

## Charter Prisons: Private Prisons 2.0 or a Race to the Top?

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The reputation of private prisons has taken a beating during the last few years. Undercover reporting in private prisons has revealed horrifying conditions and violence.<sup>1</sup> Scholars have largely turned against private prisons, supporting their opposition on both philosophical and practical grounds.<sup>2</sup> Further, the Department of Justice (DOJ) announced in August 2016 that it would phase out the use of private prisons.<sup>3</sup> However, few alternatives to private prisons have been proposed. This Article proposes an alternative: charter prisons, run through public-private partnerships, which will be capable of providing more services to prisoners without increasing the cost to taxpayers.

### WHAT IS A CHARTER PRISON?

Andra Ghent may have first proposed charter prisons in a *Wall Street Journal* commentary piece in 2015.<sup>4</sup> However, Ghent's proposal was modest: provide private prisons the same amount of funding per prisoner as public prisons, and provide the prison that produces the lowest recidivism rates at the lowest cost with more "customers" (prisoners).<sup>5</sup> The first round of private prisons used this model, operating on the idea that the market, left to its own devices, would generate cheaper and more effective prisons than government could. However, recent investigations have demonstrated this model is deeply flawed.

Prisoners have a complex array of needs beyond food and shelter that must be addressed in order to keep them from reoffending. As of the early 2000s,

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1. See Shane Bauer, *My Four Months As a Private Prison Guard*, MOTHER JONES (July/Aug. 2016), <http://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer> [<http://perma.cc/Z8XY-RH5H>] (telling undercover prison guard's story).

2. See Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFF. 67, 91-96 (2013) (setting forth philosophical objections to delegation of state function); Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 96-100 (2016) (arguing structure of incentives for private prisons pits rehabilitation against cost savings); Andra Ghent, *Taking the Charter School Approach to Prison*, WALL ST. J. (May 3, 2015), <http://www.wsj.com/articles/taking-the-charter-school-approach-to-prison-1430689149> (explaining conflict between cost-saving and reducing recidivism).

3. See Sally Q. Yates, *Phasing Out Our Use of Private Prisons*, DEP'T JUSTICE (Aug. 18, 2016), <https://www.justice.gov/opa/blog/phasing-out-our-use-private-prisons> [<http://perma.cc/AZ8T-BH94>] (explaining plan to ultimately end use of private prisons).

4. See Ghent, *supra* note 2 (coining and explaining charter prison model).

5. See *id.*

“56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates” experienced mental health problems.<sup>6</sup> In 2003, a DOJ report found that 41% of inmates had not finished high school, compared to 18% of the general population.<sup>7</sup> An estimated 85% of inmates were involved with drugs or alcohol, and 65% of prisoners met the medical criteria for substance abuse or addiction.<sup>8</sup> These problems require significantly more resources than governments are often willing to allocate to prisoners.

As a solution, governments could partner with nonprofit organizations to create true charter prisons. Like charter schools, a government would provide the same number of dollars per prisoner to charter prisons as public prisons receive.<sup>9</sup> The charter prison operator would be encouraged to develop innovative programs and solicit outside funding. Foundations and companies have proven they are willing to give; charter schools received over \$500 million in outside donations between 2000 and 2010.<sup>10</sup> Furthermore, companies already often support nonprofit programs in prisons indirectly. For example, major brands like Walmart, Target, and FedEx support the Salvation Army, which runs prison ministries and several halfway houses where former inmates can participate in work-release programs.<sup>11</sup> Similarly, self-help guru Anthony Robbins donates materials and a specially designed curriculum to prisons through his foundation.<sup>12</sup> The Safer Foundation regularly receives donations from major banks and local companies to support its work helping formerly incarcerated individuals find services.<sup>13</sup> With companies willing to

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6. KIDEUK KIM ET AL., *URBAN INST., THE PROCESSING AND TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM* v (2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf> [<http://perma.cc/Y5KT-ZSD9>] (setting forth report on mental health statistics for incarcerated individuals).

7. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS I (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf> [<http://perma.cc/ZL7Y-LQZE>] (articulating correctional population's educational issues).

8. THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE, *BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 2-3* (2010), <http://www.centeronaddiction.org/addiction-research/reports/behind-bars-ii-substance-abuse-and-america%E2%80%99s-prison-population> [<http://perma.cc/5CQF-XBGB>].

9. See Ghent, *supra* note 2.

10. JOSHUA FURGESON ET AL., *THE NAT'L STUDY OF CHARTER MGMT. ORG. (CMO) EFFECTIVENESS, CHARTER-SCHOOL MANAGEMENT ORGANIZATIONS: DIVERSE STRATEGIES AND DIVERSE STUDENT IMPACTS 6-7* (2012), <http://files.eric.ed.gov/fulltext/ED528536.pdf> [<http://perma.cc/5C8T-DLCH>] (explaining growth of charter-school management organizations).

11. See *Prison Ministries*, SALVATION ARMY, <http://www.salvationarmyusa.org/usn/prison-ministries> (last visited Feb. 21, 2017) [<http://perma.cc/4NWU-BVLE>] (providing information on Salvation Army prison ministries); see also *Corporate Partnerships*, SALVATION ARMY, <http://www.salvationarmyusa.org/usn/corporate-partnerships> (last visited Feb. 21, 2017) [<http://perma.cc/RWV2-DUHH>] (listing selection of corporate sponsors).

12. See *Inmate Program*, ANTHONY ROBBINS FOUND., <https://anthonyrobbinsfoundation.org/programs/inmate-program/> (last visited Feb. 21, 2017) [<http://perma.cc/Y42V-RPSM>] (explaining materials give inmates tools to avoid reoffending).

13. See *About Safer Foundation*, SAFER FOUND., <http://www.saferfoundation.org/about/overview> (last visited Feb. 21, 2017) [<http://perma.cc/583E-84Y7>] (describing mission of Safer Foundation); *Thank You to Our Sponsors for the 27th Annual Golf Outing!*, SAFER FOUND., <http://www.saferfoundation.org/support>

donate to support prisoners, reduce recidivism, and create better outcomes for those entangled in the criminal justice system, charter prisons would harness this desire to get involved.

Perhaps more excitingly, nonprofits, like charter schools, could create holistic environments dedicated to providing certain types of services to prisoners. There are certainly nonprofits running programs in prisons right now offering therapy or job training (often with massive waitlists), but those are limited to a few participants during a restricted part of a prisoner's day.<sup>14</sup> A charter prison, on the other hand, could redesign a prisoner's entire day to focus on improving mental health or job skills.

A charter prison could also employ economies of scale to tackle certain problems, such as HIV transmission in prisons. Inmates are five times more likely than the general population to be infected with HIV, and the CDC has indicated that a lack of resources for HIV testing and treatment poses a major challenge for prisons.<sup>15</sup> An HIV-centered charter prison could afford to employ physicians specializing in HIV full-time and train employees and inmates on best practices. Such programs have been shown to improve outcomes for HIV-positive patients in non-correctional residential programs.<sup>16</sup> A few specialized prisons offering holistic atmospheres exist, including the Moriah Shock Incarceration Correctional Facility in New York, a "military-style boot camp"; these facilities do not appear, however, to involve significant nonprofit partnership, or focus on resource-intensive problems such as mental health, addiction, or HIV.<sup>17</sup>

Unlike traditional private prisons, which have long-term contracts and are focused solely on cost minimization, a charter prison could operate on a more flexible performance or needs-based contract. The prison population has begun to decrease, creating available facilities that charter prisons could inexpensively take over.<sup>18</sup> Throughout the 1990s, many private prison companies built

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safer/sponsors (last visited Feb. 21, 2017) [<http://perma.cc/X4TS-4399>] (listing corporate sponsors).

14. See Rachel Martin, *Psychologist Helps San Quentin Prisoners Find Freedom Through Self-Reflection*, NPR (Oct. 2, 2016), <http://www.npr.org/2016/10/02/495975838/psychologist-helps-san-quentin-prisoners-find-freedom-through-self-reflection> [<http://perma.cc/T7EU-BLEU>] (describing "Guiding Range into Power" (GRIP) program in California). The GRIP program has a waiting list of 500 prisoners, and it can take years to get into the program. *Id.*

15. See *HIV Among Incarcerated Populations*, CDC (July 22, 2015), <http://www.cdc.gov/hiv/group/correctional.html> [<http://perma.cc/T785-PYQ3>].

16. See Vanessa Morgan, *The Feasibility of a Holistic Wellness Program for HIV/AIDS Patients Residing in a Voluntary Inpatient Treatment Program*, 32 J. HOLISTIC NURSING 54, 54 (2014) (explaining program and reporting positive results).

17. See Corinne Ramey, *As Boot-Camp Prisons Fade, New York Inmates March On*, WALL. ST. J. (July 31, 2016), <http://www.wsj.com/articles/boot-camp-prison-find-their-time-running-out-1469979345> (describing Moriah Shock Incarceration Correctional Facility's methods).

18. See *State, Federal Prison Populations Decline Simultaneously for First Time in 36 Years*, PEW TR. (Sept. 17, 2015), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2015/09/17/state-federal-prison-populations-decline-simultaneously-for-first-time-in-36-years> [<http://perma.cc/RKH2-67HF>] (highlighting decline in prison population and reforms to reduce recidivism).

facilities “on spec,” without contracts based on speculation that prison populations would continue to increase.<sup>19</sup> A private prison company would likely lease an empty facility to a charter prison at a low rent rather than have it sit idle and abandoned. Furthermore, charter prisons could begin in smaller facilities depending on the size of the specialized population they would like to serve. A former hospital site, for example, could be adaptively reused into a minimum security prison for individuals with HIV. These flexible arrangements would minimize the risk to both parties—the state would be less concerned about the long-term success of the prison because it could be easily shut down, and the prison will build its system without counting on large numbers of guaranteed prisoners from the state. Agility will be key.

#### THE LEGAL LANDSCAPE

As the DOJ announcement indicates, starting charter prisons at the federal level would primarily be a matter of executive discretion.<sup>20</sup> The Bureau of Prisons determined, through contract negotiation, the standards to which federal private prisons were held.<sup>21</sup> Furthermore, the Attorney General has the authority to “classify” inmates and “provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.”<sup>22</sup> Therefore, the Attorney General could likely create a prison that focused on particular types of inmates (such as those with HIV, substance abuse problems, or an interest in a specific career type), classify eligible prisoners according to that status, and assign them to the charter prison without any need for congressional action. This makes the federal prison system a prime target for initial experimentation with charter prisons.

Whether a state would require a new law to create charter prisons would likely depend on whether that state already has a private prisons law, and who formally operates the charter prison. During the 1990s, many states enacted legislation enabling the creation of private prisons.<sup>23</sup> Although charter prisons could likely sneak in under well-worded proposal requests from states, amendments to state laws governing private prisons would make them much more likely to flourish. For example, Nebraska maintains a “comprehensive

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19. See Eisenberg, *supra* note 2, at 97 (reiterating theory, “if you build it, they will come”); Judith Greene, *Bailing Out Private Jails*, AM. PROSPECT (Dec. 19, 2001), <http://prospect.org/article/bailing-out-private-jails> [<http://perma.cc/8HJE-3J4C>] (discussing empty prison beds resulting partially from companies expecting government contracts).

20. See Yates, *supra* note 3 (leaving room to return to private prisons if necessary in future).

21. See *Contract Prisons*, FED. BUREAU PRISONS, [https://www.bop.gov/about/facilities/contract\\_facilities.jsp](https://www.bop.gov/about/facilities/contract_facilities.jsp) (last visited Feb. 21, 2017) [<http://perma.cc/ZBG6-FXQQ>] (explaining operation of privately owned prisons).

22. 18 U.S.C. § 4001(b)(2) (2012).

23. DOUGLAS MCDONALD & CARL PATTEN, U.S. DEP’T OF JUSTICE, GOVERNMENTS’ MANAGEMENT OF PRIVATE PRISONS xxvi (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/203968.pdf> [<http://perma.cc/ZDW7-6U5B>] (differentiating between states using private prisons as temporary fix and those entering into partnerships).

file” on every potential private prison contractor, which would likely include any nonprofits interested in opening charter prisons.<sup>24</sup> When the state wants to make a contract for a private prison, it must notify all potential contractors on file and choose the best one according to defined statutory criteria.<sup>25</sup> Nebraska could certainly work with a nonprofit organization interested in running such a prison, discuss what sort of services they might offer, have them submit a file, and then send out a proposal request for just such a prison. The nonprofit would undoubtedly have the “qualifications and project proposal most substantially” appropriate to the listed project.<sup>26</sup> That chain of events, however, seems too labor-intensive for charter prisons to truly flourish. Nebraska could certainly put out an informal all-call for nonprofits to submit files and then call in general terms for a charter prison, but there is no guarantee they could write specifications such that traditional private prisons would not beat them. This is especially true when experience and past performance are statutorily mandated considerations.<sup>27</sup>

Other states would require at least some changes in law for the charter prison model to take root. Several states have laws requiring that private prisons reduce costs below the public prisons by a given percentage. For example, Ohio private prisons must have costs at least five percent below state prisons, although some groups have criticized how the cost savings are measured.<sup>28</sup> If a charter prison is to succeed, it must receive the same level of funding as a public prison. A charter prison’s ultimate goal is to raise additional funds and provide holistic programming, which it cannot achieve if the first fundraising dollars simply bring the quality of programming up to the status quo public prison.

One potential way around such laws would be for the state to retain formal ownership and operations of a charter prison, but bring in nonprofits to meaningfully manage the prison. For example, a state department of corrections could appoint a number of nonprofit employees as advisors and allow them to participate in all aspects of prison administration. This approach, however, is not ideal for many reasons. On the logistics side, adding additional voices beyond the official prison staff may decrease the efficacy of decision-making. Nonprofit staff may not be able to access certain information, such as prisoners’ medical histories, due to privacy laws. Additionally, such an advisor system would likely require nonprofits to foot the bill for a second prison

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24. Neb. Rev. Stat. § 47-802(4) (West 2016) (requiring application, staff resumes, performance evaluations, contracts with other states, and mailing address in file).

25. *Id.* § 47-802(5)-(9) (setting forth statutory contracting guidelines for private prisons).

26. *Id.* § 47-802(9)(a) (mandating most qualified contractor receives contract).

27. *Id.* § 47-802(7).

28. See CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 8 (2012), <http://sentencingproject.org/wp-content/uploads/2016/01/Too-Good-to-be-True-Private-Prisons-in-America.pdf> [<http://perma.cc/N3DC-NMVA>] (explaining report refuting state’s argument private prisons reduce costs).

administrative staff of advisors. Furthermore, many potential donors may not trust a prison still formally run by the state. A 2014 poll found that sixty-nine percent of Americans think the criminal justice system is “not good.”<sup>29</sup> Many of these skeptics would be unlikely to donate to what they perceive as part of a problematic system. In fact, those most likely to donate to a charter prison may be those most concerned about the state of current prisons, public and private.

#### ANOTHER PARALLEL: RACE TO THE TOP

It may seem unlikely that states will bend the rules or update their private prison laws to allow for the experiment of charter prisons, even in the wake of the DOJ decision. However, if the federal government is serious about improving the quality of prisons, it has another option: incentivize. As mentioned above, the federal government is perhaps the ablest to innovate in this area because of the broad discretion afforded the Attorney General by statute. If initial federal pilot programs were able to demonstrate feasibility and improved outcomes, the charter school movement offers a vision of the future for prisons. In 2009, Congress allocated \$4.35 billion for the establishment of the “Race to the Top” program.<sup>30</sup> The program was designed to reward states that made bold plans to improve education, and especially rewarded states that had already made the relevant statutory reforms.<sup>31</sup> One study found that states that won grants adopted eighty-eight percent of Race to the Top policies, while states that applied but did not win adopted sixty-eight percent of the desired policies.<sup>32</sup>

A similarly small congressional appropriation could jumpstart a comparable program administered through the DOJ. States could compete for grants in exchange for permitting charter prisons, implementing policies requiring inmates to complete their high school equivalency degrees, and mandating better mental health treatment. Ideally, the competition would be staggered (as Race to the Top was) to further refine how states should implement policies. The existence of such a pot of grant money could also encourage states to work with researchers to determine exactly what practices generate the best outcomes in terms of reduced recidivism and long-term cost savings.

In conclusion, private prisons appear to be on their way out—and with good reason. Even so, their demise does not mean that innovation in corrections has been a failure. Rather, the demise of conventional private prisons opens up the

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29. See THE OPPORTUNITY AGENDA, AN OVERVIEW OF PUBLIC OPINION AND DISCOURSE ON CRIMINAL JUSTICE ISSUES 4 (2014), [https://opportunityagenda.org/files/field\\_file/2014.08.23-CriminalJusticeReport-FINAL\\_0.pdf](https://opportunityagenda.org/files/field_file/2014.08.23-CriminalJusticeReport-FINAL_0.pdf) [<http://perma.cc/Y9WZ-8DSV>].

30. See WILLIAM G. HOWELL, RESULTS OF PRESIDENT OBAMA’S RACE TO THE TOP 60 (2015), [http://educationnext.org/files/ednext\\_XV\\_4\\_howell.pdf](http://educationnext.org/files/ednext_XV_4_howell.pdf) [<http://perma.cc/77L7-NBFJ>]. The author of this piece served as a research assistant to Howell, and was involved in the compilation of the data for the Race to the Top project.

31. See *id.* at 61.

32. See *id.* at 63.

possibility for true public-private partnerships. Charter prisons, operated by nonprofits with outside donations as well as public money, could focus on developing holistic solutions to the various problems that severely curtail the rehabilitation of prisoners in the current system. These specialized facilities could draw on the skills, research, and financial support of a wide variety of stakeholders to improve outcomes without increasing costs to taxpayers.