

RESOLVED, That the American Bar Association encourages the United States Congress and State and local governments to enact laws which prohibit contracting with private “for profit” operators of secure juvenile detention facilities when compensation is determined on a "per child" basis.

FURTHER RESOLVED, That the American Bar Association urges Congress and State and local governments enact laws that require contracts with private operators of all juvenile detention facilities to emphasize the goals of rehabilitation and treatment of the child above and beyond the goal of seeking profit.

FURTHER RESOLVED, That the American Bar Association urges Congress and State and local governments to enact laws requiring public disclosure of all public bids, contracts, board memberships, campaign donations and financial statements for all private contractors operating any type of juvenile facilities, including all "not-for-profit" institutions.

## **I. Introduction**

The private prison business is currently one of the fastest growing industries in America.<sup>1</sup> As early as 1990, 60% of states had at least one contract with a for-profit corporation to operate a juvenile facility and by 1999, privately operated facilities – both for-profit and non-profit – held almost thirty percent of all juveniles in residential placement, which is more than 30,000 juvenile offenders.<sup>2</sup> In 2003, thirty-one states had at least one contract with a private firm, including the District of Columbia, the Federal Bureau of Prisons, the Immigration and Naturalization Service, and the U.S. Marshals Service.<sup>3,4</sup>

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<sup>1</sup> Zito, M. (December 2003). Prison privatization: Past and present. *International Foundation for Protection Officers*.

<sup>2</sup> Bayer, P., & Pozen, D. E. (2005). The Effectiveness of juvenile correctional facilities: Public versus private management. *The Journal of Law & Economics*, 48(549).

<sup>3</sup> Private facilities are operated by either private nonprofit or private for-profit corporations or organizations and are employed by the private corporation or organization. Sickmund, M. (2004). Juveniles in correction. *National Report Series*.

<sup>4</sup> Zito, M. (December 2003).

Despite their growing popularity, private detention centers and service providers are problematic because they contravene public policy, produce a comparatively large number of recidivists than their alternatives, and have been breeding grounds for inmate abuse. Section II of this report provides an overview of private detention centers and service providers; Section III delves into the arguments against private detention centers; Section IV offers a comparative analysis between the quality of for-profit and not-for-profit owned facilities; Section V puts forth an example of privatization abuse in Luzerne County, Pennsylvania; Section VI discusses earlier policy proposed by the ABA; and Section VII concludes the report and urges federal, state, and local governments to act.

## **II. Overview of Private Detention Centers and Service Providers**

Private corporations establish different types of juvenile correctional facilities which include residential treatment centers, group homes, shelters, detention centers, ranch/wilderness camps, training schools, and diagnostic centers. In 2006, residential treatment centers made up forty-five percent, group homes made up forty-one percent, shelters made up eight percent, detention centers made up seven percent, ranch/wilderness camps made up five percent, and training schools made up two percent, and diagnostic centers made up one percent of all private juvenile facilities.<sup>5</sup>

Currently there are more than twice as many privately operated juvenile facilities as publicly operated facilities in the United States. In addition, a growing number of private corporations and organizations are providing juveniles with rehabilitation services

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<sup>5</sup> Sickmund, M. (February 2010). Juveniles in residential placement, 1997-2008. *Office of Juvenile Justice and Delinquency Prevention*

as well.<sup>6</sup> In 2002, sixty percent of juvenile facilities were privately owned, with private facilities holding thirty-one percent of United States' juvenile offenders.<sup>7</sup> Currently, there are 2,658 juvenile facilities across the United States and, out of those, 1,166 are publicly operated and 1,483 are privately operated by both for-profit and non-profit corporations.<sup>8</sup> As of a 2006, out of a total number of 92,854 juveniles in detention centers, 28,558 were held in private facilities, and 64,163 were held in public (state and local) facilities.<sup>9</sup>

### **III. The Arguments Against Private Detention Centers**

#### **A. Mismatched Policy Goals**

A concern with for-profit detention centers is that their private “profit” interest is not aligned with the public interest in rehabilitating and lowering recidivism rates among juvenile offenders. A for-profit model incentivizes detainment for financial profit, whereas public policy does not. Public policy interprets detainment as a means by which a child offender is punished and rehabilitated. Contrastingly, a for-profit model views detainment as a mechanism by which profit goals are met. This contrast in interpretation results in a direct conflict with the public purpose, and it is this direct conflict that creates undesirable results.

A market theory only produces efficient results if market rewards are tied to goals that the public wants. The detention center's profits are not directly related to the public's interest. Paying corporations for each youth offender they house provides a disincentive

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<sup>6</sup> Snyder, H. N., and Sickmund, M. (2006). Juvenile offenders in correctional facilities. In *Juvenile offenders and victims: 2006 national report* (Chapter 7).

<sup>7</sup> Snyder, H. N., & Sickmund, M. (2006).

<sup>8</sup> Hockenberry, S., Sickmund, M., & Sladky, A. (December 2009). Juvenile residential facility census, 2006: Selected findings. *Juvenile Offenders and Victims: National Report Series*.

<sup>9</sup> <http://ojjdp.ncjrs.gov/ojstatbb/ezacjrp/asp/display.asp>.

to design efficient programs, rehabilitate youths, reduce recidivism or create re-integration programs. Recidivism is desired for a pay-per-inmate detention center.

If public policy deems it advantageous to have the largest detention population possible, compensating per inmate would align directly with a for-profit model's goal. However, the United States national policy does not focus solely on numbers of detainees, therefore this is an inadequate reward structure. This reward structure only rewards the single goal (efficient detainment) to the exclusion of all others (including effective re-entry into society).

The alignment with public policy is more easily facilitated and far more prevalent in not-for-profit detention centers. Unlike for-profit detention centers, not-for profit detention centers can readily incorporate re-integration programs as part of their mandate. Moreover, funding contingent on reducing recidivism would better align with the public interest than a "cost-per-bed" setup. However, non-profit detention centers are not fool-proof and if funding is tied to facility populations, the same perverse incentives arise. Thus, public policy goals must be incorporated into non-profit mandates.

## **B. Relationship between Management Type and Recidivism**

In a comprehensive study using data on juvenile offenders released from Florida correctional facilities to determine the effect of facility management type on recidivism, Patrick Bayer and David Pozen concluded that nonprofit correctional facilities are more cost-effective in the long run than for-profit correctional facilities.<sup>10</sup> Bayer and Pozen

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<sup>10</sup> Patrick Bayer and David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 582 (2005).

used Florida statistics because it was the only state that had effectively tracked and recorded post-criminal behavior of juvenile offenders in the state.<sup>11</sup>

In this study, quality and effectiveness of facility management types are reflected through rates of recidivism. Bayer and Pozen concluded that nonprofit and state facilities were overall better at curbing recidivism rates than for-profits. More specifically, the results showed that youths released from nonprofit facilities are 5.8% less likely to be charged for a criminal offense within a year, 6.0% less likely to be readjudicated within a year, and significantly less likely to be charged with felony sex offenses, auto theft, robbery, or trespassing than youth released from for-profit facilities.<sup>12</sup> Youths released from state facilities are 7.3% less likely to be charged for a criminal offense within a year, 5.3% less likely to be readjudicated within a year, and are significantly less likely to be charged with assault and battery, felony weapon offenses, felony sex offenses, auto theft, petty larceny, or trespassing than youth released from for-profit facilities.<sup>13</sup> There were no criminal offenses that youth released from for-profit facilities were found to be less likely to recidivate than comparable release from a nonprofit, state, or county facility.<sup>14</sup> This suggests that nonprofit management types in Florida may be better suited at reducing felony sex offenses, auto theft, robbery, or trespassing among their released youths and state management types in Florida may be better suited at reducing assault and battery, felony weapon offenses, felony sex offenses, auto theft, petty larceny, and

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<sup>11</sup> Patrick Bayer and David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 556 (2005).

<sup>12</sup> Patrick Bayer and David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 567-68. 570 (2005).

<sup>13</sup> Patrick Bayer and David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 567-68. 570 (2005).

<sup>14</sup> Patrick Bayer and David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 570 (2005).

trespassing among their released youths.<sup>15</sup> It is important to note that smaller facilities did do better at releasing youth who were less likely to recidivate, which could in some part explain the reason why nonprofit correctional facilities performed better than for-profit; however, it cannot fully explain the differential because when facility size was added as a control, the results were similar to when facility size was not controlled.<sup>16</sup> After taking into account the characteristics of the facility and the individuals assigned to that facility, it is clear that nonprofit facilities cost the state more than for-profit facilities. Specifically, nonprofit facilities cost the state of Florida \$6,123 more annually and state facilities cost the state of Florida \$11,563 more annually per release of a comparable individual from a for-profit facility.<sup>17</sup> After taking the benefits of recidivism and the costs into account, Bayer and Pozen concluded that in the long run, nonprofits were more cost-effective than for-profit and state-run facilities. “Using a series of conservative assumptions concerning the future impact of the estimated differences in recidivism rates across management types, our cost-benefit analysis implies that the short-run savings offered by for-profit facilities over nonprofit facilities are reversed in the long run due to increased recidivism rates.”<sup>18</sup>

### **C. Inmate Safety**

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<sup>15</sup> Patrick Bayer and David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 570 (2005).

<sup>16</sup> Patrick Bayer and David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 578 (2005).

<sup>17</sup> Patrick Bayer and David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 573 (2005).

<sup>18</sup> Patrick Bayer and David E. Pozen, *The Effectiveness of Juvenile Correctional Facilities: Public Versus Private Management*, 48 J.L. & ECON. 549, 582 (2005).

Several studies have concluded that private facilities do not sacrifice quality and security and perform at least as well as government-run facilities<sup>19</sup>, however, the prevalence of inmate abuse perpetrated by employees of private facilities suggests otherwise.

Private for-profit detention centers have long come under fire for neglecting inmates, hosting inmates in bad conditions, and subjecting inmates to sexual abuse. Judy Greene, of Justice Strategies argues that these conditions are a direct result of the for-profit's motive to maximize profit. "Profit is still a motive and it's structured into the way these (correctional facilities) are operated. Just because the system has expanded doesn't mean there is evidence that conditions have improved."<sup>20</sup> The American Civil Liberties Union has filed several lawsuits alleging poor treatment of inmates on the basis of overcrowding, unsafe centers, and poor mental healthcare access.<sup>21</sup> At least six employees of Otter Creek Correctional Facility in East Kentucky have been charged with sex-related offenses committed against inmates. An investigator from the Department of Corrections found that detention center authorities failed to properly investigate seven alleged incidents of sexual misconduct of workers dating from 2007 in compliance with the federal Prison Rape Elimination Act. In four of those seven cases, the involved workers were fired.<sup>22</sup> Since then, at least one other woman has filed civil suit against Corrections Corporation of America (CCA), the operator of the Otter Creek Correctional Facility alleging sexual assault in June 2008. In fact, CCA, the nation's largest for-profit

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<sup>19</sup> Geoffrey F. Segal, Reason Foundation, *Comparing Public and Private Prisons on Quality* 1,2 (2005), available at <http://www.apcto.org/research/Segal-Commission-on-PrisonAbuse.pdf>.

<sup>20</sup> Stephanie Chen, *Larger Inmate Population is Boon to Private Prisons*, WALL ST. J., Nov. 19, 2008, <http://online.wsj.com/article/SB122705334657739263.html>.

<sup>21</sup> Stephanie Chen, *Larger Inmate Population is Boon to Private Prisons*, WALL ST. J., Nov. 19, 2008, <http://online.wsj.com/article/SB122705334657739263.html>.

<sup>22</sup> Stephanie Steitzer, *Former Inmate Alleges Rape at Private Prison*, COURIER-JOURNAL, Feb. 25, 2010, <http://www.courier-journal.com/article/20100225/NEWS01/2250359/Former-inmate-alleges-rape-at-private-prison>.

detention center operator, has a history of financial problems, has been named the defendant in several wrongful death civil suits, and has dealt with a high incidence of inmate violence, protests and uprisings, and escapes. Moreover, CCA has had its share of scandals from inadvertently releasing inmates who should have remained in custody to CCA employees engaging in criminal activity, including selling illegal drugs to inmates.<sup>23</sup>

#### **D. Illinois and New York Policy Prohibiting Contracts with Private Correctional Facilities**

Two jurisdictions, New York and Illinois, have taken affirmative steps to guard against dangers posed by private correctional facilities by passing statutes that ban the use of private correctional facilities.

In 1990, Illinois passed the Private Correctional Facility Moratorium Act (the “Act”).<sup>24</sup> Because of the Act, Illinois has not opened its doors to corporations seeking to profit from the practice of incarceration.<sup>25</sup> Pursuant to the Act,

“the State [of Illinois] shall not contract with a private contractor or private vendor for the provision of services relating to the operation of a correctional facility or the incarceration of persons in the custody of the Department of Corrections.”<sup>26</sup>

Illinois’ legislator declared that the operation of a correctional facility is an inherently governmental act, requiring the state to coercively exercise its police power

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<sup>23</sup> Jenni Gainsborough, *The Truth About Private Prisons*, ALTERNET, Dec. 15, 2003, <http://www.alternet.org/story/17392>.

<sup>24</sup> See <http://news.medill.northwestern.edu/chicago/news.aspx?id=157084>.

<sup>25</sup> *Id.*

<sup>26</sup> 730 Ill. Comp. Stat. 140/3. The statute was amended in 1995 by public act 88-60 to include a ban on public ownership of detention facilities for individuals in the custody of the department of juvenile justice. Public Act 88-60 was found unconstitutional because it violated the Illinois single subject rule. However, it should be noted that the legislator recognized the danger posed by public ownership of juvenile facilities.

over individuals.<sup>27</sup> To the legislator, punishment differentiates privatization of correctional facilities from other forms of privatization in the government.<sup>28</sup> During debates of the 86<sup>th</sup> General Assembly, it was noted that several southern states had begun to allow private corporations to run state correction facilities.<sup>29</sup> The practice was described as “threatening” because whether the facility is public or privately operated, the state would remain liable in the event that an inmate is violated.<sup>30</sup> It was stated that Illinois detention facilities needed accountability and security that could only be achieved through public management.<sup>31</sup>

The commitment to government-managed detention centers was reasserted by the 92<sup>nd</sup> General Assembly in a House Joint Resolution to the Director of Corrections.<sup>32</sup> The House noted that in states where private detention centers have been permitted, security was significantly compromised due to poor training, high turnover rates, and low compensation for private facilities’ employees.<sup>33</sup>

Although Illinois does not allow for privately run correction facilities, the Moratorium Act does not apply to state work release centers and contracts for ancillary services.<sup>34</sup> Ancillary services include medical services, educational services, repair and maintenance contracts, or other services not directly related to the ownership, management or operation of security services in a correctional facility.<sup>35</sup>

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<sup>27</sup> 730 Ill. Comp. Stat. 140/2.

<sup>28</sup> *Id.*

<sup>29</sup> Ill. H., *Transcript of Debate*, 86th Gen. Assembly, at p. 41-42 (May 18, 1990), available at <http://ilga.gov/house/transcripts/htrans86/HT051890.pdf>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> H.R.J.Res. HJ0019, 92nd Gen Assembly (Ill.2001), available at <http://ilga.gov/legislation/legisnet92/hrgroups/hr/920HJ0019LV.html>.

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

<sup>34</sup> 730 Ill. Comp. Stat. 140/3

<sup>35</sup> *Id.*

New York banned the use of private correctional facilities in 1997.<sup>36</sup> Specifically, the NY law prohibited “the private ownership or operation of a facility for housing state or local inmates or the private ownership or operation of a facility for the incarceration of other state's inmates.”<sup>37</sup> In a press release, Senator Michael Nozzolio, who sponsored the bill, said that public safety should never be linked to private profit motives.<sup>38</sup> He noted that private prisons have failed in several other states.<sup>39</sup> Senator Nozzolio advised that it would be in New York’s best interest to retain full control over its correctional facilities.<sup>40</sup>

#### **IV. Quality of Service and Oversight: For-Profit vs. Non-Profit**

Assessing the comparative quality and security benefits that private for-profit and private non-profit correctional facilities provide over each other and government-run facilities is challenging. Researchers who have used the same set of statistics to conduct identical studies have come up with different conclusions. The main cause of this disparity is the fact that there is no universal standard that researchers use to assess the quality of service and oversight for private correctional facilities and as a result each researcher measures quality by his/her own yardstick. In theory, performance could be measured by contract compliance; however, problems undoubtedly arise because the nature of contracts demands customization to meet the specific needs of the contracting parties, resulting in each contract being different from the other – even contracts for the

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<sup>36</sup> N.Y. CORRECT LAW § 121 (McKinney 2009).

<sup>37</sup> *Id.*

<sup>38</sup> N.Y. State Sen. Michael Nozzolio Press Release, Aug. 1, 2007, *available at*

<http://www.nysenate.gov/news/nozzolio-bill-signed-law-prohibits-profit-prisons-new-york>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

same service.<sup>41</sup> Similarly, analysis of a single institution's costs have varied greatly because research groups disagree on which costs constitute overhead costs.<sup>42</sup> As a result, this section provides a summary of findings on a study by study basis and will not attempt to generalize in favor or against all private for-profit or private non-profit facilities.

In a paper based on the theoretical analysis of for-profit and nonprofit private detention centers, Daniel Low argues that nonprofit ownership is the superior alternative because of its incentives, flexibility, and resources. It behooves nonprofits to remain focused to their mission because it is through this that they are able to secure and retain private donors. Nonprofits need private donations to stay afloat and consequently, must remain appealing to their donors. "Donors, meanwhile, are more likely to have broader goals related to improving society that nonprofits must respond to, and these improvements will include long-term changes."<sup>43</sup> As a result, nonprofits are "likely to take a more holistic approach, providing a variety of services to individuals."<sup>44</sup> Moreover, those nonprofits receiving government funds are nevertheless free from governmental controls because they "often receive supplemental private donations, which alleviates financial constraints, allows them to operate extra programs, and creates another source of accountability."<sup>45</sup> On the other hand, for-profit companies are

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<sup>41</sup> Gerry Gaes, Cost, *Performance Studies Look at Private Privatization*, 259 National Institute Journal 32, 35 (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/221507.pdf>.

<sup>42</sup> Gerry Gaes, Cost, *Performance Studies Look at Private Privatization*, 259 National Institute Journal 32, 33 (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/221507.pdf>.

<sup>43</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. Eng. J on Crim. & Civ. Confinement 1, 49 (2003).

<sup>44</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. Eng. J on Crim. & Civ. Confinement 1, 49 (2003).

<sup>45</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. Eng. J on Crim. & Civ. Confinement 1, 50 (2003).

motivated to maximize profits. They are unlikely to improve conditions or offer extra programs if it is not contributing to their prime goal.<sup>46</sup>

A nonprofit would be largely free from both political restraints and profit constraints.<sup>47</sup> They are accountable to the government, to meet minimum standards as required for government contracts. They are also accountable to their donors, to report on the use and results of their philanthropy. Moreover, their financial statements would be vulnerable to public scrutiny, which may make them focus more on “providing quality services, and less likely to focus simply on the bottom-line of revenues and expenditures.”<sup>48</sup>

Driven by their ideology, nonprofit organizations would be determined to increase productivity and implement positive improvements when needed.<sup>49</sup> They would have the flexibility to hire, discipline, and fire employees and to experiment with various aspects of their program.<sup>50</sup> In addition, nonprofits are resourceful, attracting more volunteers than for-profit organizations due to their idealistic mission.<sup>51</sup> Nonprofits are more interested in the societal good than in maximizing profits, and therefore will work collaboratively with other organizations aiming to rehabilitate or curb recidivism among

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<sup>46</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. Eng. J on Crim. & Civ. Confinement 1, 3-4 (2003).

<sup>47</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. Eng. J on Crim. & Civ. Confinement 1, 4 (2003).

<sup>48</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. Eng. J on Crim. & Civ. Confinement 1, 50 (2003).

<sup>49</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. Eng. J on Crim. & Civ. Confinement 1, 51 (2003).

<sup>50</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. Eng. J on Crim. & Civ. Confinement 1, 51-52, 60 (2003).

<sup>51</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. Eng. J on Crim. & Civ. Confinement 1, 56-57 (2003).

offenders in a non-competitive fashion, which in turn will help them to accomplish their mission and to attract more donors.<sup>52</sup>

## **V. The Incentive to Detain: The Luzerne County Case**

[Excerpt from the forthcoming ABA Criminal Justice publication, *The State of Criminal Justice 2010*. By: Jay Elliot]

Judge Mark A. Ciavarella, Jr. presided over the juvenile court for Luzern County, Pennsylvania since 1995. Judge Michael T. Conahan, a friend of Judge Ciavarella, was a common pleas court judge for the county. In June 2000, the two embarked on a scheme that would send juvenile offenders sentenced in Judge Ciavarella's court to only privately-owned facilities operated by Robert J. Powell, a wealthy attorney and friend of Judge Conahan.<sup>53</sup>

The Juvenile law center, a national legal advocacy organization for youth in Philadelphia, Pennsylvania, initially noticed Judge Ciavarella due to his habit of not advising juveniles of their right to counsel; he would habitually allow juveniles to proceed without attorneys.<sup>54</sup>

Hillary Transue, a juvenile, was prosecuted for "harassment" because her myspace page depicted a joke of her school principal. She was adjudicated delinquent

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<sup>52</sup> Daniel Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 N. ENG. J ON CRIM. & CIV. CONFINEMENT 1, 63 (2003).

<sup>53</sup> The relationship of the principals and the genesis of the facilities and the arrangements behind them are described in Ian Urbina, *Despite Red Flags About Judges, A Kickback Scheme Flourished*, N.Y. TIMES, March 28, 2009.

<sup>54</sup> See *In Re A.M.*, 766 A.2d 1263 (Pa.Super.2001). In response to the decision of the appellate court's reversal of the uncounseled conviction and sentence imposed in Judge Ciavarella's court, he vowed, "I'll never do it again," in January, 2001. In *Re Jessica Van Reeth; H.T., a Minor, through her Mother, L.T; on Behalf of Themselves and other Similarly Situated Youth*, In the Supreme Court for the Commonwealth of Pennsylvania, Middle District, No. 81 M.M. 2008, *Brief of Juvenile Law Center to Vacate Conviction 4*.

without the presence of counsel in Judge Ciavarella's court in January 2007. Judge Ciavarella sentenced her to three months detention.<sup>55</sup>

Judge Ciavarella obtained a guilty plea without providing notification of the right to counsel and then proceeded to disposition. He had Hillary shackled and sent off into custody, all without the benefit of counsel. The transcript consumes not quite the entirety of three pages, twenty-five lines each, double-spaced.<sup>56</sup>

Juvenile Law Center attorneys began investigating the pattern of waiver of counsel in Judge Ciavarella's jurisdiction. Aided by quantitative data about juvenile proceedings statewide, the Center was able to examine rates of unrepresented juveniles who were convicted in Judge Ciavarella's court.<sup>57</sup>

The Center found that half or more of the juveniles appearing in Judge Ciavarella's court were not represented by counsel, a rate ten times higher than the state average. Sixty percent of those dispositions resulted in those children being placed out of home, in confinement or in non-secure settings.

The Juvenile Law Center, in April 28, 2008, brought Judge Ciavarella's practices to the attention of the Pennsylvania Supreme Court<sup>58</sup>. Juvenile Law Center asked the Pennsylvania Supreme Court to issue an order directing the Luzerne County juvenile court to identify each and every un-counseled adjudication in its court since October 1, 2005. The center requested the Court to vacate the adjudications and dispositions of all

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<sup>55</sup> "Humour is not in abundance, it seems, in Luzerne county..." Pilkington, *The Guardian*, London, March 7, 2009, available at [www.guardian.co.uk](http://www.guardian.co.uk)

<sup>56</sup> Transcript, Exhibit C, Application, In Re J.V.R. and H.T.

<sup>57</sup> In the argot of the juvenile court, a conviction is considered "adjudication" and "disposition" is the equivalent of sentencing. These terms are used to avoid the stigma of the adult criminal court, but these euphemisms do not do justice to what happened in Luzerne County. Hence they are used interchangeably here.

<sup>58</sup> The litigation history is amply documented at Juvenile Law Center website, available at [www.JLC.org](http://www.JLC.org); link to "See all Luzerne County Scandal information."

such children still under its jurisdiction, and expunge the records of those no longer under juvenile court jurisdiction. The Center also sought fees and costs.

The Pennsylvania Supreme Court denied relief in an order entered January 8, 2009.<sup>59</sup> However, the Court was forced to reconsider its ruling when, on January 26, 2009, both Judge Ciavarella and Judge Michael T. Conahan were charged with participation in fraudulent practices and a conspiracy to conceal at least \$2.6 million in kickbacks from private juvenile services provider PA Childcare, and Western PA Childcare. They had already executed plea agreements.<sup>60</sup> In a press release, the U.S. Attorney's Office alleged the following criminal acts as:

- Taking action to remove funding for the Luzerne County juvenile detention facility, effectively closing that facility;
- Ordering juveniles to be sent to the facilities in which they had a financial interest even when juvenile probation officers did not recommend detention;
- Entering a “Placement Guarantee Agreement” to house children in a facility in which the judges had an interest, guaranteeing payment of an annual “Rental Installment” of \$1,314,000, without disclosing their interest;
- Adopting procedures for a “specialty court” with the potential for an increased number of juveniles to be sent to the juvenile detention facilities in which they had a financial interest; and,
- Summarily granting motions to seal records and grant an injunction in a civil case relating to a juvenile detention facility in which they had a financial interest.

In the wake of these revelations, and in response to Juvenile Law Center's petition for reconsideration, the Pennsylvania Supreme Court granted the Center's petition for

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<sup>59</sup> Order, Pennsylvania Supreme Court, No. 81 M.M. 2008, filed January 8, 2009.

<sup>60</sup> But see Note 20, *infra*. The United States Attorney's Office also has a website dedicated to the scandal documenting the progress of its prosecution, *available at* [www.justice.gov/usao/pam](http://www.justice.gov/usao/pam); link to “Information on the Luzerne County Corruption Prosecutions.

extraordinary relief on February 11, 2009, and appointed a Special Master to review all the cases in which Judge Ciavarella committed children to PA Child Care and all cases in which juvenile offenders had waived their right to counsel. Based on that review, the Master was to report his findings and recommendations to the court within 120 days.<sup>61</sup>

After entering two interim recommendations to the Pennsylvania Supreme Court, and after a thorough review of the records and numerous transcripts of proceedings before Judge Ciavarella dating to 2003, the Master recommended that all adjudications and dispositions of juveniles in that court be vacated.<sup>62</sup> The Master cited a “thorough and almost Herculean review” of records in that court by its probation department to conclude that, on average, about 350 children appeared in his court without counsel each year between 2003 and 2007.<sup>63</sup> Routinely, and almost without exception, there was no mention of a right to counsel in proceedings before Judge Ciavarella.

The master further reviewed the misconduct of Judge Ciavarella and Judge Conahan, finding what amounted to a fee for each juvenile they had sent to PA Child Care’s facilities. The master characterized the atmosphere in Judge Ciavarella’s court as casting such a “pall” over the functioning of that court, and declared that the court’s integrity was subverted. The master recommended that each and every adjudication of a child in that court be vacated.<sup>64</sup> The recommendation included every child, whether or not the child had the benefit of counsel or was sent to PA Child Care or elsewhere.

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<sup>61</sup> Order, Pennsylvania Supreme Court, No. 81 M.M. 2008, filed February 11, 2009.

<sup>62</sup> Third Interim Report and Recommendation of the Special Master, In Re: J.R. and H.T., No. 81 M.M. 2008, August 12, 2009. That recommendation included the period from January 1, 2003, until May 31, 2008, when Judge Ciarella left the bench.

<sup>63</sup> *Id.* at 11-12.

<sup>64</sup> *Id.* at 29-30.

Finding it would serve no public purpose, the master recommended that none of the 4,500 cases of children from 2003 to 2008, be re-tried.<sup>6566</sup>

On October 29, 2009, the Pennsylvania Supreme Court agreed finding that, “this Court simply cannot have confidence that any juvenile matter adjudicated by Ciavarella during this period was tried in a fair and impartial manner.”<sup>67</sup> Except for a very few juvenile prosecutions that remained open, all adjudications and dispositions were ordered vacated and expunged.<sup>68</sup> On February 26, 2009 the Juvenile Law Center filed a class-action suit under 42 U.S.C. 1983 against Ciavarella, Conahan, their wives and their confederates in the scheme infamously known as the “kids for cash” conspiracy.

Predictably, however, both judges invoked the doctrine of judicial immunity in an attempt to avoid liability for any deprivation of the rights of the youths in Judge Ciavarella’s court, as well as their capture for profit. Citing *Stump v. Sparkman*<sup>69</sup> and *Dennis v. Sparks*,<sup>70</sup> among other cases, the U.S. District Court dismissed the plaintiffs’ claims on grounds the judges were immune from a suit based on their actions in court, even if their misconduct was contemptible and corrupt.<sup>71</sup> Their activities outside the courtroom, however, such as engaging in conspiracies to defraud and indulge in

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<sup>65</sup> *Id.* at 27-28.

<sup>66</sup> Juvenile Law Center.

<sup>67</sup> Order, Pennsylvania Supreme Court, No. 81 M.M. 2008 at 7 (filed October 29, 2009).

<sup>68</sup> For its role in bringing the scandal to light, Juvenile Law Center was named “The Best of the Commonwealth in 2009” by the Harrisburg PA Patriot-News. The editorial board of the Philadelphia Inquirer selected Marsha Levick and Lourdes Rosado as its 2009 Citizens of the Year for their role as the Center’s attorneys “. . . in exposing this miscarriage of justice.” PHILADELPHIA INQUIRER, January 3, 2010.

<sup>69</sup> 435 U.S. 349 (1978).

<sup>70</sup> 449 U.S. 24 (1980).

<sup>71</sup> Order, *Wallace v. Powell*, No. 3:09 cv 286, consolidated with *H.T. v. Ciavarella*, No. 3:09 cv 0357, U.S. District Court, M.D. Pennsylvania, November 20, 2009.

kickbacks were another matter, and not immune to suit.<sup>72</sup> Therefore, that litigation continues.<sup>73</sup>

## **VI. ABA Past Policy**

The American Bar Association first addressed the Privatization of American correctional facilities in 1990 with a general policy that urged governments to be cautious about entering into contracts with private corporations to manage prisons and jails. The resolution recommended that legislators comply with the “Guidelines Concerning Privatization of Prisons and Jails”.<sup>74</sup> The guidelines laid out basic standards concerning operation, use of force, contracting with private operators, employee training, and oversight and monitoring.

In 1993, the American Bar Association passed policy to address oversight and accreditation of all private and public correctional facilities. This policy urged that all correctional facilities receive accreditation from the Commission on Accreditation for Corrections and the National Commission on Correctional Health Care.<sup>75</sup>

In 2002, the ABA passed a resolution that urged governments to improve the cost-effectiveness of the pretrial detention, sentencing and correctional systems and exploring

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<sup>72</sup> *Id.*

<sup>73</sup> In the criminal proceedings involving the judges, the U.S. District Court rejected their plea agreements on July 31, 2009, perceiving that the two were so unrepentant that they had not accepted responsibility adequately enough to justify either their plea or a stipulated guideline sentence of 87 months. *See*, Order, United States v. Conahan and Ciavarella, No. 3:09 cr 28, entered July 31, 2009. On January 12, 2010 the U.S. District Court hearing the civil claims against the judges denied their request for a stay of those proceedings pending resolution of the criminal charges against them. Order, Wallace v. Powell, entered January 12, 2010, *supra*, note 20.

<sup>74</sup> ABA Resolution 115B, Approved by the ABA House of Delegates at Midyear Meeting 1990

<sup>75</sup> ABA Resolution 101C, Approved by the ABA House of Delegates at Annual Meeting 1993

possible alternatives to incarceration before building new public and private correctional facilities.<sup>76</sup>

In 2008, the ABA adopted additional policy regarding the oversight of correctional institutions. This policy included “Key Requirements for the Effective Monitoring of Correctional and Detention Facilities” which recommended the establishment of independent oversight of correctional facilities. The policy presented guidelines the government should follow to properly implement a monitoring system.<sup>77</sup>

Recently, in February 2010, the ABA House of Delegates approved the ABA Standards for Criminal Justice regarding the treatment of prisoners. These standards again urge governmental authorities to avoid contracting with private entities whenever possible and to implement a strict system of oversight when the government uses private contractors.<sup>78</sup>

Along with the ABA’s extensive history of addressing the potential issues surrounding privatization and deregulation of correctional systems, the ABA has an even longer history of advocating for different treatment of children as compared to adults in the justice system. The ABA has consistently stood for the principles laid out in its policy against the juvenile death penalty that children are different than adults and must be treated differently than adults.

This resolution seeks to expand on the two aforementioned principles that: (1) privatization and deregulation of the correctional system can be dangerous and (2) that children are different and need extra protections.

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<sup>76</sup> ABA Resolution 107, Approved by the ABA House of Delegates at Annual Meeting 2002

<sup>77</sup> ABA Resolution 104B, Approved by the ABA House of Delegates at Annual Meeting 2008

<sup>78</sup> ABA Standards on Treatment of Prisoners, Third Edition, Approved by the ABA House of Delegates at Midyear Meeting 2010

The ABA addressed both of these principles in a 2007 resolution on juvenile residential treatment facilities. This resolution recognizes the accountability risk that private treatment facilities carry and urged legislatures to enact laws that require the licensure, regulation and monitoring of such facilities. The resolution also promotes the use of in-home and community based prevention and intervention programs and encourages governments to give families better access to such programs.<sup>79</sup>

For-profit privatization has become an alarming concern with juvenile facilities in recent years. This concern was exemplified by the previously discussed Luzerne County scandal.

## **VII. Conclusion**

The juvenile justice system is designed to rehabilitate the youthful offender and therefore, detention facilities must be properly regulated by government. Currently, over half of states have contracts with private detention facilities and service providers to serve out the purposes of the juvenile justice system, a majority of which are non-profit private facilities. However, these private facilities have been doing a comparatively poor job at rehabilitating youth compared to state systems, with for-profit performing worse than non-profit facilities. Proponents of prison privatization argue that it is more cost-effective for the government to use private providers than to house youthful offenders in public facilities. However, there has been no consensus that privatization is truly the cheaper alternative. In fact, Florida, this has retained the most comprehensive data to date, has found that in the short run, for-profit private prisons are cheaper, but in the long run, they are more costly than non-profit, state, and local facilities because they produce a larger number of recidivists. In addition, for-profits come at a greater cost in that they

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<sup>79</sup> ABA Resolution 114, Approved by the ABA House of Delegates at Midyear Meeting 2007

prioritize maximization of profits over rehabilitation of the individual, which directly conflicts with public policy.

Two states have realized the dangers in contracting with private prison companies arguing that incarceration is an inherently governmental function stemming from the government's police powers, that whether the facility is public or private, the state would remain liable in the event that an inmate is violated, that privatization should not be linked to public safety should not be linked to private profit motives, and in states where private prisons had been instituted security was significantly compromised.

The ABA has an extensive history advocating policy that warns against privatization and encourages federal, state, and local governments to properly regulate incarceration. Private prison corporations must remain accountable to the government and the public to ensure that they are meeting the goal of rehabilitating and treating youth. Without proper government regulation, private prisons corporations will allow their desire to increase profits to overshadow rehabilitation. It is for this reason that the ABA urges Congress, state, and local governments to enact laws to ensure that private prisons remain dedicated to treatment of their juvenile inmates.