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RESEARCH ARTICLE

IT'S ABOUT QUALITY

It's about quality

Private confinement facilities in juvenile justice

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Research Summary: The youth justice system in the United States has always depended on nongovernmental organizations to provide some of the services, supports, and sanctions for youth after juvenile court adjudication. As the use of state-operated youth confinement declined in recent years, primarily as a result of falling rates of serious juvenile crime, the relative importance of private facilities increased. The number of juveniles held in privately operated secure confinement facilities is now larger than the number confined in state institutions.

Policy Implications: Should policy makers be concerned about a gradual shift from public to private secure facilities? Certainly, some private facilities are poorly managed, neglectful, and even abusive, but the same has always been true for some public facilities. Effective policy and practice should be focused on the quality of interventions rather than on their financial auspices. Quality youth justice systems (a) limit the use of confinement to cases where it is objectively necessary, (b) ensure the health and safety of all confined youth, (c) provide effective treatments and developmentally appropriate programming, and (d) continually monitor and evaluate their effectiveness. These goals apply to all forms of secure confinement regardless of financing or organizational configuration.

KEYWORDS

incarceration, juvenile, privatization, youth corrections

1 | INTRODUCTION

Reformers and justice advocates see privately operated adult prisons as income generators for a self-interested network of carceral entrepreneurs who pursue private gain while wrongly usurping the punishment power of the government. Some advocates aim these same criticisms at the juvenile justice system. Is it appropriate for critics of private prisons to use the same arguments against the use of juvenile facilities and residential placements for court-ordered youth? If privately operated youth facilities are inherently problematic, some important changes are needed in youth justice policy. As youth crime rates began to fall across the country, many states reduced or even closed their large publicly operated secure facilities. As a result, private facilities now make up a larger share of youth confinement space in the United States.

According to the federal Census of Juveniles in Residential Placement (Sickmund, Sladky, Kang, & Puzzanchera, 2017), the number of adjudicated youths held in long-term secure facilities dropped 58% between 1997 and 2015. National philanthropies and advocacy organizations characterize the trend as evidence of “reform,” suggesting that cities and states across the country chose to limit their use of confinement in the 1990s and to handle more youth in community-based programs. Advocates use active verbs such as “cut,” “reduce,” and “slash” to describe the changes in youth confinement. A common observation is that states “reduced” their reliance on confinement, yet crime did not increase (e.g., Howell, Wilson, Sickmund, Hodges, & Howell, 2017, p. 28). The declining use of juvenile confinement, however, was not simply the product of intentional reform. More likely, falling rates of serious youth crime suppressed the demand for secure confinement in states that once made heavy use of such facilities.

In 1993, a peak year for violent crime, police agencies nationwide reported ~13 murder arrests involving youth younger than 18 years of age for every 100,000 youth ages 10 to 17 in the population. The murder arrest rate among youth then dropped 79% between 1993 and 2017 (Butts, 2018). Similarly, youth arrests for robbery and aggravated assault fell 70% since their peak year in the mid-1990s. Other offenses experienced similar decreases. Arrest rates for serious property crime plummeted 76%. The youth arrest rate for weapon possession dropped 73%, whereas the drug offense arrest rate among young people was 57% lower in 2017 than it was at the 1990s peak. States did not “decide” to use less confinement. They just did not need as much confinement.

The notion that falling youth incarceration is a result of changes in crime rates rather than of intentional reforms in policy and practice is also supported by trends in juvenile court dispositions.¹ Juvenile courts began committing fewer youth to confinement facilities because fewer youth were involved in the types of court cases that expose them to confinement. As a percentage of juvenile court caseloads, the use of residential placement has not changed much since the 1990s, whether one considers all delinquency cases or only those cases involving formal charges and adjudication. The use of out-of-home placement, in fact, has been stable for two decades (Figure 1). In 1996, approximately 28% of adjudicated juvenile court cases ended with placement dispositions. Between 1996 and 2016, the use of placement dipped slightly to 25% for several years and then rebounded to 27%.

In other words, juveniles adjudicated in delinquency proceedings are about as likely to be ordered into confinement today as they were at the height of the juvenile crime scare of the mid-1990s. Juvenile confinement numbers fell during the past two decades because the overall volume of cases referred to juvenile courts changed, not because of changes in the handling of cases or as a result of reductions in the use of confinement as a court disposition.

Not surprisingly, conventional wisdom about the juvenile justice system is often wrong. Another example of conventional wisdom that could be wrong is the belief that private correctional facilities are morally objectionable and possibly harmful for youth, their families, and communities. Among

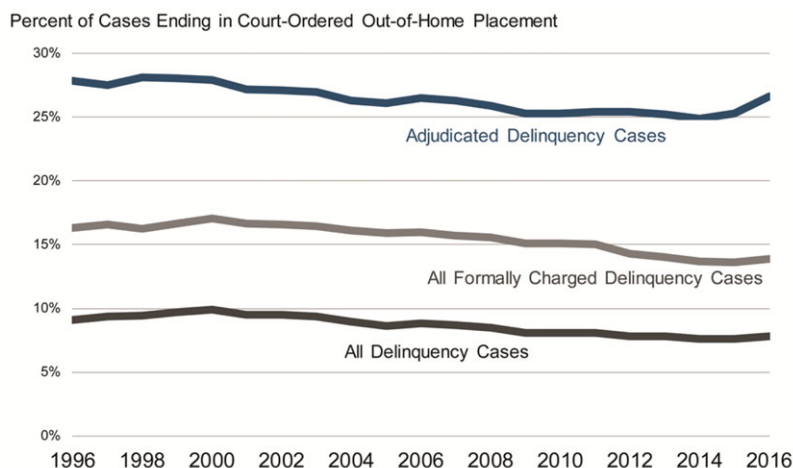


FIGURE 1 Percentage of juvenile court cases resulting in court-ordered placement declined only slightly between 1996 and 2016 [Color figure can be viewed at wileyonlinelibrary.com]

Source. Data extracted from easy access to juvenile court statistics (Sickmund et al., 2017)

liberal advocates, the condemnation of private prisons has become a standard applause line at political events. All forms of private corrections are now subjected to increased scrutiny, and the facilities for justice-involved youth are not exempt (Eisen, 2017a; Mendel, 2015; Schiraldi, 2015). The actual effects of privatization, however, have yet to be studied thoroughly. Criminologists and criminal justice researchers recommend in-depth investigations of justice privatization, and they suggest the problems and possible benefits of privatization are more complex than advocates acknowledge.

Lindsey, Mears, and Cochran (2016), for example, indicated the value of privatization should be assessed using seven dimensions: (1) the extent of need (i.e., unmet demand for space); (2) the amount and quality of services available system wide; (3) the likely impact of privatization on outcomes, both intended and unintended; (4) cost-efficiencies to be realized; (5) available support for the development of innovative alternatives; (6) likely effects on social control; and (7) ethical considerations. Without new research across the full range of these concerns, future debates about the privatization of adult prisons are likely to be dominated by theoretical and ideological speculation. In the juvenile justice context, policy makers, practitioners, and researchers should judge the value of private facilities using facts rather than relying on ideology and rhetoric. Such assessments, should include an acknowledgment of the distinct mission of juvenile justice, the long history of private youth facilities, and the key questions of youth safety and treatment quality.

2 | HISTORICAL CONTEXT

The role of secure confinement has always been controversial in the juvenile justice system. The Illinois Juvenile Court Act of 1899 established the first juvenile court in the United States, if not in the world. During the next century, every other state adopted its own form of juvenile or family court and all juvenile justice systems evolved in various ways. Throughout their first century, however, juvenile justice systems tended to embrace two key strategies: rehabilitation and diversion (Zimring, 2000). The adherence to these principles seemed more theoretical than practical at times, but the underlying legal theories supporting the separate juvenile justice system were motivated by the knowledge that children

and youth are still impressionable and not yet fully formed when compared with adults. Misbehavior during adolescence is not a sufficient predictor of adult criminality.

Juvenile justice policy embraced the principle that not all acts of delinquency merit intervention. Most young people are capable of maturing and desisting from crime without formal legal action. Exposing young people to unnecessary contact with the juvenile court may increase the probability of future justice involvement (Wilson & Hoge, 2012). Essentially, the juvenile court was invented not to punish youth for their illegal behavior but to prevent normative patterns of adolescent law-breaking from turning into lifetimes of adult crime. The juvenile justice mission was to restore each youth to a prosocial course of development using a social services approach and to avoid punitive responses that could undermine the effectiveness of intervention.

Confinement was still always part of the legal system's response to youth. Even before the emergence of juvenile justice, American courts sent recalcitrant youth to "houses of refuge," which were a combination of orphanages and work houses (Mennel, 1973; Rothman, 1980). Later known as "reformatories" and "training schools," institutions for youth were a mainstay of the nation's juvenile justice system well into the twentieth century. It was not unusual for private organizations to supply institutional space for court-involved youth, and most of the community-based programming for youth was delivered by private agencies. Scholars often found little difference in the effectiveness of institutional settings and privately operated programs in the community. Decades of research findings reveal that when provided by competent private organizations, community-based interventions can achieve public safety goals at least as well as confinement (Bonnie, Johnson, Chemers, & Schuck, 2013; Empey, 1978; Farrington, Ohlin, & Wilson, 1986; Sechrest, White, & Brown, 1979).

The preventive mission of juvenile justice was a product of its Progressive Era origins and the attendant optimism about the legal system and its ability to change behavior and transform lives. The juvenile justice system enthusiastically embraced *parens patriae*—that is, the state may be authorized to step in and take the place of inadequate parenting when necessary to protect the health and well-being of children. In their early years, juvenile courts eschewed the formal trappings and due process protections of criminal (adult) courts. Juvenile court proceedings relied on informal practices and did not require the presence of lawyers and juries (Feld, 2017).

As the United States entered the Civil Rights Era, however, many legal observers grew concerned that the informal and discretionary practices of the juvenile system sometimes worked to the detriment of youth, especially those from low-income families and communities of color. In two landmark cases, the Supreme Court imposed greater formality on juvenile courts. A 1967 Supreme Court decision, *In re Gault* (1967), required juvenile courts to adopt some adult-like procedures, including guaranteeing the right to counsel, the right to cross-examine witnesses, and the privilege against self-incrimination. Three years later, the Court's *In re Winship* (1970) decision elevated the burden of proof in delinquency proceedings to the standard of "beyond a reasonable doubt." Essentially, the Court began to erode the progressives' hope that juvenile courts would reduce youthful misbehavior using only informal and nonadversarial procedures. Despite its lofty ideals, the juvenile system was also capable of imposing costs on youth akin to criminal sanctions.

Other Supreme Court decisions, however, sustained the idea of *parens patriae*. One year after *Winship*, the Court held in *McKiever v. Pennsylvania* (1971) that juvenile defendants did not have a constitutional right to jury trials. What mattered was "accurate fact-finding," and juries were not considered essential to the task. From the 1970s onward, the juvenile justice system continued to operate as a legal hybrid. Juvenile case processing involved fewer rules and diminished procedural protections because the goal of court action was to help youth avoid further legal consequences. Some restraints were necessary, however, because it was clear that involving youth in the juvenile process could harm them as well.

The juvenile justice policy environment became even more complicated during the 1980s and 1990s. Violent youth crime was increasing, and lawmakers and justice officials across the country feared the public's reaction. Elected officials launched rhetorical attacks against the juvenile justice system, charging it with excessive lenience and an inability to respond to cases of violence (Butts & Mears, 2001). States began to change the ingredients of juvenile justice to blend in a bit of deterrence and retribution to go along with the traditional mixture of incapacitation and rehabilitation. The new menu included policies that transferred thousands of youth to criminal court for serious offenses and laws that allowed juvenile court dispositions to be set categorically by legislatures rather than individually by judges (Feld, 2017).

By the early 2000s, the "tough-on-crime" era of the 1980s and 1990s seemed to be coming to an end. Juvenile justice policy once again openly embraced the historical mission of rehabilitation and diversion. Many states endorsed efforts to improve the juvenile justice system's ability to divert youth from formal processing and to connect them with strong, community-based programs instead (e.g., Daugaard, 2018; Inslee, 2018; Teigen, 2018). Some states, such as Connecticut, Illinois, and Massachusetts, even began to explore the use of juvenile-court style procedures and interventions with criminal court cases involving "emerging adults" ages 18 to 21 or even 24 as research findings reveal that young adults may respond well to the developmentally oriented approach of youth justice (Columbia Justice Lab, 2018; Kaufmann & Bischoff, 2017).

As discussed previously, however, the less punitive and newly rehabilitative era of juvenile justice policy that emerged in the 2000s was at least partly rhetorical. The use of confinement was relatively stable throughout the period. If policy is judged by actions and outcomes rather than by ideals, confinement practices did not change significantly after the 1990s. The proportion of juvenile cases ending in out-of-home placement was about the same in 2015 as it was in the 1990s. Fewer youth were being placed, but the decline was a result of changes in the community—that is, youth crime rates were dropping. The more important change was how states reacted to falling demand for confinement space. They reduced and sometimes closed publicly operated confinement facilities while relying more on private providers.

States always varied in their use of juvenile confinement facilities for young people. The extent of confinement was never a simple and direct response to crime. It was at least partly a policy choice. Some states invested heavily in youth confinement facilities, and in these jurisdictions, incarceration became a key component of the youth justice response to youth crime. Other states could not afford to run large confinement facilities or for other reasons preferred to depend on community-based programs, reserving expensive out-of-home placement for the most serious and violent youth.

These choices were critical for budgets and for public safety. If officials spent too much on incarceration, they inevitably lacked the resources to operate many of the community-based programs that are essential to well-balanced youth justice systems. If they spent too little on confinement, they risked political conflicts and harmful public relations if juvenile crime rates rose or if even one horrific crime by a young person caused policy makers to question the legitimacy of the juvenile system. Maintaining a workable balance of community-based programs and secure confinement was a critical focus of decision making and policy development.

In the first decades of the 21st century, state and local governments faced two significant forces: (1) public funds were in short supply as a result of the initial shock and ongoing effects of the economic recession of 2008–2009; and (2) persuasive findings from studies on juvenile crime and juvenile interventions were increasingly pointing to the public safety benefits of community-based interventions and the unnecessary costs and risk of interventions involving secure confinement (Bonnie et al., 2013). In combination, these forces resulted in encouraging juvenile justice systems to react to falling crime rates by closing their large publicly operated confinement facilities and to rely

more on community-based programs, including the many privately operated programs traditionally used to supervise justice-involved youth.

For a brief period after the demand for secure confinement space began to drop, the juvenile justice system seemed to respond by lowering the standards for confinement and placing youth in secure facilities for less serious offenses (Butts, 2012). This strategy proved to be unsustainable, however, when crime rates continued to plunge across the country. Eventually, states reacted to falling demand by reducing the supply of secure facilities and even closing some juvenile institutions. The total amount of secure confinement space for juveniles was downsized, and state-operated institutions were affected more than private facilities. As state-operated juvenile corrections facilities were depleted or even closed, the privately operated facilities that remained naturally began to make up a larger share of the nation's youth confinement resources.

Is this an alarming development, or could it lead to more effective interventions and improved public safety? What if juvenile crime rebounds at some point in the future? If more confinement space is needed, will states build new publicly operated facilities, or will they have gained enough confidence in private providers to rely on them during periods of growing demand for space?

3 | PRIVATIZATION OF YOUTH JUSTICE

Privately operated facilities are not inherently incompatible with the rehabilitative mission of juvenile justice. The juvenile court's emphasis on rehabilitation has waxed and waned over the years, but the system's central or at least nominal reason for being has always been to intervene with youth at a young age to redirect their social development toward healthy, prosocial adulthoods. This mission could be achieved by well-managed and closely monitored private facilities. Some juvenile justice advocates, however, are increasingly hostile to the presence of privately operated secure confinement facilities for youth.

Privately operated prisons, and especially for-profit prisons, have attracted a considerable amount of negative attention in recent years (Eisen, 2017a). New York's Brennan Center for Justice characterized private prisons as "ground zero in the anti-mass-incarceration movement" (Brennan Center for Justice, n.d., para. 2). Juvenile justice activists joined the debate, aiming the same criticisms at the juvenile corrections sector that are used against private (adult) prisons. The Institute for Policy Studies recently published an interview with a well-known advocate titled "Who's Profiting from America's Private Juvenile Prisons?" (Dolan, 2016). The National Juvenile Justice Network (NJJN) promulgated a formal policy position on the issue, noting that "youth in trouble with the law are a public responsibility" (NJJN Staff, 2015). In a recent report about the maltreatment of youth in all forms of large juvenile institutions, the Annie E. Casey Foundation warned that a "stream of troubling reports about Florida facilities has continued both in state-run facilities and in Florida's sprawling network of privately run facilities" (Mendel, 2015, p. 17). The Southwest Juvenile Defender Center also recently described one company's network of private facilities for youth as follows:

[A] horrific example of what happens when the government punts social services to private entities with little subsequent oversight. Driven by their bottom line focus, [these] facilities pay dismal wages to employees resulting in high staff turnover rates and leaving inexperienced and poorly trained guards left to supervise juvenile populations. The resulting conditions are dangerous and unsatisfactory; juveniles are subject to extensive physical and sexual abuse, neglect, and deprivation, many times being forced to live in abysmal conditions with substandard basic necessities. (Wolf, 2013, para. 3)

Critics of private confinement facilities offer passionate arguments, but secure placements for youth have always involved a mixture of public and private organizations and the role of private facilities is growing relative to the role of public facilities. Public institutions provided the bulk of juvenile confinement during most of the twentieth century, but private organizations became a substantial and growing segment of the juvenile justice system in recent years. According to the newest federal data, the number of delinquent youths placed by courts in privately operated secure facilities exceeds the number placed in publicly operated state facilities, with facilities operated by local governments making up the remainder (Puzzanchera, Hockenberry, Sladky, & Kang, 2018).

The prevalence of private providers in the juvenile justice system grew in the late twentieth century for several reasons having little to do with the self-interest and greed of corporations. First, federal policy governing juvenile justice changed in the 1970s with the passage of the Juvenile Justice and Delinquency Prevention Act of 1974. The law encouraged the use of diversion and community-based interventions for youth involved in the justice system, and private programs became more acceptable as a result. In 1970, according to federal statistics, juveniles in privately operated facilities accounted for just 13% of all youth in long-term secure confinement. By 1979, only 5 years after passage of the JJDP Act, private facilities held 48% of juveniles in long-term secure confinement facilities (Curran, 1988, p. 367). The average daily population reported by private confinement facilities grew from fewer than 9,000 to nearly 31,000 youth between 1970 and 1979, whereas the number of youths in public facilities declined from approximately 58,000 to 34,000 during the same period.

The trend toward private placements continued after the 1970s and generally did not attract the attention of juvenile justice advocates. Residential providers became more diverse, and private organizations began to offer a broader range of interventions and treatment approaches. States also increased their support for alternatives to confinement, especially for younger youth and those with emotional problems and mental health disorders. These policy changes were supported by a growing research literature in the science of brain development, the increasing reliability of evaluation research on community-based interventions, and a series of opinions by the U.S. Supreme Court that recognized the nature of adolescent development and limited the use of purely retributive or punitive sanctions for youth involved with the justice system (Bonnie et al., 2013; Feld, 2017).

As local governments and private providers assumed more responsibility for youth justice placements, it may have helped to correct a long-standing fiscal anomaly that encouraged the use of state-operated institutions. When most of the nation's confinement institutions were operated by state governments, city and county governments were typically required to pay for the youth they referred to community-based interventions in their own jurisdictions, but confinement costs were borne by the state. This encouraged local governments to take advantage of cost-shifting and fostered an inappropriate reliance on incarceration and higher overall costs. In addition, it did not improve public safety. Research findings showed that incarceration by itself does not reduce recidivism and may even exacerbate other youth problems, such as family disruption, poor educational outcomes, unemployment, and behavioral health issues (Mulvey, 2011).

As the demand for youth confinement continued to drop, many states reduced or closed their large publicly operated institutions and relied instead on private facilities and facilities operated by local governments, including detention centers originally designed to house youth during court proceedings and those awaiting long-term placements. According to the federal census of juvenile residential facilities, the number of public facilities declined significantly after the 1990s (Puzzanchera et al., 2018). In 2000, there were 322 long-term secure facilities for adjudicated youth. By 2016, there were just 189 such facilities nationwide, indicating that 133 facilities had been closed or reclassified into something other than long-term secure institutions (Table 1). Most of the nation's long-term secure facilities for youth were in just 10 states in 2016: Florida (30 facilities); California (22); Texas (19); Oregon (8);

TABLE 1 Number of long-term secure facilities for adjudicated youth offenders: 2000, 2016

Location	Census Year	
	2000	2016
United States Total	322	189
Texas	26 (1)	19 (3)
California	25 (2)	22 (2)
Florida	17 (3)	30 (1)
Ohio	17 (3)	7 (6)
New York	16 (5)	3
Pennsylvania	16 (5)	3
Michigan	14 (7)	4
Missouri	12 (8)	0
Indiana	11 (9)	1
Massachusetts	10 (10)	3
Oregon	9	8 (4)
Colorado	8	8 (4)
Minnesota	8	6 (7)
Georgia	7	6 (7)
Utah	6	5 (9)
Illinois	5	5 (9)

Note. Numbers in parentheses are the rankings of the 10 states with the largest number of facilities.

Source. Adapted from the juvenile residential facility census (Puzzanchera et al., 2018).

Colorado (8); Ohio (7); Georgia (6); Minnesota (6); Illinois (5); and, Utah (5). Only Florida reported more long-term secure facilities in 2016 than in 2000 (30 vs. 17). The other top-10 states in 2000 reported fewer long-term facilities in 2016.

These changes produced the differences seen today in the national profile of long-term facilities. The decline in youth confinement was steepest among state-operated public facilities (Figure 2). In 1997, state facilities reported nearly 40,000 youth in placement under court commitment. By 2015, the number of committed youths plummeted 70% to slightly less than 12,000. The number of youths committed to private facilities also declined between 1997 and 2015 but to a lesser extent. Although approximately 25,000 youth were reported among the commitment population in private facilities in 1997, the number of those youth dropped 48% by 2015, reaching a total slightly less than 13,000. By 2015, the population of youth held under court commitment in privately operated confinement facilities was larger than the number held in publicly operated state facilities (Figure 3). In 1997, 53% of committed youth in long-term secure confinement were held in state facilities, whereas 34% were in private facilities and the rest were in facilities operated by local governments. By 2015, the proportions had switched: 42% of youth were confined in private facilities, whereas 38% were in state facilities and 20% were in local facilities.

4 | IS PRIVATE ALWAYS BAD?

There are at least three specific reasons why private confinement facilities for juveniles may cause concern. First, a point made in the adult context by the Israeli Supreme Court in its 2009 case *Academic*

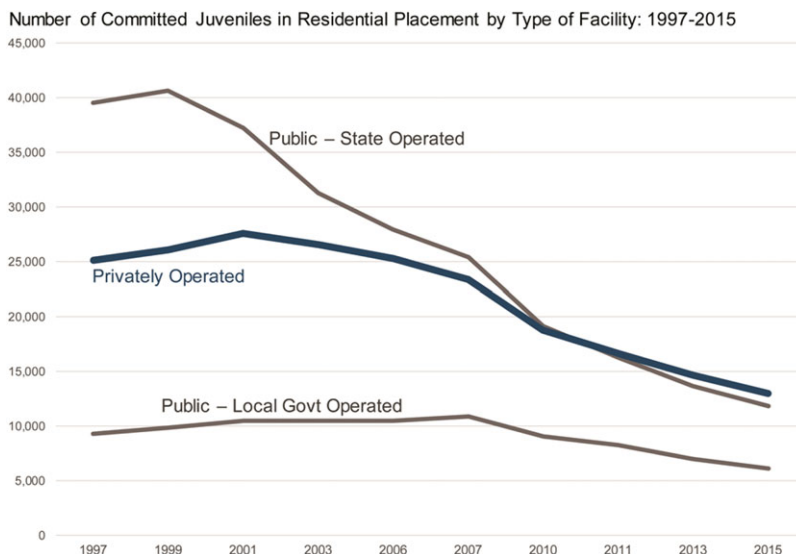


FIGURE 2 Number of youth confined to long-term secure facilities declined significantly after 1997 [Color figure can be viewed at wileyonlinelibrary.com]

Source. Data extracted from census of juveniles in residential placement (Sickmund et al., 2017)

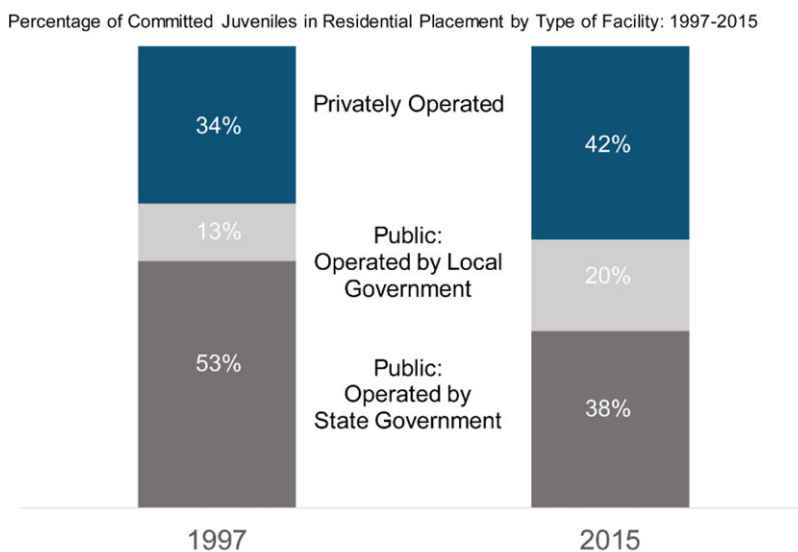


FIGURE 3 Youth confined in privately operated secure facilities now outnumber those held in state facilities [Color figure can be viewed at wileyonlinelibrary.com]

Source. Data extracted from census of juveniles in residential placement (Sickmund et al., 2017)

Center of Law and Business v. Minister of Finance is that contracting with private entities to impose punishment is fundamentally contrary to the state’s monopoly on punishment. Second, the profit motive may be ill suited to advance rehabilitative goals. Third, closely related to the second reason, the profit motive may be ill suited to encourage diversion from prison and from criminal justice exposure more

broadly. Although all three reasons raise important concerns about private facilities, they are ultimately not convincing.

The leading argument among privatization critics is usually one of delegation. Feeley (2014) argued that the claims made in the *Academic Center* case posed a serious challenge (one he took on directly) to those who defend privatization. In relying on philosophers from Hobbes and Locke to Walzer, the opinion provided in the case argued that delegating so core a state function as punishment to a private, financially motivated actor was a fundamental insult to a person's liberty:

It can therefore be said that our position is that the scope of the violation of a prison inmate's constitutional right to personal liberty, when the entity responsible for his imprisonment is a private corporation motivated by economic considerations of profit and loss, is inherently greater than the violation of the same right of an inmate when the entity responsible for his imprisonment is a government authority that is not motivated by those considerations. (cited in Feeley, 2014, p. 1406)

Even if one accepted the normative argument—as well as the debatable idea that the “profit and loss” distinction is a meaningful one—its application is weaker in the juvenile context. Although *parens patriae* as a model of juvenile justice suffered during the civil rights era as well as the tough-on-crime era, it has never been completely abandoned. Juvenile justice is still focused on rehabilitation, even when a youth seems unsuited for diversion and adjudication seems likely, which is the moment when the private-versus-public distinction matters the most. The fundamental rationale of juvenile jurisdiction, at least in theory, is that young people are uniquely amenable to treatment and state authorities should focus on rehabilitating rather than on punishing them for what are often adolescent-limited law violations.

In other words, even though juvenile confinement is still a form of punishment (especially as experienced by confined youth), the state's explicit purpose is to help and support youth. The state frequently compels parents to expose children to other treatments and practices without triggering concerns about delegation. Children must be educated, and it is acceptable to send them to private schools. Children must be vaccinated and receive adequate medical care, and the use of private hospitals is never questioned. The analogy, of course, is not a perfect one—in the case of schools and hospitals, many parents are able to make choices,² and they are not always told by the state which sort of institution to use. But, as the discussion moves away from compulsory punishments to compulsory treatments, delegation-based criticisms of private contracting begin to lose their punch. Again, at least in theory, juvenile justice is closer to compulsory treatment than to punishment when compared with the adult system.³

Privatization and rehabilitation are often viewed as antithetical as well. Concerns about profit maximizing and cost-cutting are often invoked to argue that private prisons are incentivized to cut staffing and programming to minimize per-inmate costs, decisions that obviously run contrary to rehabilitation. Given that rehabilitation is even more central to juvenile justice than to adult justice, this would seem to argue strongly against privatization. This framing, however, is a categorical error. The problem with privatization is not an issue of profit maximization; it is an issue of contract incentives.

The standard cautionary tale of private prisons goes as follows. A state enters into a purchase-of-services contract that will pay a prison some designated amount per prisoner per day. Prison administrators then have a strong incentive to reduce costs as far below the per diem as possible without losing the contract. They scale back staff training, cut staffing size, minimize programming, reduce rehabilitation options, and skimp on food and medical care. Each of these actions makes prisons even more traumatic and more iatrogenic than they already are by design. This is acceptable for the prison company as recidivism may increase revenues when the facility population grows. It also incentivizes prison companies to lobby for tougher sanctions and against expanded parole, again to keep prisoner

volume high. Moreover, if it earns profits, the company invests them outside the prison—any cost savings do not benefit people incarcerated in the prison.

These are real concerns, but they apply both to the public and to the private sector. In Louisiana recently, the legislature paid *public* sheriffs to hold state inmates in *public* jails. The sheriffs cut costs, used the savings to fund their own departments (outside of the jails), and lobbied state lawmakers to maintain sanctions to keep the cash flowing (Chang, 2012). The sheriffs acted with a financial motive, but at least initially there were no private profits involved (although later in the process, the legislature invited private prison companies to help the sheriffs build out their jail capacity to hold state inmates). The process was motivated by one public-sector actor (county sheriffs) seeking to benefit from confinement policies in coordination with another public sector actor (the state legislature).

Even without the involvement of private corporations, public officials sometimes expand the use of incarceration for their own material motives. One of the authors was once in a meeting with the head of a juvenile justice agency in a midsized state to discuss that state's future needs for youth confinement space. Based on statistical projections and research conducted by the author, the agency had decided on a precise amount of new bed space that was requested from the legislature. Twenty minutes into the meeting, the chairperson of the state senate appropriation committee called the agency director and offered to fund twice as much space as had been requested. The juvenile justice director happily accepted. When asked why, he shrugged and said, "I never turn down space; we may need it at some point." When public officials promote incarceration policies from which they benefit directly, either through the acquisition of resources or greater political influence, this is not much different from the policy distortions created when private prisons pursue profit at the expense of programmatic quality and the cost-effectiveness of justice policy.

5 | QUALITY CONTRACTS

Critics of private confinement facilities assume that private firms always place their own interests above the interests of people in their custody. Indeed, there are numerous examples of abusive and degrading conditions in privately operated facilities. When subjected to the same scrutiny, however, public facilities fare no better (Mendel, 2015; Schiraldi, 2015). The motives of profit and income may be corrosive in private facilities, but public facilities respond to their own destructive motives, including the political and budgetary power of legislative sponsors, bureaucratic and patronage benefits controlled by administrators, and jobs. Especially when public facilities are unionized, the quality of services and recidivism outcomes produced by the facility may not rank very high among the concerns of state and local officials. Both public and private facilities can be abusive and wasteful. Both can also be managed effectively and contribute to public safety goals by delivering high-quality services and behavioral interventions.

The benefits of well-managed private facilities are easily overlooked when policy discussions are focused on the dysfunctional ways that private companies sometimes pursue income and profit. Instead of examining only the risks presented by privatization, policy makers should consider how to ensure the effectiveness of private facilities by addressing contract incentives. The solution is clear: Make the income of private providers depend on the success of their rehabilitation and public safety efforts, and use performance contracts to establish the terms of the agreement.

Focusing on incentives moves the policy conversation beyond the narrow issues of private versus public or profit versus nonprofit. If the challenge is not simply about privatization but about the harmful incentives that encourage the misuse of confinement, policy makers approach the issue of private facilities differently. If private juvenile facilities are harmful, it may not be a result of the incurable nature

of privatization; it may be an issue amenable to improvements in the design and implementation of contracts.

Improving the contracts of private providers would likely mean the elimination of contracts based on simple per-diem payments. There is no inherent reason why contracts for private confinement facilities must rely on per-diem costs to set payment amounts. Per-diem contracts likely exist because they are easy to design and execute, but other models are possible. In fact, some jurisdictions are experimenting with other contracting mechanisms, including those that use recidivism metrics to set payments—that is, prison firms earn more when fewer released prisoners return to prison. The goal is to align the firm's self-interest with public safety goals. It may even be *easier* to improve incentives in the private sector. Although contracts can be designed to target the motives of private providers and to focus their efforts on public safety goals, it could be very difficult to adjust the incentives of politically appointed administrators of public facilities with employees protected by public-sector unions.

Rather than paying private firms for providing “bed-days” of confinement space, contracts based on the quality of services and the effects of programs for confined youth would track conditions in the facility and the success of youth after their release. Recidivism-based incentive contracts are still new in criminal justice, and few institutions are compensated using this device at present, but interest is growing. In 2013, the Pennsylvania Department of Corrections rewrote its contracts with private firms managing the halfway houses that provide transitional residences for newly released inmates. To incentivize recidivism reductions, the new contracts included bonuses for companies with recidivism rates below a designated benchmark and penalized those with higher recidivism numbers. The early results indicate the strategy may have desirable effects on recidivism (Gilroy, 2015).

Australia and New Zealand are also funding privately operated prisons with contracts centered on reduced recidivism (Eisen, 2018; Rani, 2017). Some of the new institutions struggle at the start—perhaps for idiosyncratic reasons⁴—but evidence exists that the new contract terms are successfully motivating private providers to improve conditions for the people detained in their facilities (Eisen, 2018).

When done correctly, contracts for private providers might even ensure higher quality than public facilities will ever be able to guarantee. Budget shortfalls at the state level recently impelled Florida prison officials to cut their own programming for adult inmates, including substance-abuse services, transitional housing, and reentry supports (Kam, 2018). States could write contracts for private institutions that legally compel them to provide services, even in economic downturns. Lacking the protections of formal contracts, prisons may be asked to degrade their own services to help solve the state's budget problems. Private contractors could not be asked to do the same.

To be fair, recidivism-based contracts are not without their challenges and perhaps the most formidable is that the very metric on which they rest, “recidivism,” is a deeply problematic number. Recidivism is not a simple measure of individual success or failure after justice intervention (Butts & Schiraldi, 2018). It is a complex, bureaucratic indicator representing multiple layers of decision making by justice officials. Recidivism measures reflect the focus and intensity of police activity and justice-system controls. Because of varying levels of policing, prosecution, and sentencing across communities in the United States, using recidivism as a key outcome measure inevitably disadvantages communities of color. Moreover, recidivism represents the aggregate consensus of multiple actors and agencies in the justice system, some of whom may be acting out of self-interest when they propel a youth deeper into the justice process.

Also, it may be difficult to imagine how to align provider incentives when it comes to diversion. A conventional argument against privatization is that—whether the goal is simple incarceration or rehabilitation—private facilities cannot be compensated for people who are *never* referred for placement. This concern is obviously a legitimate one. Private providers across the country, however, are

increasingly embracing diversion and community-based interventions, and these are even becoming growth areas (Holland, 2016). Yet even if the number of private providers in the community may continue to grow, their influence will always be overshadowed by the true centers of power in the justice system: police, prosecutors, and courts.

Note, for example, that a youth's referral to a confinement facility comes at the end of a long sequence of decisions made by public-sector actors, with few opportunities for private providers to affect the decisions. Before juveniles can be held in either public or private facilities, they first must be arrested by a public-sector police officer⁵ and then charged by a public-sector prosecutor.⁶ Finally, they have to be "sentenced" (i.e., have a juvenile court disposition imposed) by a public-sector judge or juvenile court referee.⁷ This attenuating chain of decision making by public-sector actors thus limits the impact of any lobbying by providers. Lobbying typically targets legislative bodies, and there are two types of changes legislatures can push for in justice policy: criminalizing more youth behavior and increasing the use of harsh sanctions. The latter is likely more common and could have more impact.⁸ Yet, the actual effects of private companies lobbying for more extreme court outcomes is unclear and poorly studied, especially in the juvenile justice context. As Stuntz (2004, p. 2554) explained when looking at prosecutors:

Prosecutors are not like civil plaintiffs: they are not paid by the conviction, with bonuses for each additional month the defendant spends in prison. [Thus] extra months in prison are not like marginal dollars in civil cases. Once the defendant's sentence has reached the level the prosecutor prefers ... adding more time offers no benefit to the prosecutor. Indeed, prosecutors may actually value "extra" prison time negatively.

In other words, even if the private sector successfully pushes for longer sentences in general, prosecutors (or judges) may not choose to send a young person to a juvenile facility in the first place, or for a longer period than they otherwise would have. The same logic likely applies to police who may base their arrest decisions on the expected time a potential arrestee faces (Washburn, 2017)—but that is an expectation that turns far more on what prosecutors and judges are *going* to do than on what the legislature has said they are *allowed* to.

Furthermore, the key question about lobbying by private providers is not "will they press for tougher laws and the use of restrictive sanctions?" (they will), but "what will their *marginal* contribution be, given that the public sector traditionally pushes for tough sanctions as well?" Often lost in complaints about the private sector's incentives to push for tougher sanctions are the public-sector incentives, which are similarly motivated but on a much larger scale. Take the idea of "profit." Yes, private prisons seek to protect their profits, which come to several hundred million per year nationwide (adult, juvenile, immigrant detention; state and federal alike—see Wagner & Rabuy, 2017).⁹ But approximately two thirds of the \$50 billion spent on prisons in the United States—or ~\$30 billion—goes to public-sector staff wages and benefits (Mai & Subramanian, 2017). That gives public-sector unions strong incentives to fight against any justice reforms that could jeopardize their members' wages.

Public-sector political "profits" also exist. Politicians with correctional facilities in their districts, for example, often see prisons and other correctional facilities as vital to the community's economic health (Eason, 2017)—which they value as a public good but also for their own political survival. Having too few prisoners could lead to the risk of prison closures, the loss of well-paying jobs, and population drain. Other, more complex political profits include the impact of "prison gerrymandering," the process by which inmates lose the right to vote but are counted for the purposes of districting as living in the prison, not in the place they resided before detention. Youth confined in juvenile facilities are often too young to vote, but counting them as living in (often rural) facilities still shifts political power to more remote, less urban areas and away from the more urban areas where many young people

live prior to their confinement—and thus, it shifts political power away from more Democratic cities toward more Republican, less-urbanized areas. In other words, the public sector is already a significant barrier to reform even in the total absence of private-sector lobbying (Pfaff, 2016).

Finally, it may be easier to close private facilities when populations drop than it is to reduce or close public facilities. Private facilities can be closed by simply declining to renew a contract, whereas public closures involve more complicated legislative responses. Public facility staff are also more likely to be unionized—cheaper labor is one of the ways private firms cut costs—which makes it harder to end their employment and close their facilities, and which implies that closures aimed at public facilities face better organized and better funded opposition. The ease of facility closure is not a trivial issue. Although no rigorous research has been conducted on this issue, it is likely that a state's incapacitation "capacity" can affect judicial decision making. The more beds that are available when facilities remain open despite declines in the confined population, the more judges may be willing to refer juveniles for secure placement and the more willing officials may be to keep them there for longer periods. Thus, keeping partially empty facilities open may introduce other types of risk. On the other hand, the relative ease with which privately operated facilities can be closed may suggest that systems made up mainly of private facilities could be *more* conducive to supporting expansive juvenile treatment and diversion approaches, especially as the number of juveniles in confinement continues to decline nationwide.

6 | CONCLUSION

Political conversations about the problem of mass incarceration in the United States often include references to the corrosive effects of private prisons. Whether prisons are operated by nonprofit organizations or for-profit companies, advocates and reformers suspect that privately operated prisons feed the nation's addiction to incarceration and line the pockets of corrupt public officials who favor punitive approaches to criminal justice in part for their own financial and political benefit. Juvenile justice reformers adopt this perspective when they criticize policy makers for using privately operated facilities for young people in the juvenile justice process.

If private youth facilities are indeed harmful or somehow inappropriate, juvenile justice advocates and reformers are correct to target them for criticism or outright abolition. For several reasons, more justice-involved youth are now held in privately operated secure facilities than are confined in state-operated public facilities across the United States. Private facilities, however, are most likely not inherently more harmful than publicly operated facilities. It is certainly appropriate to identify and address the incentives that may compel courts and communities to place more juveniles in locked facilities than can be justified by public safety concerns, but this applies equally to public and private confinement facilities.

The difference between public and private financing is only one factor to consider in judging youth confinement facilities. Other and perhaps more important considerations include the consistency, quality, and developmental suitability of programming; the safety of the facility environment; and the overall professionalism of facility staff and management. These concerns are readily amenable to the terms of operational contracts for youth facilities. Juvenile justice advocates should focus on the design, implementation, and monitoring of contracts for youth facilities instead of judging them only by their financing mechanisms.

ENDNOTES

¹ Judicial decisions about final case outcomes in juvenile court are called "dispositions," which is analogous to sentences in criminal court.

- ²Wealthy parents at least may be able to exercise choice. Parents with less economic power are generally compelled to rely on public institutions, although the rise of charter schools—contested perhaps as a matter of policy but not of democratic legitimacy—indicates that the state is allowed to contract out unavoidable services to private contractors.
- ³As Feeley (2014) pointed out, the *Academic Center* case never touched on the issue of private juvenile facilities, speaking only of adult institutions. Feeley suggested privatization may be more accepted in the juvenile context. That said, the delegation argument has more weight when we acknowledge that, whatever the rhetoric, the juvenile justice system is expressly punitive (Feld, 2017). In that case, however, it is still worth asking whether the policy solution should be to devise better ways to rehabilitate rather than simply conceding that the juvenile justice system is merely a reconfiguration of the punitive adult system (and taking juvenile confinement as a given, putting aside for this article any discussion of whether that should be abolished more broadly).
- ⁴Australia's privately run Melaleuca Remand and Reintegration Facility was given just 4 months of preparation before beginning operations. An outgoing government rushed to open the prison before ceding power. The contract suffered from serious limitations, and the facility was fined multiple times for noncompliance as a result (Hickey, 2018).
- ⁵Some nuance is important here. One underappreciated fact of policing—one that indicates many studies of the impact of policing on crime comprise serious measurement error—is that *more than half* of all police in the United States are private security (Heaton, Hunt, MacDonald, & Saunders, 2016). Although a formal arrest still requires the intervention of a public police officer, the initial detention can be made by private security, and there is little empirical understanding of how often these initial detention decisions by private-security firms translate into (public) arrests.
- ⁶Other complications may apply. As of 2007, the most recent available data, ~15% of counties (mostly small jurisdictions) did not have full time prosecutors, but instead they contracted with private lawyers to provide prosecutorial services (Perry & Banks, 2011). Where contracts are poorly written, this could create serious moral hazard problems. Contracts do not always include a cap on fees, which can encourage (private) prosecutors to file excessive charges (Deere, 2016).
- ⁷Unlike most police and prosecutors, there is no private-sector equivalent for a judge. It is true that there has been at least one high-profile corruption case in which a public judge in Pennsylvania accepted bribes from private juvenile prisons to send children to those facilities (Peralta, 2011), but such cases seem rare (Feeley, 2014).
- ⁸Despite all the talk of “overcriminalization,” the reality is that the criminal justice system is driven by arrests, prosecutions, and convictions for conduct that long has been viewed as criminal and is widely accepted as criminal (Richman & Stuntz, 2005). Mislabeling overly thick pasta as spaghetti may be a federal crime (21 USC §§331, 343(g) & 21 CFR §139.125(c)), but no one is in federal prison for felonious spaghetti-labeling.
- ⁹It is widely cited that private prisons are a “\$5 billion per year industry” (see, e.g., Eisen, 2017b; The Week Staff, 2018), but that is revenue, not profit, and profit drives behavior. If private prisons had to spend \$6 billion to get that \$5 billion, they would likely leave the industry.

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