

## Public Policy and Private Profit: A Study in Contrasts

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[The author is speaking as a private person. The views expressed by the author are his own and not those of the Office of the Attorney General of the State of Arizona.]

### 1. Introduction

The crisis facing government at all levels in the United States today is providing the services necessary to meet the needs of public safety and welfare within the budget constraints forced by the most severe economic contraction in more than fifty years. Although the problem of funding governmental functions and services is more acute than it has been for some time, the debate about what functions and services ought to be provided by government and how to pay for them predates the founding of this country. One option for providing governmental function and services that has a long and controversial history is privatization--the delegation by contract to a private provider of the power and responsibility to perform functions and provide services that would otherwise be performed by public employees supervised directly by public officials. For example, correctional functions in the United States have never been exclusively public. Private individuals operated local jails in the 18th century and private contractors for inmate labor were involved in prison management during the 19th century. *Richardson v. McKnight*, 521 U.S. 399, 405, 117 S. Ct. 2100, 2104, 138 L.Ed.2d 540 (1997)(Citations omitted.) Historical sources indicate that England relied upon private jailers to manage the detention of prisoners from the Middle Ages until well into the 18th century. *Id.*, 521 U.S. at 407, 117 S.Ct. at 2105.

The claim made by proponents is that the private sector can and does provide public services more cost effectively than public officials and employees. [This comes as a surprise to those of us who have paid tuition at a private university in the recent past.] The recent renewed advocacy for privatization and experimentation with privatization calls for a reexamination of its merits. My purpose here today is to propose a framework for measuring the cost effectiveness of the delivery of governmental services by private providers and make some observations about the cost effectiveness of some contemporary privatization efforts. I approach the issue from the philosophical perspective of pragmatism. I accept neither the premise of some that the functions of government must always be provided by public employees supervised by public officials, nor the premise of others that "government is the problem" in contemporary American society and that private providers will always provide "better" services at a lower cost to the taxpayer.

A pragmatic approach can be defined as an evidence based approach that accurately measures all of the relevant costs and benefits of a particular method of supplying a governmental function or service, and compares methods by comparing the relevant costs and benefits of each against the other.

## 2. Examples of government services provided by private entities

### 2.1. National defense

#### 2.1.1. Iraq

#### 2.1.2. Afghanistan [Raymond Davis-private contractor to CIA or DoD?

Charged with killing two Pakistani men in Pakistan and may or may not have been on a list of diplomatic personnel at the time of the killings.]

### 2.2. Public safety

#### 2.2.1. Police function

#### 2.2.2. Corrections

The Governor's office and the Arizona Legislature are actively considering a plan to privatize the Arizona Department of Juvenile Corrections.

Arizona already has 11 privately run adult correctional facilities.

### 2.3. Probation/Parole

#### 2.3.1. Supervising officers

#### 2.3.2. Rehabilitative programs

### 2.4. Physical/mental health services

#### 2.4.1. Federal

##### 2.4.1.1. Medicare

##### 2.4.1.1.1. Public supervision

##### 2.4.1.1.2. Private service providers

##### 2.4.1.2. Veterans administration hospitals

##### 2.4.1.2.1. Public supervision

##### 2.4.1.2.2. Private service providers

#### 2.4.2. Arizona

##### 2.4.2.1. AHCCCS/Regional Behavior Health Network

##### 2.4.2.2. Individual providers of specific services

### 2.5. Education

#### 2.5.1. Public schools

#### 2.5.2. Private schools

## 3. Costs and Benefits

### 3.1. Budget

### 3.2. Personnel

#### 3.2.1. Experience

#### 3.2.2. Stability

#### 3.2.3. Training

#### 3.2.4. Expertise

#### 3.2.5. Number of staff or service providers, ratios

### 3.3. Goods

#### 3.3.1. Procurement procedure

##### 3.3.1.1. Timeliness

##### 3.3.1.2. Quality

##### 3.3.1.3. Options available

### 3.4. Effectiveness in achieving purpose for function or service

- 3.4.1. Measurement process for provider
- 3.4.2. Measurement goal for provider
- 3.4.3. Short-term costs vs. long-term costs
  - 3.4.3.1. Current cost of operation
  - 3.4.3.2. Future cost of failure to prevent future problems
    - 3.4.3.2.1. Emergency room stabilization
    - 3.4.3.2.2. Preventative treatment
- 3.5. Openness/transparency
  - 3.5.1. Choice to use private provider
 

Both azcentral.com and KPHO.com have reported that two aides of Governor Brewer have financial links to a private prison provider. National Public Radio and The New York Times have reported that a major private prison provider advocated private prisons as a way to address expected new inmates created by Arizona's SB 1070 and, in fact, was a major supporter of the American Legislative Exchange Council (ALEC) that helped draft SB 1070 for one of its sponsors, Sen. Russell Pearce.
  - 3.5.2. Selection of private provider
  - 3.5.3. Effect of lack of transparency on legitimacy of privatization decisions
- 3.6. Accountability/responsibility for mistakes or success
  - 3.6.1. Failure to set policy goals or standards
  - 3.6.2. Failure to measure performance against standards
  - 3.6.3. Violation of legal standards in providing services
  - 3.6.4. Who pays for damages caused by employees of private prisons
    - 3.6.4.1. Damage to the public at large. Who will pay for the damages caused by the escape from a privately run prison near Kingman last summer of three men who were the subject of a nationwide manhunt and later were charged with two murders?
 

Who will pay for damage caused by Raymond Davis in Pakistan recently?
    - 3.6.4.2. Damages to inmates or persons to whom the services are delivered. Who pays for damages caused by private prison employees that deprive inmates of rights secured by the Constitution of the United States?
 

*Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100, 138 L.Ed.2d 540 (1997)(Prison guards who are employees of a private prison management firm are not entitled to a qualified immunity from suit by prisoners charging a violation of federal constitutional rights using 42 U.S.C. §1983.)
  - 3.6.5. Immunity from Freedom of Information Act or Public Records Act requests
  - 3.6.6. Protection of “proprietary information” from public access
  - 3.6.7. Frustration of “checks and balances” provided by our constitutions and laws

### 3.7. Potential for corruption of persons and process

Mark Ciaverella, former juvenile court judge in Luzerne County, Pennsylvania, was convicted on February 18, 2011, of 12 counts of various crimes including RICO after taking more than \$2 million in bribes from the builder of the PA Child Care and Western PA Child care detention centers--privatized detention centers for juvenile offenders sentenced by him.

### 3.8. Contracting issues

#### 3.8.1. Sub-contracting

#### 3.8.2. "Share in savings" compensation may create perverse incentives

#### 3.8.3. Accounting and data collection accuracy

## 4. How should public and private options for providing governmental services be compared?

### 4.1. Cost comparisons

#### 4.1.1. Short-term

#### 4.1.2. Long-term

### 4.2. Effectiveness comparisons

#### 4.2.1. Short-term

##### 4.2.1.1. Achievement of treatment goals

#### 4.2.2. Long-term

##### 4.2.2.1. Recidivism

###### 4.2.2.1.1. Time to offense

###### 4.2.2.1.2. Seriousness of offense

###### 4.2.2.1.3. Number offenses

### 4.3. Accountability standards

#### 4.3.1. Openness in lobbying for privatization

#### 4.3.2. Equivalence in responsibility for damages to public-at-large

#### 4.3.3. Equivalence in responsibility for damages to persons served

#### 4.3.4. Equivalence in access to records relating to providing service

#### 4.3.5. Regular public review of contracts by the responsible public agency or legislative body with the option to early terminate the contract or

impose additional supervision requirements and/or financial penalties

## 5. Mixing the profit motive and civic virtue

5.1. Privatization is driven by belief that introducing the profit motive into the delivery of government services will improve the quality and cost effectiveness of the services. What evidence exists to support this assumption?

5.2. Opponents of privatization argue that the only place "profit" can be derived from privatization is by reducing compensation to employees or reducing the number of employees.

5.3. Evidence does not support improvements in quality of services by private providers. Some evidence suggests that some privatization has lead to reduction in staffing which has lead to higher inmate assaults and violence

in correctional institutions and higher recidivism upon release. Juvenile Corrections Privatization, unpublished review of literature by Jenna Snyder of Children's Action Alliance.

5.4. My experience has been that some public service providers are bureaucratic and do not sufficiently distinguish between good and bad service providers. The quality of the service provider is the most important factor in providing quality public service whether it is at the motor vehicle registration office, at a drug treatment center, or in a prison. An example is the public school controversy in Washington, D.C. where the recently ousted superintendent of schools wanted more power to discharge poorly performing teachers in order to increase the quality of schools.

5.5. Proponents of privatization must explain the morality and efficacy of providing private profit at a time when most people are financially pressed to pay taxes.

5.6. Opponents of privatization must support a public system that allows for flexibility in personnel decisions and operation to provide the best quality services.

## 6. Conclusion

The essence of good government is providing for the public safety and welfare effectively, openly and with as little cost as is necessary. The debate over how to provide for the public safety and welfare has become the subject of heated political rhetoric. Decisions about the method of providing for the public safety and welfare have too often turned upon the most compelling anecdote offered by partisan advocates rather than the results of systematic evaluations of all of the relevant short and long term costs and benefits of each potential method. The apparent lack of transparency of public decisions about privatization also clouds the legitimacy of privatization decision making.

Decisions about whether to privatize governmental functions and public services should be made:

1. Transparently, where all decision makers fully disclose campaign contributions, lobbying exposure, financial links to private providers and public employee unions.
2. Based upon evaluations of all relevant short and long term costs.
3. Based upon comparisons in quality and stability of staff.
4. To allow similar levels of openness of operation to governmental oversight and public scrutiny.
5. To provide similar levels of accountability of employees to the public and to persons who are supposed to receive the service for damages caused by providers.

If privatization decisions are made openly and transparently. If they are made with evaluation of all relevant short and long term costs. If they compare similar functions and services, Then public governing bodies should feel a truly competitive option for providing government function and services is available. But, the key is whether a true "apples to apples" comparison is made between public and private options.