Field, *Making Prisons Private: An Improper Delegation of Governmental Power*, 15 HOFSTRA L. REV. 649 (1987).

<sup>172</sup> Austin & Coventry, *supra* note 14, at 3 – 4.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

of the market share,<sup>176</sup> thus leaving in essence only six privatization companies to run the market. These factors provide part of the incentive for the companies within the prison industry to stretch into the political arena.

According to the Collective Action theory those with greater resources within a group will carry a higher burden in the pursuit of a common goal, where the good to be derived is so great that they are willing to bear the cost of the burden.<sup>177</sup> This is especially the case in “privileged groups,” that is small groups in which the members of a market are limited to only a handful.<sup>178</sup> The theory explains that because the size of the group is small the problem of free riding is limited, therefore individual players who put in most or all of the efforts toward some endeavor will be less likely to lose the benefits of that endeavor to others who put in little effort.<sup>179</sup> As a result, individual players who will gain a lot will not have too much of a problem with expending greater resources for fear of others reaping the rewards.<sup>180</sup>

Such is the case in the Prison Privatization industry. CCA and WCC control 75% of an industry that has only six legitimate members,<sup>181</sup> thus it behooves them to take up the majority of the burden in terms of persuasion of the political system. This is all the more obvious when considering the fact that CCA and WCC are both publicly traded companies within the industry.<sup>182</sup> CCA and WCC trade on the New York Stock

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<sup>176</sup> *Id.*

<sup>177</sup> *See Getz supra* note 160, at 36 – 8.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *See supra* notes 161 – 7 and accompanying text for a discussion on the breakdown of ownership within the prison privatization industry.

<sup>182</sup> NYSE Group, Inc. > About NYSE

[http://www.nyse.com/about/listed/lc\\_C.html?ListedComp=All&start=281&startlist=1&item=15&firsttime=done](http://www.nyse.com/about/listed/lc_C.html?ListedComp=All&start=281&startlist=1&item=15&firsttime=done)

Exchange (NYSE).<sup>183</sup> Publicly traded companies sell stocks and bonds in order to gain additional funds that aid in raising capital for expansion and other endeavors which private companies miss out on.<sup>184</sup> However, the sale of stocks and bonds at a beneficial rate depends on the company and its future value.<sup>185</sup> As a result the CCA and WCC have more to gain and are thus more likely and willing to bear the burden of purchasing policy.

*b. Corrections Corporation of America and Its Political Influence*

The state of the Prison Privatization industry has indeed provided an incentive for exerting political influence. As the company with the largest market share,<sup>186</sup> the Corrections Corporation of America has stood at the forefront of that endeavor. However its participation has not been entirely direct.

The American Legislative Exchange Council (ALEC) is a non-partisan though ideologically conservative association.<sup>187</sup> Its members include more than a third of the country's state legislators.<sup>188</sup> ALEC's stated mission is to promote free markets, small government, states' rights, and privatization.<sup>189</sup> ALEC members gather to swap ideas and form "model legislation."<sup>190</sup> Legislators then take those "model" bills home and try to

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<sup>183</sup> *Id.*

<sup>184</sup> Public Vs. Private Companies, Forbes.com  
[http://www.forbes.com/entrepreneurs/2004/11/08/cx\\_sr\\_1108mondaymatchup.html](http://www.forbes.com/entrepreneurs/2004/11/08/cx_sr_1108mondaymatchup.html)  
(follow the link stating "Click Here" at center of page)

<sup>185</sup> *Id.*

<sup>186</sup> See *supra* note 162 and accompanying text for a discussion of the percentage market share owned by CCA.

<sup>187</sup> See American RadioWorks, *supra* note 168.

<sup>188</sup> Brigitte Sarabi & Edwin Bender, *The Prison Payoff: The Role of Politics and Private Prisons in the Incarceration Boom* 4 (Western States Center & Western Prison Project 2000).

<sup>189</sup> American Legislative Exchange Council, *Mission Statement*  
<http://www.alec.org/index.php?id=301> (last visited Jan. 1, 2007)

<sup>190</sup> American Legislative Council, <http://www.alec.org/> (last visited Jan.1, 2007).

make them state law.<sup>191</sup> The ALEC conferences are co-sponsored by over a hundred private companies.<sup>192</sup> These co-sponsors include companies like the Turner Construction Corporation, which is the number one builder of the nation's prisons and the Wackenhut Corrections Corporation.<sup>193</sup> Along with state legislators there are 200 "private-sector members."<sup>194</sup> These "private-sector members" pay dues for the privilege of helping legislative members write ALEC's model bills.<sup>195</sup>

The Corrections Corporation of America is one of ALEC's private-sector members.<sup>196</sup> It is through participation in ALEC that CCA exerts its influence over the political system and the creation of legislation. CCA claims that ALEC provides it with a means by which to communicate with legislators.<sup>197</sup> CCA uses ALEC to express the benefits of Prison Privatization, or more specifically "that if [] states and counties have considerable overcrowding in their jails and prisons that partnering with a private corrections company can realize cost savings to their taxpayers and [CCA] can offer effective programming for their inmates."<sup>198</sup> However CCA does more than just that. CCA pays ALEC \$2,000 dollars a year for a spot on the ALEC Criminal Justice Task Force.<sup>199</sup> In fact the task force's co-chairman included a CCA official, Bradd Wiggins,

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<sup>191</sup> See American RadioWorks, *supra* note 168.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See American RadioWorks, *supra* note 168.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

who was CCA's Director of Business Development.<sup>200</sup> Prior to Mr. Wiggins' participation John Rees, CCA's vice president, co-chaired the task force.<sup>201</sup>

According to ALEC:

[t]he Criminal Justice Task Force is dedicated to developing model policies that reduce both crime and violence in our cities and neighborhoods. The Task Force is accomplishing this by approving model bills that hold criminals accountable for their actions and provide swift and certain punishment for their crimes.<sup>202</sup>

This ideology has led the task force to push tough on crime legislation as well as promoting pro-private prison legislation. Recently, for instance, the task force modeled the Habitual Offender/Three Strikes Act, which mandates life imprisonment for a third felony conviction.<sup>203</sup> It has also modeled truth in sentencing acts which mandates prisoners serve 85% of their sentences.<sup>204</sup>

*c. The Conflict of Interest*

There would be no issue of a possible conflict of interest within the prison privatization industry if CCA's involvement within ALEC were in fact limited to merely communicating the advantages of prison privatization. However, CCA's position within ALEC allows it to sit with over 40% of the country's state legislators.<sup>205</sup> Additionally, CCA officials sitting as co-chairmen of the Criminal Justice Task Force depicts the strength of its position within ALEC.

CCA indisputably has a hand in the creation of the model legislation that is created by ALEC and then pushed forward by member legislators in their respective

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<sup>200</sup> *Id.*

<sup>201</sup> GRADUATE EMPLOYEES & STUDENTS ORGANIZATION AT YALE, YALE UNIVERSITY'S INVESTMENT IN CORRECTIONS CORPORATION OF AMERICA, ENDOWING JUSTICE, 8 (2006).

<sup>202</sup> See American Legislative Council *supra* note 191.

<sup>203</sup> See *supra* note 189.

<sup>204</sup> See Sarabi & Bender, *supra* note 188, at 4.

<sup>205</sup> *Id.*

states. That model legislation reflects a general disposition of being tough on crime. The CCA requires tough on crime legislation in order to battle the risks for the prison privatization industry which it listed in its S.E.C. filing as the “short term nature of government contracts, dependence on government appropriations *and dependence on government agencies for inmates.*”<sup>206</sup> In battling these risks the CCA and ALEC have been most successful in pushing forward two specific types of legislation: Truth in Sentencing legislation and Habitual Offender/Three strikes legislation.

Truth in Sentencing Legislation, modeled by ALEC in 1995, has been passed in twenty-five states.<sup>207</sup> Among these states are Nevada and New Hampshire.<sup>208</sup> These state’s versions of the Truth in Sentencing legislation require that inmates serve 100 percent of their sentence.<sup>209</sup> Twenty of the remaining 23 states require that inmates serve eighty-five percent of their sentences.<sup>210</sup> While CCA and ALEC’s modeled truth in sentencing laws passed in twenty-five states, the trend that they became so influential that by the late 90’s forty states had truth in sentencing laws like those modeled by ALEC.<sup>211</sup>

As a result of Truth in Sentencing laws, state inmate populations have increased through the incarceration of more offenders for longer periods of time.<sup>212</sup> For example, shortly after Wisconsin passed truth in sentencing laws an “analysis by the state estimated that the 990 inmates imprisoned just in the first 21 months after the law took

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Paula M. Ditton & Doris James Wilson, *Truth in Sentencing in State Prisons*, Bureau of Justice Statistics (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf>.

<sup>210</sup> *Id.*

<sup>211</sup> See American RadioWorks, *supra* note 168.

<sup>212</sup> See Ditton & Wilson, *supra* note 209.

effect would spend 18,384 additional months in jail.”<sup>213</sup> Therefore, as more inmates enter into the system, those already in the system also remain in the system. Not surprisingly, Wisconsin employs CCA to maintain private prisons housing those inmates.<sup>214</sup>

Habitual Offender/Three Strikes legislation, modeled by ALEC, has been passed in eleven states.<sup>215</sup> These laws require life imprisonment for those convicted of a felony for the third time.<sup>216</sup> Because three-strikes laws arbitrarily sentence repeat offenders to longer sentences, they play a part in the “skyrocketing prison population.”<sup>217</sup> Most importantly, however, is the fact that those being incarcerated by three strikes laws are not typically violent offenders. For instance, an analysis of California’s 1994 three strikes law found that the majority of the 50,000 individuals incarcerated under the three strikes law were convicted of non-violent crimes.<sup>218</sup> As a result, the influence of three strikes legislation has not been to make the streets safer but to increase the incarceration population and exacerbate the overcrowding problem. The final result is greater demand

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<sup>213</sup> See American RadioWorks, *supra* note 168.

<sup>214</sup> *Id.*

<sup>215</sup> See Sarabi & Bender, *supra* note 188, at 4.

<sup>216</sup> *Id.*

<sup>217</sup> See Lisa E. Cowart, Comment, *Legislative Prerogative vs. Judicial Discretion: California’s Three Strikes Law Takes a Hit*, 47 DePaul L. Rev. 615, 617 (1998) (acknowledging that three-strikes laws have proven to be an effective means of getting rid of crime, while asserting that they also contribute to the prison population); see also Michael Vitiello & Clark Kelso, *A Proposal For a Wholesale Reform of California’s Sentencing Practice and Policy*, 38 LOY. L.A.L. REV. 903, 966 (2004) (concluding that “[t]hree strikes is an elephant in the living room that cannot be ignored” and that “[i]t guarantees excessive prison sentences both because the sentence does not reflect the culpability of many third strike prisoners and because the length of those sentences is unnecessary to guarantee public safety for offenders whose careers may not have involved crimes of violence and whose criminal careers were on the wane when they received their third strike sentences”).

<sup>218</sup> Cathleen Auerhahn, *Dangerousness and Incapacitation: A Predictive Evaluation of Sentencing Policy Reform in California*, (Aug. 20, 2001) (unpublished report, on file with United States Department of Justice) available at <http://www.ncjrs.gov/pdffiles1/nij/grants/189734.pdf>.

for the privatization industry because of legislation modeled by members of the prison privatization industry.

ALEC's criminal justice objectives stretch beyond just truth in sentencing laws and three strikes legislation. In fact a list of ALEC's legislative actions to fight crime include: sentencing for "actual conduct" in cases where a plea bargain had lead to conviction of a lesser crime, treating juveniles as adults for serious crimes, and requiring mandatory minimum sentencing.<sup>219</sup> All of these would increase the number of individuals incarcerated in prisons and thus continue the need for prison privatization.

The most compelling evidence of a conflict of interest may be found when comparing ALEC's success in pushing tough on crime legislation into law, the increase in the numbers incarcerated, the decline in the actual crime rate, and the prison privatization's increasing profits. According to the Bureau of Justice Statistics' National Crime Victimization Survey violent crime rates have steadily declined since 1994 reaching the lowest records ever recorded in 2005.<sup>220</sup> In the same time frame incarceration rates have increased by twenty-four percent.<sup>221</sup> Some may see these statistics as proof that tough on crime legislation, which increases incarceration is the reason for the decrease in crime rates.<sup>222</sup> Yet between 1991 and 1998 those states that increased incarceration at rates that were *less* than the national average experienced a *larger* decline in crime rates than those states that increased incarceration at rates higher

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<sup>219</sup> Sarabi & Bender, *supra* note 188, at 5.

<sup>220</sup> *Incarceration and Crime: A Complex Relationship*, The Sentencing Project (2005), available at <http://www.sentencingproject.org/pdfs/incarceration-crime.pdf>

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

than the national average.<sup>223</sup> Additionally, trends between 1998 and 2003 continued to demonstrate no significant impact of increased incarceration rates on reducing crime.<sup>224</sup>

The increase in incarceration rates were products of unnecessary legislation that had little or nothing to do with the decrease in crime rates.<sup>225</sup> Such legislation included truth in sentencing laws, mandatory minimum laws, and three strikes legislation, all of which were pushed into law by ALEC and its criminal justice task force, headed up by CCA co-chairmen on the task force.<sup>226</sup> The result of the superfluous and unnecessary tough on crime legislation that has exacerbated the overcrowding problem may be found in CCA's earnings. While the crime rate declined and the prison population increased during the 1990's, CCA's revenue in 2005 grew to 1,192,640,000<sup>227</sup> from 21,404,000 in 1994.<sup>228</sup> Additionally CCA's net income in 2005 was 50,122,000<sup>229</sup> compared to 1,381,000 in 1994.<sup>230</sup>

## **CONCLUSION**

This article has sought to make apparent the realities of prison privatization, for while there may be benefits to prison privatization there are the definitive disadvantages that also accompany it. It is becoming more and more apparent that the disadvantages brought on by privatizing the prison system is one that mandates crime, criminals, and

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<sup>223</sup> See The Sentencing Project, *supra* note 220.

<sup>224</sup> *Id.*

<sup>225</sup> Ken Silverstein, *US: America's Private Gulag*, Corpwatch, (June 1, 2000) available at <http://www.corpwatch.org/article.php?id=867>.

<sup>226</sup> See *supra* notes 183-205 and accompanying text for a discussion on CCA's involvement in ALEC and ALEC's involvement in prison legislation.

<sup>227</sup> Corrections Corporation of America, Annual Report (Form 10-Q), at 3 (March 7, 2006)

<sup>228</sup> Corrections Corporation of America, Annual Report (Form 10-Q), at 3 (Dec. 31, 1994)

<sup>229</sup> *Supra* Corrections Corporation of America, note 227

<sup>230</sup> *Supra* Corrections Corporation of America, note 228

more prisons. As a society we are required to ask whether we wish such a trend to be the kind that defines our penal characteristics. It would not be far fetched to assume that we do not, which requires then an alternative means by which to solve the pre-existing issues plaguing our penal system. While I have provided none here, I have shed light on the short comings of the solution that we have seemingly settled on.

Legislators and state governments have sought the solution to overcrowded prisons and they found their solution in prison privatization. Privatization companies are in the business of solving the prison population crisis in order to make a profit. However if they do solve the problem then there would be no means by which to make profits, and that's the "Catch 22". As a result, the privatization industry ensures that profits continue by pushing forth tough on crime legislation that ensures overcrowding continues, which is in direct conflict with the very purpose behind privatization of prisons. Hence lies the conflict of interest.