
ARTICLE

PRISON VOUCHERS

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School vouchers have been proposed as a way to bypass the political pathologies of school reform and improve school quality by transforming students and parents into consumers. What if we did the same for prisons—what if convicted criminals could choose their prison rather than being assigned bureaucratically?

Under a voucher system, prisons would compete for prisoners, meaning that the prisons will adopt policies prisoners value. Prisons would become more constitutionally flexible—faith-based prisons, now of dubious legality, would be fully constitutional, and prisons would also have increased freedom to offer valued benefits in exchange for the waiver of constitutional rights. As far as prison quality goes, the advantages of vouchers would plausibly include greater security, higher-quality health care, and better educational opportunities—features that prison reformers favor for their rehabilitative value.

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The counterarguments are threefold. “Social meaning” and other philosophical arguments hold that choice in prison conditions is either impossible or morally undesirable. On the more economic plane, “market failure” arguments hold that because of informational or other problems prisoner choice would not succeed in improving overall prison quality. “Market success” arguments, on the other hand, hold that prison choice would improve prison quality too much, satisfying inmate preferences that are socially undesirable or diluting the deterrent value of prison. These counterarguments have substantial force but do not foreclose the possibility that prison choice results in socially desirable improvements that could outweigh these disadvantages.

I conclude with thoughts about the politics of prison vouchers, both before and after their adoption.

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INTRODUCTION

In this Article, I invite the reader to indulge in a thought experiment. What would the world look like if, instead of assigning a prisoner to a particular prison bureaucratically, we gave the prisoner a voucher, good for one incarceration, to be redeemed at a participating prison?

School vouchers have been debated to death¹ ever since Milton Friedman proposed them in 1955² and progressives championed them in the 1960s.³ Vouchers have also been discussed and used for

¹ And actually adopted in Milwaukee, Cleveland, and elsewhere. Caroline M. Hoxby, *School Choice and School Competition: Evidence from the United States*, 10 SWED. ECON. POL'Y REV. 11, 11, 15 (2003). School voucher effectiveness remains a topic of debate. Compare *id.* at 11 (arguing that voucher programs have improved student performance and created positive incentives for struggling public schools), with Helen F. Ladd, *Comment on Caroline M. Hoxby: School Choice and School Competition: Evidence from the United States*, 10 SWED. ECON. POL'Y REV. 67, 71-72, 74-75 (2003) (disputing Hoxby's claims).

² Milton Friedman, *The Role of Government in Education* ("Governments could require a minimum level of education which they could finance by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on 'approved' educational services."), in *ECONOMICS AND THE PUBLIC INTEREST* 123, 127 (Robert A. Solo ed., 1955). Friedman was not the first theorist to propose school choice. See JOHN STUART MILL, *ON LIBERTY* (1869) (arguing that the government "might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children"), reprinted in *ON LIBERTY AND OTHER ESSAYS OF JOHN STUART MILL* 3, 126 (1926); THOMAS PAINE, *RIGHTS OF MAN* (1791) (proposing a distribution of surplus funds to poor families for them to spend on the education of their children), reprinted in *THE GREAT WORKS OF THOMAS PAINE* 5, 185 n.* (D.M. Bennett ed., New York, Liberal & Scientific Publ'g House 1877); ADAM SMITH, *THE WEALTH OF NATIONS* 822 (Edwin Cannan ed., 2000) (1776) (arguing that competition would improve educational quality if students were given scholarships and "left free to chuse what college they liked best").

³ See, e.g., Christopher Jencks, *Private Schools for Black Children*, N.Y. TIMES, Nov. 3, 1968, § 6 (Magazine), at 30 (stating the proposal in terms of a tax subsidy instead of vouchers, but with generally similar substance); Theodore Sizer & Phillip Whitten, *A Proposal for a Poor Children's Bill of Rights*, PSYCHOL. TODAY, Aug. 1968, at 59, 62 (suggesting that a voucher program would "provide an incentive to middle-class schools to take in poor children"); see also James Forman, Jr., *The Secret History of School Choice: How Progressives Got There First*, 93 GEO. L.J. 1287, 1309-12 (2005) (discussing voucher plans proposed in the late 1960s by progressives including Jencks, Sizer, and Whitten).

other government services, including housing,⁴ health care,⁵ child care, job training, environmental protection, welfare, nutrition, and transportation.⁶

Vouchers are no stranger to the criminal justice system: they are used for halfway houses, mandatory anti-alcohol and drug treatment programs,⁷ and criminal defense lawyers for the indigent.⁸ A voucher system was implemented in a few states in the 1970s to allow inmates to buy training and education as part of “mutual agreement programs”—also known as “contract parole” programs—that helped in-

⁴ See Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 990-92 (2010) (examining housing vouchers and finding some success that never developed into wider application).

⁵ See Ezekiel J. Emanuel & Victor R. Fuchs, *Health Care Vouchers—A Proposal for Universal Coverage*, 352 NEW ENG. J. MED. 1255, 1255-56 (2005) (advocating for health care vouchers as a mechanism for creating universal coverage while preserving consumer choice).

⁶ See, e.g., Paul Posner et al., *A Survey of Voucher Use: Variations and Common Elements* (proposing voucher usage for the provision of many government services), in *VOUCHERS AND THE PROVISION OF PUBLIC SERVICES* 503, 504-13 (C. Eugene Steuerle et al. eds., 2000). In Ira Lupu and Robert Tuttle’s definition, “voucher programs do not depend upon the issuance of any certificate or other physical manifestation of the financing scheme; rather, voucher programs earn that characterization by the elements of beneficiary designation of the provider coupled with government payment based on individualized services or goods provided to the beneficiary.” Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539, 539 n.4 (2002).

⁷ See JUDITH GREENE & TIMOTHY ROCHE, JUSTICE POLICY INST., *CUTTING CORRECTLY IN MARYLAND* 30 (2003) (recommending the use of vouchers to pay Maryland drug treatment providers); see also *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 884 (7th Cir. 2003) (upholding the constitutionality of a state voucher program that allowed alcohol and drug offenders to choose between religious and secular rehabilitation programs).

Judge Posner commented on the usage of the term “voucher”:

We have put “vouchers” in scare quotes because the state has dispensed with the intermediate step by which the recipient of the publicly funded private service hands his voucher to the service provider. But . . . there is no difference between giving the voucher recipient a piece of paper that directs the public agency to pay the service provider and the agency’s asking the recipient to indicate his preference and paying the provider whose service he prefers.

Id. at 882.

⁸ Defense counsel voucher systems have been implemented in Ontario and in England and Wales. See Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 110-11 (1993) (arguing that a similar system of counsel vouchers is possible in the United States); see also Posner et al., *supra* note 6, at 506-07 (noting examples of voucher programs in the realm of criminal justice, including a “Goods for Guns” program and disbursements of clothing vouchers for those on probation).

mates work toward parole.⁹ This last idea was taken up in 1978 in the Model Sentencing and Corrections Act,¹⁰ which suggested that prisoners get vouchers to purchase “specified treatment programs and services directly from either public or private agencies.”¹¹

But, as far as I can tell, no one has ever discussed vouchers as a serious possibility for prisons.¹²

⁹ See FAY HONEY KNOPP ET AL., *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* 97-98 (1976) (reviewing the voucher components of mutual agreement programs in Maryland); DAVID T. STANLEY, *PRISONERS AMONG US: THE PROBLEM OF PAROLE* 66-68 (1976) (reviewing mutual agreement programs in Wisconsin, California, and Arizona); James O. Finckenauer & Carol Rauh, *Contract Parole: Some Legal and Rehabilitative Issues of Mutual Agreement Programming for Parole Release*, 5 CAP. U. L. REV. 175, 194 (1976) (describing mutual agreement program vouchers in California); Leon Leiberg & William Parker, *Mutual Agreement Programs with Vouchers: An Alternative for Institutionalized Female Offenders*, AM. J. CORRECTIONS, Jan.-Feb. 1975, at 10, 13 (discussing an early California experiment with inmate training vouchers); Ronald J. Scott, *Contract Programming in Probation: Philosophical and Experimental Bases for Building a Model*, 4 JUST. SYS. J. 49, 54 (1978) (presenting an overview of voucher programs in California and Maryland); *id.* at 64-65 (including funding for community services vouchers in a model of a contractual probation system); *id.* at 65 (describing Michigan’s voucher system that is part of its probation program, which allows for the “provision of financial assistance to secure services available in the community”); Steve Gettinger, *Parole Contracts: A New Way Out*, CORRECTIONS MAG., Sept.-Oct. 1975, at 3, 4 (discussing vouchers in Maryland and plans for vouchers in Massachusetts).

¹⁰ MODEL SENTENCING & CORRECTIONS ACT §§ 4-701 to -706, in 10 UNIFORM LAWS ANNOTATED 325, 535-40 (2001).

¹¹ *Id.* § 4-701(a). This feature of the Model Act, to my knowledge, hasn’t been adopted anywhere. See also *id.* § 4-703(b) (proposing vouchers be used “to purchase programs or services relating to [a person’s] care, rehabilitation, treatment, or adjustment to life in the free community, including: (1) academic programs; (2) vocational training programs; (3) medical or psychiatric services; (4) counseling services, including personal, marital, employment, or financial counseling; and (5) any other program or service approved by the director”); *id.* § 4-704(a) (“An application may not be denied solely because the applicant provides programs or services already available from the department or elsewhere.”).

¹² A search for “prison vouchers” in Westlaw’s JLR and ALLCASES databases yields no results, other than my own recent work. See Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983 (2011) [hereinafter Volokh, *Constitutional Possibilities*]; Alexander Volokh, Book Review, 25 J.L. & RELIGION 323, 326-27 (2010) (reviewing WINNIFRED FALLERS SULLIVAN, *PRISON RELIGION: FAITH-BASED REFORM AND THE CONSTITUTION* (2009)). Cf. Andrei Shleifer, *State Versus Private Ownership*, J. ECON. PERSP., Fall 1998, at 133, 139 (“[P]risoner choice is not a realistic possibility . . .”). There’s been no shortage of offhand comments and jokes about prison vouchers, often in sarcastic response to school choice proposals. E.g., Bruce Shapiro, *Portfolio Prisons*, NATION, Oct. 20, 1997, at 4, 5 (characterizing a joke about prison vouchers as “not quite as facetious as it sounds”); gocards44, *Prison Vouchers*, KEVIN BURKE’S WEBLOG (Mar. 29, 2007, 6:22 PM), <http://gocards44.wordpress.com/2007/03/29/prison-vouchers> (suggesting a system of prison vouchers, while acknowledging that it “would never get past Congress”); Lightning Bug’s Butt, *Even More Bulletins*, LIGHTNING BUG’S BUTT (Feb. 19, 2007, 11:40 PM), <http://bugsbutt.blogspot.com/>

This is a shame, because some of the same factors that led early education reformers to suggest school vouchers apply with equal, if not greater, force in the context of prisons. Both prisons and schools face a similar confluence of three factors:

1. Both face widespread and serious problems.
2. The problems in both areas have proven hard to solve through the usual political, administrative, and judicial means.
3. Allocation of students to schools, like the allocation of inmates to prisons, is predominantly done bureaucratically, with limited possibilities for choice.

The *prima facie* case for considering a market solution, in which the subject population would become consumers and thus drive reform by voting with its feet—essentially, getting rid of (3) to bypass (2) and thereby solve (1)—thus seems strong.

Let me focus on (1) for a bit. Modern American prisons—with their high violence rates, bad medical care, overuse of highly punitive measures like administrative segregation, and the like—are widely believed to be of low quality.¹³ Note the similarity to the views of early school voucher proponents on the left, who wrote that the “public schools have not been able to teach most black children to read and write or to add and subtract competently”¹⁴ and that the public school system “destroys rather than develops positive human potential.”¹⁵

We should care about prison quality even if we don’t care about prisoners themselves because bad prison conditions often indirectly

2007/02/even-more-bullet-ins.html (sarcastically envisioning an advertisement for a voucher prison “where the guard beatings are minimal”); yourworstnightmare, Comment to *Do You Think Kansas Should Have Private Prisons?*, LJWORLD.COM (Mar. 26, 2006, 9:56 AM), <http://www2.ljworld.com/onthestreet/2006/mar/26/prisons/#c118025> (proposing prison vouchers in response to the question of whether Kansas should privatize its prisons). “Prison vouchers” as discussed here shouldn’t be confused with the same expression that is occasionally used to refer to money that prisoners can use in some penal systems to buy products in prison. See, e.g., ARTHUR KOESTLER, *DARKNESS AT NOON* 43 (Daphne Hardy trans., Bantam Books 1986) (1941) (describing a system of vouchers in a fictional prison where the vouchers are required to purchase goods); ARTHUR KOESTLER, *DIALOGUE WITH DEATH* 147 (Trevor & Phyllis Blewitt trans., Macmillan Co. 1942) (“Angelito came to change the hundred peseta note into prison vouchers.”).

¹³ See *infra* Section I.A.

¹⁴ Jencks, *supra* note 3, at 30.

¹⁵ Sizer & Whitten, *supra* note 3, at 62. But see KEVIN B. SMITH & KENNETH J. MEIER, *THE CASE AGAINST SCHOOL CHOICE: POLITICS, MARKETS, AND FOOLS* 16-19 (1995) (arguing that voucher proponents are overstating some of the problems with public education).

hurt the rest of society.¹⁶ Brutal conditions,¹⁷ as well as excessive use of high-security segregation,¹⁸ make prisoners less useful members of society and more likely to reoffend.¹⁹ The low level of educational, vocational, and rehabilitative programs also contributes to recidivism. Furthermore, communicable diseases can spill over into the outside world when infected inmates are released.²⁰ The risk of multi-drug-resistant tuberculosis in New York in the 1980s and early 1990s may have been linked to poor medical treatment in prisons and jails.²¹

There are thus clear opportunities for gains from prison vouchers—not just to prisoners, but also to society at large—as competing prisons seek to attract prisoners by offering better security, medical care, and vocational programs.²²

But, now focusing on (2), why can't we “just” fix prisons by other means, such as reform legislation, administrative oversight, or litigation?

¹⁶ See James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1006-09 (2010) (reviewing PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009)) (asserting that prison violence, overcrowding, and the lack of educational and treatment programs present a threat to public safety when offenders are released).

¹⁷ See M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1, 17-21 (2007) (arguing empirically that harsh prison conditions make prisoners more likely to reoffend); Francesco Drago et al., *Prison Conditions and Recidivism*, 13 AM. L. & ECON. REV. 103, 120-25 (2011) (finding similar results in a study of Italian prisoners); Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 115 (2009) (concluding, after reviewing the available literature, that “incarceration appears to have a null or mildly criminogenic effect on future criminal behavior”); Rafael Di Tella & Ernesto Schargrodsky, *Criminal Recidivism After Prison and Electronic Monitoring* 28 (Nat'l Bureau of Econ. Research, Working Paper No. 15602, 2009, rev. 2010) (finding that recidivism rates are lower for offenders who are electronically monitored than for offenders who are sent to prison).

¹⁸ THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *CONFRONTING CONFINEMENT* 52-53 (2006).

¹⁹ See Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 245 (2009) (“[T]he people who have been marked out for incarceration may become *through the experience of incarceration* the very ‘anti-social’ misfits whose exclusion from society was thought so necessary.”); Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 352-61 (2009) (suggesting that restrictive regulation of visitation and outside correspondence has adverse effects on prisoners’ relationships with their families and communities).

²⁰ See THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 18, at 13 (“Every year, more than 1.5 million people are released from jail and prison carrying a life-threatening contagious disease.”).

²¹ *Id.* at 47 (citing research showing a correlation between time spent in prison and diagnosis with tuberculosis); see also GEORGE KNOX, *AN INTRODUCTION TO GANGS* 465 (5th ed. rev. 2000) (noting that over half of correctional facilities surveyed in 1999 reported having had inmates diagnosed with tuberculosis during the last year).

²² See *infra* Section I.A.

Legislative prison reform is a tough sell—criminals are widely vilified.²³ In contrast, in the school reform context, all politicians at least claim to like kids.²⁴ Nor are elected officials eager to fund prisons.²⁵ Some reformers recognize that prison administrators or legislators have shown little interest in improving prisoners' lives,²⁶ especially if such improvements carry a cost.²⁷ Nonetheless, reformers continue to “urge” and “encourage” these same officials to increase prison expenditures or implement reforms.²⁸ Of course there's nothing wrong

²³ See, e.g., Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 12 (1999) (noting that politicians frequently favor harsher sentencing laws in order to curry favor with voters).

²⁴ See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.) (reflecting nationwide concern with the education of children in public schools).

²⁵ See, e.g., Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 82-83 (2008) (observing opposition to prison funding from state legislatures).

²⁶ See THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 18, at 30 (finding that the “direct supervision” technique faces resistance that is mostly “attitudinal” and prison officials usually react to the idea with “astonishment”); *id.* at 31 (arguing that direct supervision will not succeed unless officers “have the competence to understand and respect persons from different racial, ethnic, and cultural backgrounds”); *id.* at 35 (noting that a shift in priorities toward placing prisons closer to inmates' communities “would require tremendous political will”).

²⁷ See *id.* at 36 (acknowledging that welcoming visitors and helping with transportation would be costly); *id.* (stating that prisons are under pressure from state legislatures to use telephone contracts to generate income); *id.* at 39 (“[L]egislatures chronically underfund correctional health care.”); *id.* at 41 (“Partnerships between correctional agencies and community health-care providers . . . require openness and flexibility on the part of participating correctional agencies, a broad-minded sense of mission, and a deep commitment to that mission on the part of participating public health agencies.”); *id.* at 46 (stating that adequate mental health standards “cannot be met without better funding”); *id.* at 48 (“[U]nder significant pressure from state lawmakers to control spiraling medical costs, correctional facilities began charging prisoners co-payments for health care.”); *id.* (acknowledging “the tremendous pressure on corrections administrators to contain costs and hold prisoners accountable”); *id.* at 79 (“[S]ome corrections administrators have been resistant to external monitoring, and by and large the public and its representatives have not insisted on it.”); *id.* (“[T]he few [external monitoring] systems that do exist are generally underresourced and lacking in real power.”); see also Lynn S. Branham, *“The Mess We’re In”: Five Steps Towards the Transformation of Prison Cultures*, 44 IND. L. REV. 703, 732 (2011) (“There is always reticence or resistance on the part of many to initiatives to depart from the status quo.”).

²⁸ See THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 18, at 14 (“Lawmakers must provide adequate funding . . .”); *id.* at 39 (“[T]he Commission urges lawmakers to adequately fund correctional health care.”); *id.* at 41 (“[T]he Commission urges correctional agencies and community health-care providers to consider the benefits of forging solid partnerships”); *id.* at 49 (“The Commission believes the risks are too great to justify any short-term cost-savings and urges state lawmakers to eliminate co-payments and provide corrections departments with the resources they

with urging, and some reforms have been implemented even in the face of political pressure to the contrary.²⁹ But it's unsurprising that mere urges haven't gone very far.³⁰

Administrative solutions are likewise difficult because prison officials resist "scrutiny by 'outsiders.'" ³¹ Independent inspection and monitoring, as well as internal oversight mechanisms, such as effective grievance systems, are underused.³²

Judicial solutions are also unpromising.³³ Courts often defer to the judgment of prison administrators,³⁴ and prisons are exempt from administrative procedure acts in many states.³⁵ Prisoner litigation, whether as individual claims or as more ambitious prison reform cas-

need to provide quality medical care . . ."); *id.* at 74 ("Corrections leaders . . . must have the courage to confront executive and legislative leaders when proposed policies and budgets threaten the health and safety of our prisons and jails, and of our communities."); *id.* ("[E]xecutive branch officials must stand up to organized labor . . ."); *id.* at 81 ("The Commission strongly urges states to create a monitoring body independent of the department of corrections . . ."); *id.* at 88 ("The Commission urges many more facilities to seek accreditation and, at the same time, urges the ACA [American Correctional Association] to strengthen the process so that accreditation is even more meaningful."); *id.* at 92 ("The Commission encourages the ACA to involve the broadest range of interested parties in the process of developing ever stronger standards for correctional practice."); *see also* Branham, *supra* note 27, at 706 ("There are innumerable steps—some big, some small—that need to be taken . . ."); *id.* at 714 ("[G]overnments can and should make transparency and accountability hallmarks of their prisons . . .").

²⁹ *See, e.g.*, THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 18, at 88 (explaining that efforts to promote internal accountability "are all the more impressive given that they have been largely self-generated rather than imposed through political pressure"); Branham, *supra* note 27, at 705 ("There are some correctional leaders, though not nearly enough, who have publicly espoused the need for, and the feasibility of, what has been aptly termed 'culture busting' in prisons." (citations omitted)).

³⁰ In suggesting merit pay for prison wardens, Rick Hills says that prisons might be "the one sort of Big Government that neither party wants to reinvent," complicating prospects for reform. Rick Hills, *Merit Pay for Prison Wardens?*, PRAWFSBLAWG (Mar. 3, 2008, 11:14 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2008/03/tying-the-salar.html>.

³¹ THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 18, at 16.

³² *See id.* at 16-17 (describing existing oversight systems as "inadequate, sometimes wholly meaningless").

³³ *See* Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 313-15 (2008) (finding that the ability of courts to propose solutions is limited by an inability to appropriate funds, "the inherent difficulty in courts formulating standards and enforcing them," and restrictions imposed on judicial remedies by the Prison Litigation Reform Act).

³⁴ *See* Shay, *supra* note 19, at 343 ("[T]he Supreme Court has accorded corrections officials significant leeway, even when constitutional rights are implicated.").

³⁵ *See id.* at 346-47 (surveying state regimes and finding that twenty-eight have such exemptions).

es, is restricted by statute—for instance, by the Prison Litigation Reform Act (PLRA)³⁶—and by case law holding prisoners’ rights to be quite limited.³⁷

Some have suggested contracting out prison management to the private sector (but holding the method of allocating prisoners constant) as a means of improving prison quality.³⁸ This is a controversial proposition—others categorically deny that contracting out improves prison quality,³⁹ and even some who are more sympathetic to private contracting grant that the evidence on the quality of private prisons relative to public ones is mixed.⁴⁰

³⁶ The PLRA requires inmates to exhaust all administrative remedies before filing suit in court. 42 U.S.C. § 1997e(a) (2006). Even more controversially, the PLRA bars recovery for mental and emotional injuries in the absence of a physical injury. *Id.* § 1997e(e). One district court has held the limitation on recovery for mental and emotional injuries unconstitutional as applied. *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006); see also Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 141-42 (2008) (observing that the number of lawsuits filed per thousand inmates has declined by sixty percent since passage of the PLRA); Shima Baradaran-Robison, Comment, *Kaleidoscopic Consent Decrees: School Desegregation and Prison Reform Consent Decrees After the Prison Litigation Reform Act and Freeman-Dowell*, 2003 BYU L. REV. 1333, 1335 (“Congress clearly intended to reduce judicial involvement in the improvement of prison conditions.”).

³⁷ See, e.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that prisoner regulations can limit prisoners’ rights for “legitimate penological interests”); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (requiring “deliberate indifference to serious medical needs of prisoners” to rise to the level of an Eighth Amendment violation).

³⁸ See, e.g., GEOFFREY F. SEGAL & ADRIAN T. MOORE, REASON PUB. POL’Y INST., POL’Y STUDY NO. 290, *WEIGHING THE WATCHMEN: EVALUATING THE COSTS AND BENEFITS OF OUTSOURCING CORRECTIONAL SERVICES PT. 2*, at 15 (2002) (concluding that privatization can increase quality, introduce innovation, and reduce costs); Samuel Jan Brakel & Kimberly Ingersoll Gaylord, *Prison Privatization and Public Policy*, (arguing that prison privatization will lead to greater efficiency), in *CHANGING THE GUARD: PRIVATE PRISONS AND THE CONTROL OF CRIME* 125, 139 (Alexander Tabarrok ed., 2003).

³⁹ See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 505 (2005) (arguing that private prisons will cut costs in pursuit of greater profits, causing prison conditions to fall below the level required by the “humanity principle”).

⁴⁰ See *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1875-77 (2002) [hereinafter *Developments*] (Part III is the author’s student note) (citing evidence that private prisons are superior to public ones on some quality indicators but not others); cf. DOUGLAS McDONALD ET AL., ABT ASSOCS., *PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE* 56 (1998) (evaluating existing studies on the quality of private prisons and finding that claims of superiority over public prisons are “not well documented”); Richard Culp, *Prison Privatization Turns 25* (arguing that while private prisons may initially bring cost savings, this “cost advantage decreases” over time), in *U.S. CRIMINAL JUSTICE POLICY: A CONTEMPORARY READER* 183, 199 (Karim Ismaili ed., 2011).

Here, too, the parallels with schools are clear. Whether the blame lies with teachers' unions⁴¹ or with politicians unwilling to spend money on schools,⁴² schools have been hard to reform politically. Litigation hasn't worked well,⁴³ and any constitutional rights to a good education are generally weak.⁴⁴ Privatization of entire school systems within the context of mandatory government provision has been tried sporadically, but the results haven't been terribly impressive so far.⁴⁵

⁴¹ See Joe Klein, *Failing Our Schools*, TIME, Feb. 8, 2010, at 20, 20 (chronicling a teachers' union's successful efforts to block New York from receiving \$700 million in federal funds for school reform).

⁴² See Linda Darling-Hammond, *Restoring Our Schools*, NATION, June 14, 2010, at 14, 18 (criticizing Reagan-era policies cutting education funding); Lisa Kaiser, *An Interview with Educator and Activist Jonathan Kozol*, EXPRESSMILWAUKEE.COM (Mar. 4, 2009), <http://www.expressmilwaukee.com/article-5728-an-interview-with-educator-and-activist-jonathan-kozol.html> (characterizing education activist Jonathan Kozol as arguing that "promises by states to equalize funding for urban districts never materialize").

⁴³ See, e.g., D.S.W. v. Fairbanks N. Star Borough Sch. Dist., 628 P.2d 554, 556 (Alaska 1981) (rejecting theory of negligent classification, placement, or teaching); Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 861 (Cal. Dist. Ct. App. 1976) (rejecting a claim against a school district for negligently failing to provide basic academic instruction); Hunter v. Bd. of Educ., 439 A.2d 582, 585-86 (Md. 1982) (rejecting an educational malpractice claim because ruling otherwise would require the courts to monitor school policies and operations); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1353 (N.Y. 1979) (refusing to recognize an educational malpractice claim on public policy grounds because the legislature had established the school system and provided for the hearing of complaints). See generally Melanie Natasha Henry, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 CALIF. L. REV. 1117 (2004) (surveying educational malpractice jurisprudence and the emergence of statutory claims under the No Child Left Behind Act); Kevin P. McJessy, Comment, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768, 1798-1803 (1995) (discussing various contract law theories of school liability).

⁴⁴ See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54-55 (1973) (rejecting an equal protection attack on inequalities in a Texas school system that were attributable to a funding scheme dependent on local property tax revenues). State constitutional challenges to funding systems have sometimes been successful. See, e.g., Serrano v. Priest, 487 P.2d 1241, 1265 (Cal. 1971) ("[W]e are satisfied that plaintiff children have alleged facts showing that the public school financing system denies them equal protection . . ."). But state constitutional challenges to educational quality have generally failed on the theory that the relevant constitutional provisions are nonbinding, unenforceable, or only guarantees a very low minimum quality. See, e.g., Donohue, 391 N.E.2d at 1353-54 (holding that a state constitutional provision obligated the legislature only to maintain and support the school system). One notable exception is *McDuffy v. Secretary of the Executive Office of Education*, 615 N.E.2d 516, 554-55 (Mass. 1993), which found a constitutional right to an education and outlining seven broad goals, but left their implementation to the legislature.

⁴⁵ See, e.g., Shelby Wolff Reitz, Note, *Mastering Two Services: Advancing Public Values Through School Privatization*, 6 GEO. J.L. & PUB. POL'Y 101, 110-15 (2008) (reviewing the

The market-based approach that prison vouchers represent has an obvious appeal in this context. The logic is similar to that of school choice: vouchers empower the prisoners themselves to reward and punish prisons, creating powerful incentives for prisons to improve in accordance with the prisoners' own standards.⁴⁶ No longer would advocates have to urge prison administrators or legislatures to reform conditions in the interest of prisoners or try to convince these authorities that prisoner welfare is aligned with the social interest—a strategy that has not worked well so far.⁴⁷ Instead, prison administrators would be moved, as if by an invisible hand, to make their prisons better places.

In Part I, I explain how a prison choice program might work and how the vouchers would be funded. I also explain how prison choice is different from, and conceptually independent of, prison privatization.

In Part II, I discuss how vouchers would make prisons more constitutionally flexible. First, prisons would be freer to experiment with religiously inspired rehabilitation: faith-based prisons,⁴⁸ whose constitutionality under the current regime is dubious, would become fully constitutional. Under vouchers, the prison system would come within *Zelman v. Simmons-Harris* because prisons would be participating on a neutral basis, independent of religion.⁴⁹ As is already the case with halfway houses, residential programs for delinquent children, and alcoholism and drug addiction programs, participating providers could be public or private, religious or secular.⁵⁰ The participant's ability to choose from a variety of providers, not all of which

management of Philadelphia public schools by for-profit school operator Edison Schools, and finding modest but shaky improvement).

⁴⁶ See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1347 (2003) ("Vulnerability can be exacerbated when the consumers of the service are not the same as the payers—when taxpayers, for instance, finance prisons occupied by convicts, welfare received by eligible low-income applicants, and schools occupied by other people's children.").

⁴⁷ See *supra* notes 23-40 and accompanying text.

⁴⁸ For a discussion of different sorts of faith-based programs, see Marc O. DeGirolami, *The New Religious Prisons and Their Retributivist Commitments*, 59 ARK. L. REV. 1, 13-19 (2006). For a discussion of whether faith-based programs reduce recidivism, see Alexander Volokh, *Do Faith-Based Prisons Work?*, 63 ALA. L. REV. 43 (2011) (arguing that they don't).

⁴⁹ See 536 U.S. 639, 662-63 (2002) (holding that a school choice program that includes a large proportion of religious schools does not violate the Establishment Clause if all schools can participate based on neutral criteria, and parents can freely select or reject the religious school).

⁵⁰ See, e.g., *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 884 (7th Cir. 2003) (upholding the dismissal of a suit to enjoin correctional authorities from funding a private faith-based halfway house.)

are religious, puts these programs in the same category as the school vouchers upheld in *Zelman*.

The effect of vouchers would be more fundamental than merely to validate existing faith-based programs. Consider private schools under a school voucher regime. Clearly, under *Zelman*, they are not limited to merely providing the sorts of ecumenical prayers that are struck down in the public school context. Rather, they can advertise themselves as Catholic, display crucifixes, teach theology, and do everything else that private schools can do. Prisons would be similar. Modern-day faith-based prisons, in an effort to comply with the Establishment Clause, aggressively seek nondenominationalism and ecumenism.⁵¹ But—just as one can disfavor “To Whom It May Concern” prayer in schools—a religious organization may be unsatisfied with prison rehabilitation based on “Religion Lite.”⁵² With vouchers, such an organization could become far more ambitious. One could have “religious prisons” in the proper sense, each advertising its own sectarian rehabilitative agenda. Vouchers could thus be the best, or perhaps even the only, way to allow for faith-based prisons.

Second, prisons would be freer to offer inmates packages of features that currently would be considered unconstitutional. Prisoners have dramatically reduced rights, but they still retain some. In general, people—prisoners or not—may benefit from being able to waive their rights in exchange for other benefits. For instance, inmates may agree to waive some part of their due process rights in exchange for better job training. A prison’s ability to offer such a package is limited by the unconstitutional conditions doctrine.⁵³ I argue that, in a prison system that is more competitive from the inmate’s point of view, the unconstitutional conditions doctrine would (and should) be somewhat more permissive because the inmates’ ability to choose would

⁵¹ See, e.g., SULLIVAN, *supra* note 12, at 157-61 (documenting the efforts of Inner-Change Freedom Initiative to portray its values system as so general that it would be consistent with any religion).

⁵² See, e.g., Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 BYU L. REV. 569, 572 (“In my house, we do not offer prayers ‘to whom it may concern.’”); Paul Finkelman, *School Vouchers, Thomas Jefferson, Roger Williams, and Protecting the Faithful: Warnings from the Eighteenth Century and the Seventeenth Century on the Danger of Establishments to Religious Communities*, 2008 BYU L. REV. 525, 551-52 (noting that the school prayer at issue in *Engel v. Vitale*, 370 U.S. 421 (1962), “would hardly be recognized as ‘prayer’ in any meaningful way by people of faith who take religion seriously” and “was exactly what we would expect from a state agency trying to create a prayer that would offend no one, side with no one, and not run counter to anyone’s faith”).

⁵³ See *infra* Section II.B.

mitigate the possibility that prisons would be illegitimately taking advantage of inmates.

With all this going for prison vouchers, what could go wrong?

In Part III, after having presented the positive case in favor of prison vouchers, I address the problems. One possible critique is that this idea is a nonstarter because prisoners either *cannot* or *should not* exercise voluntary choices regarding their places of imprisonment.

Another possible critique, sounding more in economics than in philosophy, is “market failure”—that inmate’s individual decisions won’t succeed in improving overall prison quality. This lack of improvement could be because inmates can’t make *themselves* better off through their decisions because, for instance, they are poorly informed about prison quality. The lack of improvement could also be because some inmates’ decisions will make *other inmates* worse off because, for instance, the better informed inmates will get the best prisons and leave the bad prisons to the uninformed.

A third, more serious critique is what I call “market success”—that inmates *will* succeed in improving prison quality *by their own standards*, and that this is precisely the problem.⁵⁴ Prisoners’ preferences aren’t always good; we are, after all, talking about (presumptive) criminals. For example, satisfying prisoner preferences may harm society by allowing gang members to serve their sentences together and thus better run their outside criminal enterprises. Alternatively, prisoner choice may merely make prison a less undesirable place and thereby undermine the deterrent value of prison.⁵⁵

I take these counterarguments seriously, and so I make no strong claims about the bottom-line merits of prison vouchers. *If* the potential downsides—that prisoners, through their voucher spending, drive prisons to adopt undesirable features in ways that can’t be adequately controlled by the political process—are outweighed by the benefits—such as improvements in prisoner security, health care, and education—then vouchers *could* dramatically improve penal policy. But this Article is meant to spur further research and debate on the question, not to come down on one side or another.

In Part IV, I deal with the politics of prison vouchers. In the first place, if vouchers are so great, and if they improve prison conditions

⁵⁴ Properly speaking, this is also a species of market failure, since prisoners’ decisions impose negative externalities on the world at large; the term “market success” is meant to be merely evocative.

⁵⁵ *But see infra* note 328 and accompanying text.

as the political system hasn't been able to, why would they ever be adopted? Conversely, if prison vouchers are adopted, and if they're good for prisoners, wouldn't their adoption be evidence of a change in attitudes toward prisoners that would make more conventional reforms possible? In this Part, I speculate on a possible political coalition that could get prison vouchers adopted even without a change in attitudes toward prisoners. I further speculate on how the political system would treat prison vouchers after their adoption, both in terms of funding and in terms of regulation.

I. THE MECHANICS

A. Choice

Inmates today have little or no choice regarding where they serve their prison sentence. When assigning prisoners to federal prisons, the Bureau of Prisons (BOP) is required to consider “the resources of the facility contemplated,”⁵⁶ “the nature and circumstances of the offense,”⁵⁷ “the history and characteristics of the prisoner,”⁵⁸ “any statement” by the sentencing court “concerning the purposes for which the sentence . . . was determined to be warranted,”⁵⁹ and Sentencing Commission policy statements.⁶⁰ The BOP is also required to consider the sentencing court's recommendations regarding what *type* of facility is appropriate,⁶¹ but isn't required to consider recommendations of *particular* facilities.⁶² Moreover, if the sentencing court “order[s], recommend[s], or request[s]” that the convicted defendant be sentenced to a community correction facility, this has “no binding effect” on the BOP.⁶³

⁵⁶ 18 U.S.C. § 3621(b)(1) (2006). Federal law authorizes the BOP to place inmates in “any available penal or correctional facility,” whether public or private, anywhere in the federal government's jurisdiction. *Id.* § 3621(b).

⁵⁷ *Id.* § 3621(b)(2).

⁵⁸ *Id.* § 3621(b)(3).

⁵⁹ *Id.* § 3621(b)(4)(A).

⁶⁰ *Id.* § 3621(b)(5).

⁶¹ *Id.* § 3621(b)(4)(B).

⁶² This can be inferred from the absence of a requirement in the relevant section of the statute, which directs the BOP to consider the sentencing court's recommendation only as to “type . . . of facility.” *Id.*

⁶³ *Id.* § 3621(b). While the BOP's regulations seem to accommodate sentencing court recommendations, generally there's no guarantee that the court will convey the prisoner's preferences and no systematic way for prisoners to have their preferences satisfied. See U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, NO. 5100.08, PROGRAM STATEMENT, at IV-3 (2006), available at http://www.bop.gov/policy/progstat/5100_008.pdf (indicating that an inmate's designation to a particular facility would include

In Texas, convicted defendants can't even ask for a particular prison at sentencing; prisoners are assigned according to their supposed needs.⁶⁴ There is no formal way to "bargain" with the court or with the prosecutor, and voluntary transfers are limited.⁶⁵

In California, there's a limited amount of choice in jail assignment. Through "offender self-pay" programs, minimal-risk offenders can, for a fee and with court approval, opt out of the regular jail system and be housed in the jail equivalent of a "five-star Hilton,"⁶⁶ where they get distance from violent offenders, work furlough rights, and sometimes even have the right to bring computer equipment.⁶⁷ But this California system is both unusual and inequalitarian.

Thus, under the standard regime, prisoners are assigned primarily based on a state correctional employee's judgment of available space and inmate needs, such as proximity to family or appropriate treatment programs.

consideration of the specific institution or program recommended by the sentencing court); *id.* at III-1 (advising the BOP to "follow[] the intentions of the [sentencing] Court when designating a facility"); *id.* at III-3 to -4 (stating the BOP "make[s] every effort" to follow the sentencing court's recommendation); *id.* at IV-5 ("The court may recommend a specific institution or a geographical region for a newly committed inmate."); *id.* at V-3 ("When consistent with policies or when [the sentencing court's suggestions] are consistent with sound correctional management, the Bureau of Prisons attempts to satisfy judicial recommendations.").

⁶⁴ See TEX. DEP'T OF CRIMINAL JUSTICE, OFFENDER ORIENTATION HANDBOOK 6 (2004) ("Offenders do not have a right to choose their unit of assignment. Inter-Unit transfers are based on departmental and offender needs. Offenders may not be transferred closer to home for visitation reasons."). The Handbook does contemplate "[t]ransfer requests for medical or educational reasons," subject to approval by the relevant department head and the State Classification Committee. *Id.* at 6-7.

⁶⁵ See *id.* (detailing various committees' roles in the prison assignment process). Inmates may request transfers because of problems or conflicts. *Id.* at 7. Such requests should be made to "unit staff," who will send the request to the Classification Committee, if the staff deems necessary. *Id.*

⁶⁶ Jennifer Steinhauer, *For \$82 a Day, Booking a Cell in a 5-Star Jail*, N.Y. TIMES, Apr. 29, 2007, at A1. Coincidentally, this sort of jail made the news when celebrity Paris Hilton, great-granddaughter of Hilton Hotels founder Conrad Hilton, was sentenced in 2007. See Laurie L. Levenson & Mary Gordon, *The Dirty Little Secrets About Pay-to-Stay*, 106 MICH. L. REV. FIRST IMPRESSIONS 67, 68-69 (2007), <http://www.michiganlawreview.org/assets/fi/106/levensongordon.pdf> (describing public reaction to Hilton's luxury imprisonment as "unequal justice").

⁶⁷ See Steinhauer, *supra* note 66 (reporting that offenders in paid prisons may in some cases use personal music players and laptops); Geoffrey Segal, *Innovative Alternatives to Traditional Municipal/County Corrections*, REASON FOUND. (Mar. 1, 2001), <http://reason.org/news/show/innovative-alternatives-to-tra-1> (describing public and private self-pay programs in California as beneficial to low-risk inmates and city residents).

Prison choice would supersede this mechanism. The process would begin at conviction. The convicted defendant would receive a coupon, good for incarceration for the duration of his term, which he would be required to redeem at a participating prison (sorry, no choice there). The set of participating prisons may or may not include private prisons.⁶⁸ As I discuss below, choice is conceptually independent of privatization, and—even though some arguments for or against vouchers are often made with private providers in mind—one can discuss vouchers separately from privatization.⁶⁹

I've assumed above that everyone gets a voucher, but this needn't be the case. Some school choice plans only give vouchers to students assigned to schools that are judged to be "failing" in some objective sense;⁷⁰ similarly, officials could do an initial round of nonconsensual assignment and then give vouchers to prisoners at the "worst" prisons, as determined by the Department of Corrections or Bureau of Prisons.

Imagine a convicted defendant awaiting sentencing, presumably with a lot of time on his hands. The soon-to-be prisoner can spend his time flipping through a book, perhaps like the Yellow Pages, with ads for different prisons—or perhaps the browsing can be done online if he has Internet access.⁷¹ To get an initial view of dimensions along which prisons might compete, let's take a more detailed look at some of the problems prisoners face today. Each of the problems listed below suggests possible reforms that inmates might find attractive.⁷²

Violence. Though good data is elusive,⁷³ violence against inmates by other inmates and by staff is a serious problem. This includes

⁶⁸ I'm primarily envisioning this system operating within a single state—or within the federal system, for federal prisons—but nothing inherently prevents out-of-state or out-of-country prisons from participating, subject to governing laws in the origin and destination jurisdictions.

⁶⁹ See *infra* Section I.B.

⁷⁰ For a discussion of the complexities of such a system in the education context, see David N. Figlio & Marianne E. Page, *Can School Choice and School Accountability Successfully Coexist?*, in *THE ECONOMICS OF SCHOOL CHOICE* 49 (Caroline M. Hoxby ed., 2003).

⁷¹ On the availability of Internet access, see, for example, Greg Beato, *You've Got Jail*, REASON.COM (July, 2011), <http://reason.com/archives/2011/06/24/youve-got-jail>.

⁷² Prisons could advertise such reforms with color photos, supporting statistics, and inmate testimonials. One blogger suggests: "Come to Pinal Country Prison, where the guard beatings are minimal and shower sex assaults are a thing of the past. Color-coded cells identify Black Panthers, [Aryan] Nation Skin Heads, and embezzling tax accountants. Tattoo artist on duty. Sorry, no shanks allowed." Lightning Bug's Butt, *supra* note 12. The proposal is sarcastic, but why not take it seriously?

⁷³ There isn't even reasonably complete and reliable data on conditions in prisons nationwide. THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 18, at

prison riots, as well as “gang violence, rape, beatings by officers, and in one large jail, a pattern of illegal and humiliating strip-searches.”⁷⁴ Overcrowding, idleness, and distance from family and community, among other factors, fuel the violence in American prisons.⁷⁵

A prison in a voucher system might respond to this problem by adopting a more effective security policy. This could include a “direct supervision” policy, which involves more face-to-face interactions between inmates and correctional officers and tends to improve safety, rather than the “traditional model” in which guards supervise prisoners from behind glass or bars.⁷⁶ It could also include a focus on conflict resolution and prevention rather than the present emphasis on using force as “a ‘first strike’ response before other tactics are considered or attempted.”⁷⁷ Such a prison could make use of surveillance technology more broadly to “protect prisoners and staff from violence and from false allegations of misconduct” to the extent that this is consistent with inmates’ preferences for privacy, as well as non-invasive drug- and weapon-detection devices.⁷⁸ It could segregate populations that are particularly vulnerable to violence or rape—

17 (stating that present data “make[s] it impossible to get a complete picture of safety and abuse in correctional facilities”).

⁷⁴ *Id.* at 11-12. The data is better for deadly violence, that is homicides and suicides, than for nondeadly violence. In state prisons, there were 4 homicides and 14 suicides per 100,000 prisoners in 2002. *Id.* at 24. In local jails, there were 3 homicides and 47 suicides per 100,000 prisoners in the same year. *Id.* For nondeadly violence, “[a]ll we have are rough indicators”: over the course of 2000, “there were 34,355 reported assaults among prisoners in state and federal facilities and 17,952 reported assaults by prisoners against staff,” and in 2004, there were “4,252 recorded allegations of sexual assault, misconduct, and harassment by prisoners and staff.” *Id.* However, official records may underestimate actual rates by perhaps a factor of five. *Id.*

On prison rape, see, for example, *Combating Rape in Prisons: Little and Late*, ECONOMIST, May 7, 2011, at 32 and Lovisa Stannow, *Rape Factories*, REASON, July 2011, at 54; see also Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 2 & nn.1-6 (describing research on the rape of gay and transgender inmates).

⁷⁵ THE COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 18, at 12. For a news story on the link between overcrowding and violence, see *The Fifth Circle of Hell*, ECONOMIST, July 16, 2011, at 40, which describes prison conditions in Venezuela.

⁷⁶ See THE COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 18, at 29.

⁷⁷ *Id.* at 32.

⁷⁸ *Id.* at 29-34.

either identifiable populations like gay and transgender inmates⁷⁹ or a more broadly defined vulnerable class.⁸⁰

Health care. Correctional health care is inadequately funded, understaffed, and often provided by underqualified doctors.⁸¹ Moreover, communicable diseases, such as staph infections, tuberculosis, hepatitis C, and HIV, are widespread.⁸² Care for the mentally ill in prisons and jails—where rates of mental illness are two to four times higher than among the general public—is likewise inadequate.⁸³

⁷⁹ See Dolovich, *supra* note 74, at 4 (noting that “gay men and trans women detained in the [segregated unit of the L.A. County] Jail are relatively free from the sexual harassment and forced or coerced sexual conduct that can be the daily lot of sexual minorities in other men’s carceral facilities”).

⁸⁰ See *id.* at 63, 73-82 (exploring ways to protect those vulnerable to sexual assault in prison through targeted or general segregation methods). But see NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT: EXECUTIVE SUMMARY 8 (2009) (“The Commission . . . discourages the creation of specialized units for vulnerable groups and specifically prohibits housing prisoners based solely on their sexual orientation or gender identity because it can lead to demoralizing and dangerous labeling.”). The idea of sexual orientation-specific prisons might be in conflict with my suggestion below that prisons be required to take all applicants and accept by lottery if they’re oversubscribed. See *infra* text accompanying notes 130-31. But it could be consistent in a variety of ways: (1) I also suggest that prisons could specialize in particular categories of prisoners, and this might be one of them; they would then only be required to accept all comers within the category that they serve. (2a) The prison could serve all comers but nonetheless have its own gay segregation wing. (2b) The prison might not offer any particularly interesting services for those not in its gay segregation wing, so it might not be particularly attractive to the population at large. But *cf. infra* notes 289-91 and accompanying text. In any event, the “accept all comers” rule is just one way of running a voucher system. The “mutual choice” rule is another, though it presents greater opportunities for cream skimming.

⁸¹ See THE COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 18, at 38 (demonstrating the problems with correctional health care and offering solutions like partnerships with health providers and screening for infectious diseases).

⁸² See *id.* at 47 (stating that among people released from prisons and jails in 1996, over 1.3 million had hepatitis C and approximately 39,000 had AIDS).

⁸³ See *id.* at 13 (describing the higher than average drug treatment, contagious disease treatment, and mental health needs of the prison population); *id.* at 39-40 (noting the challenges correctional facilities face in recruiting qualified medical staff, which results in care by “unlicensed physicians, doctors with substance abuse problems, [and] doctors with criminal histories” (quoting Michael S. Vaughn & Leo Carroll, *Separate and Unequal: Prison Versus Free-World Medical Care*, 15 JUST. Q. 3, 3 (1998))); *id.* at 43-47 (discussing the prevalence rate of serious mental disorders in jails and prisons, which is on average two-to-four times higher than among the general population (citing 1 NAT’L COMM’N ON CORRECTIONAL HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES 24 tbl.3-3, 25 fig.3-3 (2002))); see also SpearIt, *Mental Illness in Prison: Inmate Rehabilitation & Correctional Officers in Crisis*, 14 BERKELEY J. CRIM. L. 277, 280-85 (2009) (detailing the deficiencies in California’s mental health programs for prisoners).

A voucher prison could offer better medical care—including better screening, testing, and treatment of infectious diseases, and better care for the mentally ill—better staffed facilities, more doctors and nurses per inmate, and partnerships with community health-care providers. A voucher prison could also provide a variety of health insurance plans offering inmates the chance to opt out of the common cost-control system that requires copayments for medical care.⁸⁴

High-security segregation. High-security segregation is overused, often on prisoners who pose little security risk or are mentally ill. Some believe that such segregation is counterproductive because segregated prisoners have reduced access to programming that could make them more productive citizens when they reenter society.⁸⁵

A voucher prison could limit the use of high-security segregation, have secure therapeutic units for mentally ill prisoners, and offer more human contact and dedicated programs to inmates in segregation. These prisons could also develop individualized plans to transfer high-security prisoners to the general prison population near the end of their sentences to prepare them for release.⁸⁶

Correctional officers. Correctional officers are often underqualified and insufficiently trained to resolve problems without violence. Although learning to treat prisoners with respect is a valuable skill that helps maintain security and control, the idea is undervalued in officer training.⁸⁷ A voucher prison could (perhaps through higher wages

⁸⁴ See THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 18, at 48-49 (arguing that state legislatures should revoke existing laws that require prisoner copayments because such payments cause prisoners with legitimate medical concerns to forego or delay treatment).

⁸⁵ See, e.g., *id.* at 55 (citing COMM. OF MASS. GOVERNOR'S COMM'N ON CORR. REFORM, STRENGTHENING PUBLIC SAFETY, INCREASING ACCOUNTABILITY, AND INSTITUTING FISCAL RESPONSIBILITY IN THE DEPARTMENT OF CORRECTION (2004)); JOAN PETERSILLA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003); Hans Toch, *The Future of Supermax Confinement*, 81 PRISON J. 376 (2001); David Lovell & Clark Johnson, *Felony and Violent Recidivism Among Supermax Prison Inmates in Washington State: A Pilot Study* (Apr. 19, 2004) (unpublished manuscript), available at <http://www.son.washington.edu/faculty/fac-page-files/LovellSupermaxRecidivism-4-19-04.pdf>; see also Atul Gawande, *Hellhole*, NEW YORKER, Mar. 30, 2009, at 36, 40 (documenting the destructive psychological effects of long-term solitary confinement and suggesting that such treatment amounts to torture and is counterproductive to the reintegration of released offenders).

⁸⁶ See THE COMM'N ON SAFETY & ABUSE IN AMERICA'S PRISONS, *supra* note 18, at 52-53 (describing how the misuse and overuse of segregation work against rehabilitation and threaten public safety).

⁸⁷ See *id.* at 15, 66-73 (suggesting improvements such as promoting a culture of mutual respect and recruiting a diverse work force); see also SpearIt, *supra* note 83, at

and better training) recruit a more highly qualified and diverse staff with lower turnover and higher morale.⁸⁸

These are only a few possibilities. Here are some more:

- A prison could offer improvements over existing services, like better gym equipment, more diverse television programming, Internet access,⁸⁹ or help with writing legal petitions.⁹⁰
- A prison could offer better programming, such as high-school and college-level education,⁹¹ job training or opportunities for voluntary inmate labor, partnerships with post-release job placement programs,⁹² counseling, and other rehabilitative programs.⁹³
- The prison could also adopt policies that might be expected to yield better results in the long run—one example is “merit pay” for the prison warden.⁹⁴
- A prison could offer more space per inmate.⁹⁵

290-93 (reviewing the mental health training provided to correctional officers in the California prison system and finding it lacking).

⁸⁸ Cf. THE COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 18, at 70-73 (citing low pay, demanding hours, inadequate benefits, and stress as obstacles to instilling morale and professionalism in correctional officers).

⁸⁹ On Internet access, see, for example, Beato, *supra* note 71, at 16.

⁹⁰ Cf. Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners’ Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 291-96 (2010) (advocating that attorneys ghost-write petitions for pro se prisoners).

⁹¹ See Gregory A. Knott, *Cost and Punishment: Reassessing Incarceration Costs and the Value of College-in-Prison Programs*, 32 N. ILL. U. L. REV. (forthcoming 2012) (manuscript at 19), available at <http://ssrn.com/abstract=1649164> (describing the recent rise in interest for such programs)

⁹² For a study of the effectiveness of one such program, see CINDY REDCROSS ET AL., *WORK AFTER PRISON: ONE-YEAR FINDINGS FROM THE TRANSITIONAL JOBS REENTRY DEMONSTRATION* 88-89 (2010). This follow-up report on prison-to-work program participants one year later found an increase in temporary, transitional jobs, but few permanent placements and a minimal effect on recidivism.

⁹³ See THE COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 18, at 27-29 (advocating prison rehabilitation programs that reduce violence and change behavior); see also *A New Deal*, ECONOMIST, Mar. 22, 2008, at 36 (discussing the success of a Texas rehabilitation program that teaches entrepreneurship skills).

⁹⁴ Such a scheme might tie the warden’s salary negatively to later recidivism. See Hills, *supra* note 30; see also Max Taylor & Ken Pease, *Private Prisons and Penal Purpose* (advocating that a “no reconviction” bonus be written into private prison contracts), in *PRIVATIZING CRIMINAL JUSTICE* 179, 189-90 (Roger Matthews ed., 1989); James Slack, *We’ll Pay Jail Governors to Cut Reoffending, Say Tories*, DAILY MAIL (Eng.), Oct. 8, 2008, at 39, available at 2008 WLNR 19151823 (describing the implementation of “super governors” who are paid more for each convict who does not reoffend after release).

- A prison could facilitate family visits by “providing ample space and time, and even assisting with transportation.”⁹⁶
- A prison could provide cheaper telephone calling plans that would allow more frequent communication between inmates and their families.⁹⁷
- A prison could be located closer to inmates’ home communities.⁹⁸
- A prison could institute an independent system of external monitoring with meaningful enforcement, perhaps through a nongovernmental organization modeled after the International Committee of the Red Cross, which “carries out inspections of detention facilities in conflict zones worldwide.”⁹⁹ Implementation of this system might involve encouraging politicians, judges, citizens, the media, and nongovernmental organizations to visit prisons and interview prisoners and staff.¹⁰⁰
- A prison could develop a meaningful internal grievance system, where complaints are confidential, inmates get copies of their grievances, and prisoners and guards are protected from retaliation.¹⁰¹
- A prison could seek accreditation from the American Correctional Association (ACA), develop its own standards, or adopt another organization’s standards.¹⁰²
- A prison could allow inmates to sue it—at least in state court and on contract grounds—regardless of the PLRA.¹⁰³

⁹⁵ See THE COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 18, at 23, 26-27 (arguing that reducing prison overcrowding will reduce violence).

⁹⁶ *Id.* at 36.

⁹⁷ See *id.* at 36-37 (explaining that prisoners pay more for phone service because prisons use telecommunications contracts to generate income).

⁹⁸ See *id.* at 35-36 (arguing that incarcerating offenders closer to their homes will improve family and community bonds, which improve the chances that a prisoner will succeed after release).

⁹⁹ *Id.* at 82.

¹⁰⁰ See *id.* at 79-82, 95-99 (advocating external monitoring as a mechanism for improving prisoner safety and curbing abuse).

¹⁰¹ See *id.* at 92-94 (discussing the importance of a meaningful grievance system as a source of institutional knowledge and as a commitment to procedural justice).

¹⁰² See *id.* at 88-90 (reviewing and criticizing current standards of professional accountability); see also *Developments*, *supra* note 40, at 1888-90 (discussing standards and performance-based measures that could be used to measure prison quality). *But see* Dolovich, *supra* note 39, at 488-90 (expressing skepticism about the ACA’s willingness to engage in reform of accreditation standards).

None of these policies *requires* vouchers. Any could be adopted by reform-minded legislatures or correctional agencies. Perhaps they all should be. The problem, though, is that (rightly or wrongly) they haven't been. Many reforms are costly; people don't like inmates, so they hesitate to implement reforms that would improve prison life;¹⁰⁴ and bureaucracies are slow to change.¹⁰⁵

Many of these policies would be costly for voucher prisons as well. Prisons that adopted such changes would tend to make less profit per inmate. But if inmates value the change enough, the prisons could make up for the lower per-inmate profit by attracting more inmates. Prisons could also bundle a valued but costly change with a reduction in other amenities. For instance, a prison with better medical care or a prison that abolished copayments might locate in cheaper areas further from the inmates' communities or might offer less programming.¹⁰⁶

The inmate's choice would be limited by security level (minimum, medium, or maximum) and gender. There may also be certain mandatory conditions attached to the voucher. For example, a sexual offender might be required to go to a prison with appropriate programs. Additionally, mentally ill prisoners may be incapable of choosing themselves. But even for the mentally ill, the person who chooses the prison need not be a Department of Corrections bureaucrat. The inmate's family or an appointed legal guardian could make the choice.

Having made his choice, the convicted defendant would be sent to his requested prison, subject to availability. A prison system may want to guarantee a spot in certain units to certain prisoners: those with particular physical or mental illnesses may need special accommodation, and a gang member who has informed on his gang may have to be sent to a "snitch farm" to avoid reprisals.¹⁰⁷ As with schools, popu-

¹⁰³ For prospective relief, the PLRA only covers proceedings "arising under Federal law." 18 U.S.C. § 3626(g)(2) (2006). Litigation over contract provisions wouldn't arise under federal law unless the contract explicitly incorporated federal law. Moreover, while the PLRA does regulate consent decrees, *id.* § 3626(c)(1), it doesn't regulate private settlements, *id.* § 3626(c)(2), or state law remedies, *id.* § 3626(d). The exhaustion provisions only apply to suits brought under § 1983 or § 1997e(a). *Id.* § 1997e(e). It does not apply to suits brought under a contract, and the limitations on recovery for mental or emotional injury only apply to federal civil actions. *Id.*

¹⁰⁴ See *supra* note 23 and accompanying text.

¹⁰⁵ See *supra* text accompanying notes 12-13.

¹⁰⁶ For bundles that include a waiver of constitutional rights, see *infra* Section II.B.

¹⁰⁷ See, e.g., KNOX, *supra* note 21, at 445-46 (describing the protections "snitch farms" provide including anonymity, physical isolation, and visual security); George W.

lar prisons will have waiting lists, which—provided the voucher amount is high enough—would provide an incentive for the prison to increase its capacity.¹⁰⁸ This growth would be easier because a voucher prison wouldn't need permission to accept new prisoners if it expands, aside from any necessary local construction permits.¹⁰⁹

Once a prisoner is in a minimally acceptable place, he may want to stay, perhaps because of social connections he has forged in prison. Therefore, it makes sense to offer the choice before incarceration begins. But because prisoners may not have enough information to make a good choice before they've served any time, the voucher system should offer at least one transfer after a fixed time period, so that prisoners can effectively punish a low-quality prison. Alternatively, there could be transfer possibilities at regular intervals—like open enrollment periods for health plans or the natural reenrollment periods in schools based on the school year. One could even imagine transfers at will, though this would involve greater administrative and transportation costs.¹¹⁰

Current policies on involuntary transfers¹¹¹ could still be used in the same way as before, for instance to fight gang activity or otherwise to

Knox, *The Problem of Gangs and Security Threat Groups (STG's) in American Prisons Today: A Special NGCRC Report*, J. GANG RES., Fall 2004, at 1, 15 (stating that only 14.5% of wardens surveyed indicated that their state provided a separate facility for informants); see also Dolovich, *supra* note 74, at 77-78 (describing the California prison system's "sensitive needs yards," designed for "likely victims of prison violence," including "gang dropouts, sex offenders, prison informants (i.e., 'snitches'), and anyone else who requests protective custody").

¹⁰⁸ The idea that a prison would *want* to have more inmates is key. Cf. Ladd, *supra* note 1, at 70 ("[S]uccessful schools will be reluctant to expand if doing so requires lowering the average socioeconomic or ability level of their students."). Requiring prisons to take all comers, and accept inmates by lottery if they are oversubscribed, is thus an important feature. See *infra* Section I.C.

¹⁰⁹ Local communities are often eager for the business. See Dolovich, *supra* note 39, at 539-42 (noting rural community support of prison building as a sustainable form of economic development); Eric J. Williams, *The Big House in a Small Town: Prisons, Communities, and Economics in Rural America* 5 (Apr. 2010) (unpublished manuscript), available at <http://ssrn.com/=1580533> (same).

¹¹⁰ Furthermore, frequent transfers may reduce the incentives that inmates have to cooperate with staff and other inmates.

¹¹¹ Prisons may, for instance, transfer inmates to relieve overcrowding. See *Brandon v. Alaska Dep't of Corr.*, 938 P.2d 1029, 1030 (Alaska 1997) (discussing the process by which Alaska solicited inmates to be transferred to other states to relieve overcrowding). Involuntary transfers have been held not to implicate a liberty interest under the Due Process Clause. See *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) (holding that there is no due process right to pretransfer hearing); *Meachum v. Fano*, 427 U.S. 215, 228 (1976) (holding that the Due Process Clause is not implicated in every change in

maintain safety.¹¹² (But the more frequent involuntary transfers are, the less attractive the ability to choose one's initial assignment will be.)

B. *Choice Is Not the Same as Privatization*

As I've mentioned above,¹¹³ arguments about choice are often merged with arguments about privatization. Privatization skeptics thus may also be skeptics about choice, but this needn't be the case.

In the school choice debate, a prominent question has been whether religious schools should be allowed to participate.¹¹⁴ This question presumes that the school choice plan includes private schools since a religious public school would obviously be unconstitutional. More generally, arguments for school choice often include arguments in favor of private schools. This is because the factors that are claimed to make choice work—chiefly, flexibility, cost savings, and responsiveness to market incentives—are claimed to be more present in the private than in the public sector.¹¹⁵

But choice needn't have anything to do with private provision. These are logically distinct policies.

First, imagine the following scenarios, but ignore private providers.

- Without choice, everyone could be assigned to a particular public school, perhaps their local one. This also describes the current system of incarceration in states without prison privatization,¹¹⁶ as well as state-funded indigent defense in most jurisdictions.¹¹⁷

confinement conditions). In contrast, a due process liberty interest is implicated when an inmate is transferred to a mental hospital. *Vitek v. Jones*, 445 U.S. 480, 491-93 (1980).

¹¹² See *infra* text accompanying notes 354-56; see also *Muhammad v. Carlson*, 845 F.2d 175, 179 (8th Cir. 1988) (upholding involuntary transfer to AIDS unit); Philip Ellenbogen, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J.L. & SOC. PROBS. 335, 371 (2009) (proposing a protective process including involuntary transfer for rape victims).

¹¹³ See *supra* text accompanying note 69.

¹¹⁴ See, e.g., *Locke v. Davey*, 540 U.S. 712, 725 (2004) (holding that a state *may exclude* ministry education from a publicly funded college scholarship plan); *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (2002) (holding that a state *may include* religious schools in a publicly funded voucher plan).

¹¹⁵ In the prison context, see Charles W. Thomas, *Correctional Privatization in America: An Assessment of Its Historical Origins, Present Status, and Future Prospects* (characterizing private firms as more flexible and open to change than government agencies), in CHANGING THE GUARD: PRIVATE PRISONS AND THE CONTROL OF CRIME 57, 93 (Alexander Tabarrok ed., 2003).

¹¹⁶ Arkansas, Delaware, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon,

- Alternatively, one could have a choice program within the public system alone, for example, one that offered vouchers limited to public schools.¹¹⁸ Magnet and charter schools are also a form of public school choice.

Now suppose some services are provided privately.

- Even then, one could have privatization without choice. For instance, a private company, like Edison Learning (formerly Edison Schools), could become the superintendent of an existing, choiceless public school system.¹¹⁹ This structure is also evident in the W-2 program for welfare in Wisconsin,¹²⁰ the current prison privatization regime,¹²¹ assigned private counsel for indigent defendants,¹²² and a regional health facility to which Arizona has delegated the entirety of its health care responsibilities under the Medicaid statute.¹²³
- Alternatively, one could have choice within a regime of partly or wholly private provision. Food stamps are a classic example of such a program since the government plays

Rhode Island, Utah, and West Virginia have no prisoners in private facilities. HEATHER C. WEST ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 23167, PRISONERS IN 2009, at 34 app. tbl.20 (2010).

¹¹⁷ See Schulhofer & Friedman, *supra* note 8, at 102 & n.93 (noting that most jurisdictions do not allow the indigent to select defense counsel from among those eligible).

¹¹⁸ See, e.g., 20 U.S.C. §§ 7225–7225g (2006); CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, SCHOOL CHOICE: A SPECIAL REPORT, at xvi, 1-2, 29-62 (1992) (arguing for choice to be limited to the public school system); Richard D. Kahlenberg, *Public School Choice: Student Achievement, Integration, Democracy, and Public Support* (similar), in PUBLIC SCHOOL CHOICE VS. PRIVATE SCHOOL VOUCHERS 137, 137-52 (Richard D. Kahlenberg ed., 2003).

¹¹⁹ See, e.g., Reitz, *supra* note 45, at 108-10 (discussing Edison's management of schools in Philadelphia); see also, e.g., Rendell-Baker v. Kohn, 457 U.S. 830, 832 (1982) (discussing a state-funded private school specializing in the education of special-needs students referred by public school districts or the Department of Mental Health); Logiodice v. Trs. of Me. Cent. Inst., 296 F.3d 22, 24 (1st Cir. 2002) (stating that the school district did not operate schools, but contracted secondary education to "a privately operated high school in the district").

¹²⁰ See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1385-88 (2003) (reviewing the growing privatization of welfare systems using Wisconsin as the primary example).

¹²¹ *Developments*, *supra* note 40, at 1867.

¹²² See Schulhofer & Friedman, *supra* note 8, at 92-96 (reviewing the assigned counsel approach to indigent defendants); see also HARPER LEE, TO KILL A MOCKINGBIRD 165-66 (Warner Books 1982) (1960) (discussing an attorney's appointment to represent an indigent criminal defendant).

¹²³ See *J.K. ex rel. R.K. v. Dillenberg*, 836 F. Supp. 694, 697-99 (D. Ariz. 1993).

no significant role in food distribution.¹²⁴ Consider also drug or alcohol abuse rehabilitation¹²⁵ and traffic school, where defendants are sentenced to the program but can then choose (with or without government funding) among a range of providers, many of which are private. In England, Wales, and Ontario, indigent defendants choose their own private defense attorneys using public funds.¹²⁶ And, of course, school choice proposals often include private schools.

This last option of choice with at least partial private provision is the one imagined most often, and so I'll primarily use private-sector examples.¹²⁷ But it should be clear that we can have privatization without choice and choice without privatization. All four possible schemes exist in the real world. Thus, choice is an option, whether in schools, prisons, or elsewhere, even if one is hostile to private provision.

C. Funding

As with school vouchers, the prison voucher amount simply could be a percentage of the average cost of incarceration at public prisons.¹²⁸ If the program is to include private prisons, the percentage

¹²⁴ See Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1447 (2003) (discussing the evolution from direct to indirect provision of food subsidies to the poor).

¹²⁵ See *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 881-82 (7th Cir. 2003) (concerning public funding of a private halfway house).

¹²⁶ Schulhofer & Friedman, *supra* note 8, at 110 & nn.123-24 (noting jurisdictions where an indigent defendant may choose his own counsel).

¹²⁷ Note, though, that nonprofit prisons may also be an option. See Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 5-8 (2003) (proposing nonprofit prisons as an option for reform); Richard Moran, Op-Ed., *A Third Option: Nonprofit Prisons*, N.Y. TIMES, Aug. 23, 1997, at 23 (opining on the benefits of prison management by nonprofit foundations). For discussions of the advantages of nonprofit schools, see Byron W. Brown, *Why Governments Run Schools*, 11 ECON. EDUC. REV. 287, 293-96 (1992), and John Morley, Note, *For-Profit and Nonprofit Charter Schools: An Agency Cost Approach*, 115 YALE L.J. 1782, 1795-810 (2006).

¹²⁸ In school voucher plans, the value of the voucher is set at a percentage below one-hundred percent of per-pupil expenditure. See JOHN MERRIFIELD, CATO INST., POLICY ANALYSIS NO. 616, DISMAL SCIENCE: THE SHORTCOMINGS OF U.S. SCHOOL CHOICE RESEARCH AND HOW TO ADDRESS THEM 46 (2008) (explaining that in "option-demand" programs, school vouchers are worth less than the public schools' per-pupil funding); Hoxby, *supra* note 1, at 15 ("[T]he typical voucher in the US is worth between 14 and 29 percent of per-pupil expenditure in the local public schools."). Public school funding and voucher funding are typically separate, so if someone switches from a public to a private school, the private school gets the voucher amount, but the

would have to be high enough to induce enough prisons to participate in order to yield meaningful competition.

The voucher amount could be determined in more complicated ways. The amount could be determined by an inmate-specific formula based on as many observable characteristics of the inmate as are permissible to consider, such as disability level,¹²⁹ sex, age, security level, nature of the crime, known psychological or medical conditions, and known history of violence.¹³⁰

The voucher amount also could vary with the prison at which it is redeemed. The amount might depend on how many inmates the prison already has. Thus, if initial inmates are expensive but additional inmates (up to some limit related to the capacity of the prison) are less costly to serve, the voucher amount at a prison could start high and decline as the number of inmates increases. But this approach would have costs of its own: it would require that the government monitor prisons' costs to ensure honest pricing, and it would discourage the expansion of successful prisons by penalizing prisons with more inmates.

Before talking further about funding, we should determine how prisons should be able to pick and choose among inmates, if they should be able to do so at all. Clearly, *all* prisons can't choose the inmates they prefer because they might all reject the same inmates. Consequently, there must be at least one prison of last resort, perhaps a public prison, although one could imagine a private firm willing to serve in this capacity. If *some* prisons can choose, they'll probably be better informed than the government about the characteristics of the inmate, if for no other reason than that some factors that are probably correlated with the cost of incarceration, like race, may well be impermissible for the government to include in the voucher-

public school's funding doesn't decrease by the amount of the voucher. *See id.* For a discussion of the importance of the voucher amount for the participation of multiple providers, see Lupu & Tuttle, *supra* note 6, at 569. Of course, the percentage is endogenous to each school voucher program. *See infra* text accompanying note 380.

¹²⁹ For a discussion of how the analogous issue of special education would fare under school choice, with stress on the need to fund special education adequately to induce schools to compete for such students, see Julie Berry Cullen & Steven G. Rivkin, *The Role of Special Education in School Choice*, in *THE ECONOMICS OF SCHOOL CHOICE*, *supra* note 70, at 67, 69-70, 98-101.

¹³⁰ The school voucher program at issue in *Zelman v. Simmons-Harris* provided a percentage of private-school tuition up to a cap, with the percentage varying according to family income. 536 U.S. 646, 639 (2002); *see also* Schulhofer & Friedman, *supra* note 8, at 113-17 (discussing alternate funding mechanisms for indigent defense, including lump-sum payments and hourly rates).

determination formula. Thus these prisons will consider more factors than those used in the formula that determines the voucher amount.

Prisons that can choose will systematically reject inmates with insufficient vouchers, placing the burden of incarcerating these inmates on the prison of last resort. Perhaps in future rounds of voucher-amount determination, the government will be able to correct past mistakes, but in general, voucher prisons will have an advantage over the government in determining the true cost of incarcerating an inmate.

Therefore, it may make sense to require participating prisons to take all comers, with a lottery system used to admit prisoners if the prison has a waiting list. Prisons might still be allowed to serve particular categories of persons—a company might specialize in women’s prisons, or prisons for inmates with particular medical or psychological problems—but at least within those categories, prisons shouldn’t be able to pick and choose accepted inmates. In this scenario, the only burden on the government is to make the voucher amount for each prisoner category generous enough that, *on average*, inmates in that category are worthwhile for private prisons to incarcerate.

So far, I have assumed that the voucher amount—however determined—for a particular type of inmate at a given prison is a flat fee. But voucher amounts could be even more complicated. As an alternative to a flat fee, one could imagine a “per service” voucher amount, where the government pays a fee that varies with the number of medical visits, disruptions, etc. However, assuming the per-service amount is generous enough to exceed the cost of providing the service, this type of system would give prisons incentives to oversupply the service and in turn require the government to incur heavy monitoring costs to avoid having to pay for too many unnecessary services.¹³¹

I only mention alternatives to flat fees to illustrate the variety of conceivable funding schemes. From now on I’ll assume that vouchers

¹³¹ Cf. Schulhofer & Friedman, *supra* note 8, at 116-17 (discussing an “hourly-rate” approach to indigent defense and explaining the drawbacks to such a scheme, including costly government monitoring). Another possibility would be to institute an auction system, in which prisons would bid on each prisoner, who would then be issued a voucher sufficient to cover a certain number of bids. For instance, if prison *A* is willing to handle prisoner *X* for \$30/day, prison *B* would require \$35/day, prison *C* would require \$40/day, and prison *D* would require \$45/day, prisoner *X* could be issued a voucher worth \$40/day and would be allowed to choose among prisons *A*, *B*, and *C*. An auction system would allow prisons to reject inmates while still allowing for competition. But this might be too complicated from an administrative standpoint and would also require a prison of last resort in case all prisons demanded a fee that the government considered excessive.

are structured as a flat fee and that prisons are unable to reject inmates who fall within the category the prison serves.

The voucher would replace the current arrangements by which private prisons are reimbursed. If an inmate chooses a particular prison, the prison gains the voucher amount as revenue, and, if the inmate transfers out, the prison loses that amount.

For public prisons, the financial impact of the gain or loss of a prisoner is less clear. Public schools under voucher plans often continue to be funded out of general revenues, without any explicit accounting of how many students attend the school.¹³² Whether a public school loses money when it loses a voucher student to a private school depends on the details of the school finance system. Some school voucher plans are structured so that public schools don't suffer at all from losing students.¹³³ In school systems with "pseudo-choice plans," successful schools experienced a fall in funding because "money does not follow students or so little money follows students that a school accepting an extra student cannot cover its marginal costs."¹³⁴ The public-prison funding system under a voucher system should probably avoid such perverse incentives. If public schools, or prisons, *don't* lose money when they lose "customers," we shouldn't expect competition to improve the quality of the public system.¹³⁵ Not reducing the public system's funding when people leave also increases the total cost of the system;¹³⁶ on the other hand, an argument in favor of such a system is that it might be a political concession to public employees. I would suggest that public and private prisons be funded by vouchers in the same way, with each individual prisoner in the prison associated with a specified funding amount.

¹³² Hoxby, *supra* note 1, at 18. Competition is further hindered because "schools are not able to enter, expand, contract, or exit [or] schools need to seek approval or financial support from other schools with which they are supposed to compete." *Id.*; *see also id.* at 24 (explaining that most school choice reforms failed to satisfy competitive criteria where perverse incentives were created); *infra* text accompanying notes 135, 143.

¹³³ Hoxby, *supra* note 1, at 18.

¹³⁴ *Id.*

¹³⁵ *See id.* at 18 n.1 (discussing the failure of these types of plans and the lack of incentives they provide to schools to improve).

¹³⁶ *But cf.* Schulhofer & Friedman, *supra* note 8, at 113 (noting that a pure lump-sum indigent defense voucher system "would cost no more than the prior system of representation").

The analogy with schools or food stamps suggests that prisoners could be allowed to supplement their voucher with their own funds,¹³⁷ but this probably isn't a good idea on ethical grounds—I've noted the inegalitarianism of California's "offender self-pay" program¹³⁸—despite its possible efficiency benefits.¹³⁹

D. Statutory Restrictions

Suppose the prison choice plan includes private prisons. What regulations would govern them? We may focus on two possibilities:

- anyone may establish a prison, subject to certain security requirements;¹⁴⁰ or,
- the government may choose who may operate a prison, but the allocation of prisoners to prisons would proceed by choice rather than by bureaucratic assignment.¹⁴¹

By analogy to schools, one could imagine a system of "charter prisons," prisons that are public but that have significant independence from the Department of Corrections.¹⁴² Like charter schools, charter prisons could operate without regard to the presence of pri-

¹³⁷ The school program in *Zelman v. Simmons-Harris* only covered a portion of tuition, leaving parents responsible for a copayment. 536 U.S. 639, 646 (2002).

¹³⁸ See *supra* text accompanying note 66-67.

¹³⁹ Cf. John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 ECON. INQ. 583, 586-99 (1992) (arguing that the rich already face the highest expected penalties, even when lower conviction rates are taken into account, because of the great effect of conviction on their future earnings); John R. Lott, Jr., *Should the Wealthy Be Able to "Buy Justice"?*, 95 J. POL. ECON. 1307, 1310 (1987) (arguing that it may be efficient for the rich to reduce their probability of criminal conviction through payment for high-quality legal services). There may also be retributive value in letting the rich off more lightly, if one wants to equalize the "subjective experience of punishment" and if rich people are, on average, more sensitive because they're more accustomed to luxurious lifestyles. See Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 230-35 (2009) (explaining that if one accepts that people suffer in proportion to their blameworthiness, then rich people deserve a "subjectively equal but objectively less severe punishment" than poor people). But see Martin H. Pritikin, *Fine-Labor: The Symbiosis Between Monetary and Work Sanctions*, 81 U. COLO. L. REV. 343, 353 (2010) (justifying sanctions based on income and wealth because they "help ensure a proportionate impact on all offenders").

¹⁴⁰ Cf. Schulhofer & Friedman, *supra* note 8, at 112-17 (noting that in "voucher models" of indigent defense, legal service providers could be public or private, provided that they comply with certain threshold requirements and ethical standards).

¹⁴¹ Cf. *id.* at 101-12 (explaining that in an indigent defense "deregulation" scheme, the government would continue to designate public defenders, but each defendant could choose his own defense counsel).

¹⁴² See Hoxby, *supra* note 1, at 15-17.

vate providers. This could increase the possibility that choice within the public system will improve public prisons.¹⁴³

Once the universe of providers is determined as above, prisons could be governed by most of the same statutes and regulations that currently exist. However, one sort of statute that may now be moot would be the sort that requires private prisons to achieve particular cost savings or quality improvements relative to public prisons.¹⁴⁴ The quality improvement requirement would be replaced by prisoner choice. Quality would no longer be defined by an externally imposed yardstick (like the Logan quality of confinement index¹⁴⁵), and each prison could pursue its own vision of quality, just as each prisoner could have his own view of what constitutes quality. Litigation over quality, like floor space assignments or grievance procedures, would become contractual disputes. Arguably, this would benefit prisoners because they would be in a better position to litigate as contractual partners than as prisoners.¹⁴⁶

Nonetheless, just as the government requires minimum standards for private schools,¹⁴⁷ nothing prevents quality regulations from serving as a floor. There may also be a role for continuing monitoring to prevent prisons from renegeing on the promises they make in their advertising. Shady, venal, incompetent, and sadistic operators will, after all, always be with us, even in the presence of competitive markets. In many competitive markets, consumer choice, litigation, and word of mouth are sufficient to keep such operators in line. If these mechanisms work well for prisons, so much the better; but given that inmates are stuck in their prison at least for a while, that a bad prison experience is worse than a bad hotel stay, and that prisoners' com-

¹⁴³ Cf. *supra* text accompanying note 140-41.

¹⁴⁴ See *Developments, supra* note 40, at 1873 n.38 (citing statutes requiring private prisons to attain numerical cost and quality targets).

¹⁴⁵ See RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 113-15 (1997) (describing Charles Logan's factors for assessing prison quality, such as security, activity, and justice); see also *Developments, supra* note 40, at 1889-90 (advocating performance-based contracts and suggesting the Logan index, among other possibilities, as a measure of performance).

¹⁴⁶ The possibility that courts might be less deferential to private prisons may partly explain this. But conceivably litigation with a public prison might also be contract-based. See *Developments, supra* note 40, at 1879-83 (addressing the legal accountability of private prisons in comparison to public prisons in light of the immunity exceptions for the latter).

¹⁴⁷ See, e.g., E. Vance Randall, *Private Schools and State Regulation*, 24 URB. LAW. 341, 369-70 (1992) (evaluating the efficiency of private-school regulation).

plaints aren't always credible, it may be better to err on the side of greater market policing.

Under a voucher system, there is also an argument for government regulation to provide a *ceiling* for quality, lest prisons become so good from the prisoners' perspectives that prison's deterrent value is reduced. Similarly, increases in "quality" (from the prisoners' perspectives) that are socially harmful will also have to be regulated. But more on this later.¹⁴⁸

As for cost savings, this requirement is probably unnecessary because there's already a strong incentive to cut costs under any fixed-reimbursement scheme.¹⁴⁹ In addition, the government can reduce the voucher amount if it believes there's sufficient competition for prisoners at a given voucher amount.

The voucher system could also change how prisons enter, exit, contract, and expand. Currently, private prison firms win contracts and then build prisons to fulfill these contracts, or build the prisons in advance, hoping to win the contracts to use them.¹⁵⁰ Under a voucher system,¹⁵¹ firms would still need to get local building or zoning permission,¹⁵² but otherwise they'd only need to convince the prisoners themselves. As noted above, and assuming the market worked correctly, popular prisons would have waiting lists and be able to expand without having to ask permission from the Department of Corrections, while

¹⁴⁸ See *infra* text accompanying note 361.

¹⁴⁹ See Oliver Hart et al., *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127, 1152-54 (1997) (discussing the incentives of private providers to cut costs compared to their public counterparts); *Developments*, *supra* note 40, at 1875-77 (presenting data from three studies showing cost savings in privatization and roughly comparable quality to public prisons). *But see* MCDONALD ET AL., *supra* note 40, at 33-34 (arguing that private prisons may not save money, but that current empirical studies are inadequate to test the proposition); Brad W. Lundahl et al., *Prison Privatization: A Meta-Analysis of Cost and Quality of Confinement Indicators*, 19 RES. ON SOC. WORK PRAC. 383, 393 (2009) (finding that cost savings from privatization appear minimal).

¹⁵⁰ See Thomas, *supra* note 115, at 87 ("In 1998 . . . CCA assessed the need for prisoner housing space . . . to be so great that it committed more than \$100 million of private capital to construct a 2,304-bed medium-security prison . . . without any contract that guaranteed the utilization of the facility.").

¹⁵¹ Whether entrance and exit is as easy as expansion and contraction of existing facilities depends on whether we're in a "voucher" or "deregulation" model. See *supra* notes 140-41 and accompanying text.

¹⁵² See *supra* text accompanying notes 108-09.

unpopular prisons would contract or close.¹⁵³ I discuss the constitutional regime that would govern voucher prisons immediately below.

II. VOUCHERS AND CONSTITUTIONAL FLEXIBILITY

In this Part, I explain how prison vouchers would increase prisons' constitutional flexibility in two ways. First, they would make faith-based prisons—which, as currently constituted, likely violate the Establishment Clause—fully constitutional. Second, even though prisons are always state actors and must respect inmates' constitutional rights, a voucher regime would give prisons somewhat greater leeway to offer inmates valued benefits in exchange for the waiver of some constitutional rights.¹⁵⁴

A. *The Constitutionality of Faith-Based Prisons*

Faith-based prisons today face a number of constitutional hurdles: depending on the program, faith-based prisons may have the effect of advancing religion, either through funding or through mere endorsement; they may “coerce” religious practice by offering greater benefits within the religious program; and they may delegate governmental power to religious organizations. Avoiding these problems might be possible, but it would be difficult.

But under vouchers, these problems would largely disappear. *Zelman v. Simmons-Harris* establishes that, when money is funneled to religious providers by the independent choice of beneficiaries, there is no government advancement or endorsement of religion.¹⁵⁵ Coercion and delegation become moot when inmates choose freely among a wide range of providers chosen without reference to religion.

1. Religious Effects

One way that the government can inappropriately advance religion is by reimbursing the religious organization's expenses. For direct reimbursement to be constitutional, the organization's program

¹⁵³ Cf. 20 U.S.C. § 6316(b)(8)(B)(i) (2006) (stating that a failing school can be closed down and reopened as a public charter school). Of course, arrangements would have to be made for the prisoners incarcerated in a prison that is closing, but this is no different from the issues presented under the current system when a private prison goes bankrupt.

¹⁵⁴ For a more developed version of this argument, see Volokh, *Constitutional Possibilities*, *supra* note 12, at 1006-10.

¹⁵⁵ 536 U.S. 639, 652-53 (2002).

can't be dominated by religious material.¹⁵⁶ The aid has to be "offered to a broad range of groups or persons without regard to their religion."¹⁵⁷ And the criteria for choosing the programs cannot be related to religion.¹⁵⁸ Even a small number of programs could be prohibitively resource intensive, especially if they are residential.

All these problems would no longer be relevant under a voucher system. Direct reimbursement wouldn't be an issue anymore, so religious content wouldn't need to be diluted. Vouchers would fall within the permissive scope of *Zelman*, because inmates, not prisons or program providers, would receive the benefits. Provided the voucher would be available to any prison that provided adequate security or otherwise satisfied certain technical requirements, neutral choice of providers would be automatic.

Vouchers would also solve the resource problem. Because inmates could select one prison over another, the choice available to them would span the entire system, even if each prison had no more than one religious program. Therefore, no prison would be obligated to offer multiple programs.

"Endorsement" is not limited to monetary aid. But under *Zelman*, vouchers cure *any* endorsement: in a voucher program, the "incidental advancement of a religious mission, or the *perceived endorsement of a religious message*, is reasonably attributable to the individual recipient, not to the government."¹⁵⁹

Finally, one might wonder whether *Zelman* applies to prisons, which, unlike schools,¹⁶⁰ are always state actors under the "traditional public function" doctrine.¹⁶¹ If the government itself can't teach any religious doctrine as true, why can a private religious prison? The

¹⁵⁶ See Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 88-89 (2005) ("[T]eaching about the truth or falsity of particular religious commitments, or encouraging (or discouraging) faith in particular beliefs, crosses the constitutional line into impermissible indoctrination.").

¹⁵⁷ *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion).

¹⁵⁸ See *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 207-12 (1948) (finding a constitutional violation where a public school hosted teachers of specific religions who offered voluntary weekly religion classes, even though a secular alternative was available).

¹⁵⁹ *Zelman*, 536 U.S. at 652 (emphasis added).

¹⁶⁰ See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-43 (1982) (illustrating that a school for maladjusted students operating principally on public funds is not a state actor in the employment context).

¹⁶¹ See, e.g., *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460-61 (5th Cir. 2003) ("Private prison-management companies and their employees are subject to § 1983 liability because they are performing a government function traditionally reserved to the state.").

state action doctrine shows us how to solve this problem: when state action is found in a particular context, it doesn't mean that the actor is a state actor in all contexts. Rather, a finding of state action means that the particular action is "fairly attributable to the State"¹⁶² or "chargeable to the State,"¹⁶³ and that the state is "*responsible* for the specific conduct of which the plaintiff complains."¹⁶⁴

Because private prisons fulfill the exclusively public function of incarceration, their incarcerative functions, like restricting prisoners' freedoms and meting out punishment, constitute state action. But in a voucher system, their offer of religious services does not.¹⁶⁵

2. Coercion

Though faith-based prison programs are voluntary, modern Establishment Clause doctrine nonetheless prohibits them as "coercive" if they involve "subtle coercive pressure,"¹⁶⁶ or if they force participants to make a "difficult choice"¹⁶⁷ and "forfeit . . . benefits as the price of resisting conformance to state-sponsored religious practice."¹⁶⁸

Programs that offer "a better possibility of parole"¹⁶⁹ or reduced security restrictions¹⁷⁰ may be coercive. A great enough quality difference might be coercive, but this is less likely if vouchers are used, since *Zelman* already requires, for "true private choice,"¹⁷¹ that the secular options be "adequate substitutes"¹⁷² for the religious options, even if they might "not be superior . . . in every respect."¹⁷³

The doctrine thus contains a built-in mechanism to prevent secular options from becoming too unattractive. Moreover, the government could fulfill its secular-quality maintenance duty differently un-

¹⁶² *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

¹⁶³ *Id.* at 937.

¹⁶⁴ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

¹⁶⁵ For further discussion of the state action doctrine as related to prison vouchers, see Volokh, *Constitutional Possibilities*, *supra* note 12, at 1006-10.

¹⁶⁶ *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

¹⁶⁷ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000).

¹⁶⁸ *Lee*, 505 U.S. at 596.

¹⁶⁹ Richard R.W. Fields, *Perks for Prisoners Who Pray: Using the Coercion Test to Decide Establishment Clause Challenges to Faith-Based Prison Units*, 2005 U. CHI. LEGAL F. 541, 561.

¹⁷⁰ See *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996) (finding that "classification to a higher security risk category" if an inmate didn't attend a religious program was a severe enough penalty to amount to coercion).

¹⁷¹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

¹⁷² *Id.* at 670 (O'Connor, J., concurring).

¹⁷³ *Id.*

der a voucher system than it does today. No longer will the government have to guarantee attractive options *at the same prison*; because of inmate choice, the government needs merely to ensure that, system-wide, the secular system is sufficiently comparable.

The government could fulfill this requirement by running a system of secular public prisons. But even in a world where the government disengages from private provision and where all prisons are private voucher operations, the government could still fulfill its duty by contracting with prisons to accommodate prisoners who want an adequate secular alternative.

3. Delegation of Governmental Power

Delegation may also be problematic. A religious organization's management of a residential wing of a prison might violate the Establishment Clause because it could "enmesh[] churches in the exercise of substantial governmental powers,"¹⁷⁴ which would independently violate the Establishment Clause. The Supreme Court has most prominently used this doctrine in two cases. First, in *Larkin v. Grendel's Den*, it struck down a Massachusetts statute allowing churches to veto liquor license applications for establishments located near a church:¹⁷⁵ the Establishment Clause forbids an arrangement whereby "important, discretionary governmental powers" are "delegated to or shared with religious institutions."¹⁷⁶ Next, in *Board of Education of Kiryas Joel Village School District v. Grumet*, the Court struck down a New York statute drawing a special school district to coincide with an insular religious community.¹⁷⁷ The Court held that the statute "allocat[ed] political power on a religious criterion."¹⁷⁸

Is running a wing of a prison a governmental power? Perhaps so. As long as the officials of the religious organization maintain order in their wing, keep track of disciplinary infractions, and perform similar penal functions, the delegation problem plausibly may arise.

But vouchers would eliminate this problem. Neutrality is the key factor: as the Court held in *Kiryas Joel*, the problem was that the legis-

¹⁷⁴ *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982).

¹⁷⁵ *Id.* at 126-27 (holding that the statute violated the Establishment Clause).

¹⁷⁶ *Id.* at 127.

¹⁷⁷ 512 U.S. 687, 690-92 (1994) (discussing the process that culminated in the creation of a special carve-out school district comprising members of the Satmar Hasidic community).

¹⁷⁸ *Id.* at 690.

lature had “fail[ed] to exercise governmental authority in a religiously neutral way.”¹⁷⁹

4. The Future of Faith-Based Prisons

For a program to comply with the Establishment Clause, it must solve the problems discussed above. The religious component must be watered down. Providers must be chosen neutrally. Secular programs must be available. Religious programs must not offer significantly greater benefits, and program officials must not maintain order and discipline.

Perhaps one can’t fulfill all these conditions and still have a real faith-based program. Some programs might be constitutional; for instance, the Federal Bureau of Prisons runs a program called Life Connections, which “hires spiritual guides of different faiths, links inmates with mentors of their own faith, and provides no special privileges to participants.”¹⁸⁰ But if that’s constitutional, it is because it combines a secular program with extensive extracurricular use of constitutionally innocuous chaplains and volunteers.

But whether or not the current regime could constitutionally support faith-based prisons, vouchers would make faith-based prison programs much more clearly valid.¹⁸¹

B. *Beyond the Establishment Clause*

A voucher system affects more than just faith-based prisons. Suppose a prison wants to save money or improve security by banning incoming mail or eliminating its grievance system.

Under current law, this would violate prisoners’ constitutional rights. But what if prisons merely *offered* these “features” to prisoners, perhaps as part of a package that might include other benefits like better health care or gym facilities?

¹⁷⁹ *Id.* at 703.

¹⁸⁰ Patrick B. Cates, Comment, *Faith-Based Prisons and the Establishment Clause: The Constitutionality of Employing Religion as an Engine of Correctional Policy*, 41 WILLAMETTE L. REV. 777, 824-25 (2005).

¹⁸¹ Whether they reduce recidivism or not is another question. See generally Volokh, *supra* note 48 (reviewing available empirical studies of faith-based prisons and concluding that there’s no strong reason to believe that faith-based prisons work). On whether faith-based prisons might be affirmatively harmful, see *infra* text accompanying notes 331-40.

The unconstitutional conditions doctrine governs state actors' ability to "offer" such "deals." Vouchers would probably allow prisons to offer such deals to a greater extent than is allowed today. The unconstitutional conditions doctrine serves the purpose, among others, of making sure that governments don't abuse their power, and when prisons compete with each other, the risk of such abuse is reduced.

1. The Unconstitutional Conditions Doctrine

It's one thing to say that there are certain rights the government may not abridge, but quite another to say that the government may never *induce* the waiver of those rights by the offer of benefits. The government presumably can't prevent a private school from banning interracial dating through its disciplinary code, but it may deny such a school a charitable tax exemption.¹⁸² The federal government might not be able to force states to adopt a minimum drinking age of twenty-one, but it may offer federal highway funds to states that do.¹⁸³ Whether the government may conduct a warrantless search of a probationer depends on whether such a search is "reasonable" in a broad sense;¹⁸⁴ a probationer's consent to such warrantless searches as a condition of his probation, while it may not validate all such searches, at the very least makes them likely to be found reasonable.¹⁸⁵

These examples all take the form of "deals" or "contracts," and involve three steps. First, someone holds a constitutional right. Second, the government controls a benefit which it is under no obligation to grant. Third, the government offers the benefit conditioned on a waiver of the right.

The law has neither endorsed such conditions wholesale, nor banned them entirely. Instead, it has steered a middle course and distinguished valid conditions from "unconstitutional conditions."¹⁸⁶

Consider how this might operate in prisons. Take a right that is not very valuable to the inmate and that the prison would like the inmate to waive. For instance, the prison might want its sex offender

¹⁸² See *Bob Jones Univ. v. United States*, 461 U.S. 574, 604-05 (1983).

¹⁸³ See *South Dakota v. Dole*, 483 U.S. 203, 211-12 ("Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action . . . is a valid use of the spending power.").

¹⁸⁴ See U.S. CONST. amend. IV.

¹⁸⁵ See *United States v. Knights*, 534 U.S. 112, 114, 119-20 (2001).

¹⁸⁶ See, e.g., *Doyle v. Cont'l Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) (arguing that a state may not impose unconstitutional conditions on foreign corporations transacting business within the state).

inmates to participate in a treatment program. Further suppose the prison also wants these inmates to take responsibility for past-uncharged crimes¹⁸⁷—perhaps because admitting responsibility improves the benefit an inmate receives from the treatment program. Most sex offenders would probably comply with the condition because no one will know if they omit undiscovered sex crimes. Even if the prisoners object to the condition, they likely prefer the proposed benefit more. The Supreme Court held that this deal was valid¹⁸⁸—but one can think up other deals that are not.¹⁸⁹

2. Vouchers and the Rationale of Unconstitutional Conditions

Why have such a doctrine? Kathleen Sullivan articulates a systemic rationale: banning certain deals is necessary to preserve, among other things, “the overall distribution of power between government and rightholders.”¹⁹⁰ Her most interesting argument, for our purposes, is the following:

Preferred constitutional liberties generally declare desirable some realm of autonomy that should remain free from government encroachment. Government freedom to redistribute power over presumptively autonomous decisions from the citizenry to itself through the leverage of permissible spending or regulation would jeopardize that realm.¹⁹¹

The danger of the government acquiring power over benefit recipients is heightened in prisons. Prisoners’ constitutional rights are quite minimal. Generally, actual prison conditions fall short of being unconstitutional. This is good from a prisoner’s perspective, but it also means that the government can exercise significant leverage over the inmate.

Prison officials can already make an inmate’s prison experience much less pleasant with no oversight simply by underinvesting in secu-

¹⁸⁷ See *McKune v. Lile*, 536 U.S. 24, 30-31 (2002) (plurality opinion) (describing a Kansas prison’s sex offender treatment program which required inmates to sign an “Admission of Responsibility” form).

¹⁸⁸ See *id.* at 44-45 (allowing a state to require an inmate to choose between participation in a treatment program and losing certain prison privileges, and holding that such a choice “does not amount to compulsion”).

¹⁸⁹ See *Vance v. Barrett*, 345 F.3d 1083, 1087 (9th Cir. 2003) (holding that a state Department of Corrections couldn’t force an inmate to give up accrued interest on prison savings accounts as a condition of continued prison employment).

¹⁹⁰ Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1490 (1989).

¹⁹¹ *Id.*

riety and health care—thus avoiding the *deliberate* indifference that constitutes an Eighth Amendment violation¹⁹²—and by removing anything that isn't part of an inmate's liberty interest and therefore isn't subject to the Due Process Clause.¹⁹³ Or, at least, they can threaten to do so—and then offer those benefits back to the inmate in exchange for a waiver of certain troublesome constitutional rights.

However, in a world with prison vouchers, where prisons compete and prisoners choose, the risks of abuse are much less. In fact, we may face a quite different problem: that voucher prisons will become *too* cushy, undermining the deterrent value of a criminal sentence.¹⁹⁴ There is always a danger that prisons will improperly pressure inmates to waive their rights, but this danger is surely attenuated in a competitive context.

Recall, too, that the government is responsible for making sure that every inmate has a fully constitutionally compliant prison experience, if he wants one. This means not only that every inmate is entitled to secularity on demand, but also that every inmate is entitled to have a spot in a prison where the unconstitutional conditions doctrine applies in full force. This is necessary to avoid the unacceptable prospect that *all* prisons might demand that their inmates waive their rights. The guarantee of constitutional compliance should further make us comfortable that deals offered by prisons aren't illegitimate.

III. VOUCHERS AND PRISON QUALITY

A. *The Potential Benefits of Vouchers*

Let me recap how vouchers could improve prison quality. Under a voucher system, inmates would be free to choose a particular prison, and they would tend to choose prisons that best satisfied their own preferences. This choice might be very different from the one made under the current system by prison officials, whose humanity and pro-

¹⁹² See *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976) (“In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”).

¹⁹³ See *Montanye v. Haymes*, 427 U.S. 236, 242 (1976) (“As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight.”).

¹⁹⁴ See *infra* subsection III.B.3.

fessionalism can't always be taken for granted,¹⁹⁵ and whose interests don't necessarily align with those of the prisoners.¹⁹⁶ This choice might also be different from the one made by judges who may be steering prisoners to particular prisons for political reasons,¹⁹⁷ and who may actually be opposed to prisoner welfare.

If inmates' preferences are very heterogeneous, this could just result in a reallocation of inmates among prisons, creating a better match between prisons and inmates. That alone would be a significant benefit from the prisoners' point of view, even if some objective measure of "quality" didn't rise.¹⁹⁸

But many amenities are likely to be broadly desired: safety, good medical care, less high-security segregation, better activities and programming, and more floor space.¹⁹⁹ Inmates may also value opportunities to work, which may reduce recidivism.²⁰⁰

It therefore seems reasonable to expect that prisons, if forced to compete for prisoners, will offer these broadly desired amenities; I've

¹⁹⁵ See John J. DiIulio, Jr., *What's Wrong with Private Prisons*, PUB. INT., Summer 1988, at 66, 77-78 (describing some prison administrators as "uncaring" and highlighting competent administration as a key attribute of successful prisons).

¹⁹⁶ Cf. *Richardson v. McKnight*, 521 U.S. 399, 419 (1997) (Scalia, J., dissenting) (discussing how state officials overseeing private prisons may focus on minimizing cost above all other considerations); Schulhofer & Friedman, *supra* note 8, at 83-89 (highlighting conflicts of interest between indigent defendants and the current mechanism for selecting a public defender).

¹⁹⁷ Cf. Schulhofer & Friedman, *supra* note 8, at 111 (arguing that judges steer indigent counsel appointments in part based on political reasons, including courthouse budgetary constraints and who supported the judge politically).

¹⁹⁸ See *infra* text accompanying note 277; cf. Caroline M. Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 90 AM. ECON. REV. 1209, 1209 (2000) ("Choice may also allow students to self-sort among schools in a manner that facilitates learning—for instance, a disabled child may be able to attend a school that has an especially good program for disabled children."). But note that from an efficiency perspective, free entry into a marketplace with product diversity can be either excessive or insufficient. See, e.g., N. Gregory Mankiw & Michael D. Whinston, *Free Entry and Social Inefficiency*, 17 RAND J. ECON. 48, 49, 54-55 (1986) (arguing that heterogeneity may have benefits in a free market).

¹⁹⁹ For more on what it means to be a "safer prison," see *infra* text accompanying notes 289-91.

²⁰⁰ Whether prison labor reduces recidivism is empirically disputed. Compare Kathleen E. Maguire et al., *Prison Labor and Recidivism*, 4 J. QUANTITATIVE CRIMINOLOGY 3, 15 (1988) (noting that a growing amount of research indicates that programs allowing inmates to work in prisons have no effect on recidivism rates), with Jeffrey D. Hopper, *The Effects of Private Prison Labor Program Participation on Inmate Recidivism* 79-81 (Aug. 2008) (Ph.D. dissertation, Middle Tenn. State Univ.), available at <http://gradworks.umi.com/33/22/3322480.html> (finding that prisoner participation in industry work while incarcerated lowers recidivism rates).

suggested a list of them earlier in this Article.²⁰¹ Prisons that have many of those attributes will likely be oversubscribed, and inmates may have to go to their second, third, fourth, or even last choice.

Under conditions of substantial overcrowding, perhaps no prison, not even the worst one, will lose inmates. Thus, in a static world, prisons might not benefit from being more attractive; there would be no pressure on prisons to change, and so (apart from taste-based reallocation) quality wouldn't rise. However, in the long run, if the voucher amount is generous enough, prisons will want more inmates,²⁰² and oversubscribed prisons will benefit from building extra wings and extending their business model.²⁰³

Prisons would thus improve by competing with each other on attributes prisoners value; the mechanism is essentially similar to the one driving educational improvements in voucher schools.²⁰⁴ Further, individual prisons would reap substantial benefits by adding more valued features. First, (at least private) prison providers would be able to implement a feature directly, without having to convince a procurement officer that the feature is a good idea and a wise use of funds. Second, a prison could benefit more immediately than under the current regime, as it could "poach" existing inmates from other prisons through transfers rather than having to wait for an influx of new prisoners as they are convicted.²⁰⁵ Even if an amenity is expensive, a prison can benefit from adding it if its inmate population increases sufficiently.²⁰⁶

²⁰¹ See *supra* text accompanying notes 73-103; see also Hoxby, *supra* note 198, at 1209.

²⁰² See *supra* Section I.C; *infra* Section IV.B.

²⁰³ For a discussion of how easy this will be to accomplish, see *supra* text accompanying notes 150-53.

²⁰⁴ See, e.g., Jay P. Greene et al., *School Choice in Milwaukee: A Randomized Experiment* (finding significant effects on math scores starting three years in and significant effects on reading scores three or four years in for the Milwaukee Choice program), in *EVALUATION IN PRACTICE: A METHODOLOGICAL APPROACH* 329, 331 (Richard D. Bingham & Claire L. Felbinger eds., 2d ed. 2002); Jay P. Greene et al., *The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data from the Program's Evaluation* 32 tbl.4 (Program in Educ. Policy & Governance, Occasional Paper 96-3, 1996), available at <http://www.eric.ed.gov/PDFS/ED401597.pdf> (finding significant gains in math scores in students' third and fourth years in the Milwaukee Choice program, though no significant effects for reading); Paul E. Peterson et al., *An Evaluation of the New York City School Choice Scholarships Program: The First Year* (finding that being offered a voucher had a positive and significant effect on both math and reading scores, at least in grades four and five, in the New York City School Choice Scholarships Program), in *EARNING AND LEARNING: HOW SCHOOLS MATTER*, at x, x tbl.18 (Susan E. Mayer & Paul E. Peterson eds., 1999). For a general discussion of these studies, see Volokh, *supra* note 48.

²⁰⁵ Cf. Michael Spence, *Product Selection, Fixed Costs, and Monopolistic Competition*, 43 *REV. ECON. STUD.* 217, 230-31 (1976) (arguing that product differentiation may be ex-

These choice-driven improvements thus bypass the barriers to legislative, administrative, and judicial reform.²⁰⁷ Likewise, privatization may improve quality in a nonchoice allocation regime through competitive bidding and reputation building.²⁰⁸ But this depends crucially on the competence and benevolence of the officials who run the bidding (which, like those of the officials who assign prisoners, aren't guaranteed).²⁰⁹ Once a private provider gets a prison contract, if reputational and contract-renewal concerns are weak, there are strong incentives to reduce quality.²¹⁰ Choice prisons, on the other hand, have less of an incentive to reduce quality because at least the decisionmakers can punish them directly if they observe quality reductions.²¹¹ If prisoners can transfer out, quality reductions can result in a loss of inmates. Even if the possibility of transferring is limited, quality reductions could harm the prison's reputation, thus reducing the inflow of new prisoners.

Choice can also have long-term effects on the entire prison system. As Caroline Hoxby has noted in the analogous context of school vouchers: "choice can affect productivity through a variety of long-term, general equilibrium mechanisms that are not immediately available to an administrator."²¹² In the prison context, this could include increasing the wages of more competent prison managers or corrections officers, which may attract higher-quality people to these professions. Schools, Hoxby continues, may find it in their interest to "issue more information about their achievement[s] and may thus gradually make students into better 'consumers'";²¹³ the same could be true for prisons. The need to attract "customers" may make prisons more responsive to evidence-based techniques rather than fads that appeal to bureaucrats.

cessive under monopolistic competition because firms fail to take account of the lost profits of competing firms).

²⁰⁶ See *supra* Section I.A.

²⁰⁷ See *supra* text accompanying notes 23-37.

²⁰⁸ See *supra* text accompanying notes 38-40.

²⁰⁹ See *supra* text accompanying notes 195-97.

²¹⁰ See Shleifer, *supra* note 12, at 138-40 (explaining that private prisons might cut costs and reduce quality to inefficient levels absent "soft incentives").

²¹¹ See *id.* at 139 (noting that quality reductions often cause consumers to switch suppliers, and arguing that the lack of these incentives undercuts the value of government-administered programs).

²¹² Hoxby, *supra* note 1, at 21; see Caroline M. Hoxby, *School Choice and School Productivity: Could School Choice Be a Tide That Lifts All Boats?*, in *THE ECONOMICS OF SCHOOL CHOICE*, *supra* note 70, at 287, 309-10.

²¹³ Hoxby, *supra* note 1, at 21.

While the “active” inmates under a voucher system are those who transfer from one prison to another, or make an initial choice to go to a different prison than the one to which they would otherwise have been assigned,²¹⁴ choice could also improve the prison experience for those who never transfer or who choose to go to their default prison. In fact, this could be the most important vehicle for improvements if many inmates don’t actively exercise their freedom of choice.²¹⁵ Moreover, if public sector quality rises enough, this could overcome any negative spillovers on certain inmates, such as those based on peer effects.²¹⁶ Similarly, there is evidence that vouchers have improved productivity in Milwaukee *public* schools,²¹⁷ that charter schools have improved productivity in Michigan and Arizona *public* (noncharter) schools,²¹⁸ and that the quality of public schools and public school teachers in Texas is positively correlated with the degree of competition among public schools, even without vouchers or charter schools.²¹⁹

²¹⁴ For instance, the most widely publicized results of school vouchers relate to whether achievement rises for students who actually use the vouchers and transfer to a voucher-accepting private school. Recent studies suggest that transferring to a private school does increase scholastic achievement, at least for black students. Paul E. Peterson et al., *School Vouchers: Results from Randomized Experiments*, in THE ECONOMICS OF SCHOOL CHOICE, *supra* note 70, at 107, 131.

²¹⁵ Cf. Hoxby, *supra* note 1, at 17 (making this point for schools). I have made a similar point in the context of prison privatization, arguing that cheaper prisons may alleviate overcrowding and thus improve both the public and private sector. *Developments*, *supra* note 40, at 1875.

²¹⁶ See *infra* text accompanying notes 289-91.

²¹⁷ See Hoxby, *supra* note 1, at 22-34 (“Overall, Milwaukee suggests that public schools can have a strong positive productivity response to competition from vouchers.”).

²¹⁸ See Hoxby, *supra* note 1, at 44 (finding a causal connection between gains in productivity and achievement and the introduction of charter schools in Arizona); see also GREG FORSTER, FOUND. FOR EDUC. CHOICE, A WIN-WIN SOLUTION: THE EMPIRICAL EVIDENCE ON SCHOOL VOUCHERS 24 tbl.4 (2d ed. 2011), available at <http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/656/A-Win-Win-Solution—The-Empirical-Evidence-on-School-Vouchers.pdf> (surveying empirical studies of voucher programs in Milwaukee, Florida, and elsewhere, and finding positive effects in all but one study). But see Ladd, *supra* note 1, at 75 (arguing that there is insufficient evidence to determine the actual impact vouchers have on public schools).

²¹⁹ Eric A. Hanushek & Steven G. Rivkin, *Does Public School Competition Affect Teacher Quality?*, in THE ECONOMICS OF SCHOOL CHOICE, *supra* note 70, at 23, 23. Note also that the likelihood of competitively driven improvements in public sector quality depends on how public sector funding reacts to the use of vouchers or the loss of students generally. See *supra* text accompanying notes 132-36.

B. *The Potential Disadvantages*

Two key factors have been implicit in the argument that vouchers would improve prisons. The first assumption is that a prisoner's ability to choose would make certain prisons more attractive, which would mean that inmates would choose such prisons, and that as a result, the system as a whole would indeed improve from the prisoner's perspective. One could dispute this mechanism on a number of grounds. Perhaps the prison industry won't be competitive enough to generate meaningful innovation. Perhaps inmates won't be informed enough to reward innovative prisons. Perhaps inmates, while making choices that are individually rational, will impose external costs on other inmates that leave the system as a whole worse off—for example, through self-segregation along undesirable dimensions. These sorts of market failures could prevent vouchers from being successful.

The second assumption is that "improvement" of prisons from the prisoners' perspective is socially desirable. This depends on how well inmates' preferences are aligned with social preferences. What if prisoners effectively demand prisons with loose regulation of contraband or with country club-like conditions? While the previous set of objections stemmed from "market failure," these objections may be said to stem from "market success"—in other words, the market "works" *too* well, and society disapproves.²²⁰

Another factor has also been implicit—a "step zero" of the analysis:²²¹ the belief that a regime of choice is, in principle, possible or appropriate for people who have been intentionally deprived of their choice over most important aspects of their lives.

In this Section, I discuss these three factors. First, I discuss the nonempirical arguments against vouchers based on the supposed inconsistency between the idea of choice and the idea of incarceration. Second, I discuss the "market failure" arguments. Third, I discuss the "market success" arguments.

²²⁰ Of course, "market success" is just an evocative term; this is really just another form of market failure, one that hurts society at large. *See supra* note 54.

²²¹ *Cf.* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 & n.19 (2006) (addressing "step zero," the initial inquiry into whether a framework applies at all, in one context (citing Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001))).

1. Nonempirical Arguments Against Vouchers

Is the concept of prison choice inherent in vouchers inconsistent with the very idea of incarceration? Perhaps prisoners are unable to freely choose because as prisoners, they are under “duress.”²²² Perhaps the very idea of incarceration is inconsistent with free choice.

Prisoners are placed in an environment that, by its nature, restricts their freedom. They have no privacy rights under the Fourth Amendment.²²³ All sex, including consensual sex and sometimes even masturbation, is forbidden, except in the limited context of conjugal visitation programs,²²⁴ although prisoners and prison officials acknowledge—even if only tacitly—that these acts do occur.²²⁵ Prisoners aren’t allowed to exercise choice in a range of activities; for instance, they are limited in their right to consent to medical studies.²²⁶

But the mere fact that prisoners’ choice is *sometimes*—or even *usually*—restricted doesn’t mean that prisoners are incapable of exercising choice. Prisoners retain constitutional rights, even if these can be

²²² See Lupu & Tuttle, *supra* note 156, at 28 (suggesting that limited circumstances may affect the constitutional permissibility of a school voucher scheme).

²²³ *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (concluding that a prisoner has no legitimate expectation of privacy in his prison cell entitling him to Fourth Amendment protection).

²²⁴ See Christopher Hensley, *Introduction: Life and Sex in Prison* (discussing the policy justifications for and benefits of conjugal visitation programs), in *PRISON SEX: PRACTICE AND POLICY* 1, 10 (Christopher Hensley ed., 2002); Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 *COLUM. J. GENDER & L.* 185, 200 & nn.79-80 (2006) (discussing prison regulations regarding a variety of sexual acts); see also Dolovich, *supra* note 74, at 59 n.296 (explaining the difficulties inherent in collecting data about sexual contact between inmates and staff at a particular prison).

²²⁵ See Dolovich, *supra* note 74, at 40 & n.196 (explaining that one attraction of the L.A. County gay segregation program is that inmates admitted there “will find many willing sexual partners”); *id.* at 88 n.393 (noting the existence of prison condom-distribution programs); Nina T. Harawa et al., *Sex and Condom Use in a Large Unit for Men Who Have Sex with Men (MSM) and Male-to-Female Transgenderers*, 21 *J. HEALTHCARE FOR POOR & UNDERSERVED* 1071, 1076 (2010) (discussing condom use among a random sample of inmates in a Los Angeles prison). See generally Terry A. Kupers, *Rape and the Prison Code* (discussing systemic and sociological factors that feed the culture of rape that pervades most prisons in spite of bans on sexual activity), in *PRISON MASCULINITIES* 111 (Don Sabo et al. eds., 2001).

²²⁶ See Ian Urbina, *Panel Suggests Using Inmates in Drug Trials*, *N.Y. TIMES*, Aug. 13, 2006, at 1 (discussing current and historical issues involved in the participation of inmates in medical studies). See generally *INST. OF MED. OF THE NAT’L ACADS., ETHICAL CONSIDERATIONS FOR RESEARCH INVOLVING PRISONERS* (Lawrence O. Gostin et al. eds., 2007) (providing a comprehensive review of the ethical considerations implicated in conducting research on prisoners).

limited in the interests of prison management.²²⁷ Many of these rights—for instance, free speech,²²⁸ free exercise of religion,²²⁹ and freedom to marry²³⁰—are based on the idea that, despite their unfree condition, prisoners can still make autonomous moral choices. In fact, prisoners’ ability to experience religious freedom,²³¹ combined with outrage at prison officials’ arbitrary treatment of various meritorious religious claims,²³² motivated the passage of the bipartisan Religious Land Use and Institutionalized Persons Act of 2000,²³³ so that now, “in principle, inmate religious claims against states are given more solicitous consideration than are nonprisoner religious claims against states.”²³⁴ (Presumably, the Prison Rape Elimination Act of 2003,²³⁵ which passed unanimously,²³⁶ also bespeaks at least a minimal commitment to bodily and sexual autonomy.²³⁷)

Prisoners often have some flexibility as to whether they work while in prison.²³⁸ They’re allowed to control the course of their own litiga-

²²⁷ See *Turner v. Safley*, 482 U.S. 78, 89 (1987) (adopting a more lenient standard of review for cases in which prisoners’ constitutional rights were impinged in the name of legitimate penological interests).

²²⁸ See *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (“[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner . . .”).

²²⁹ See *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (declaring that inmates are entitled to “a reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts”).

²³⁰ See *Turner*, 482 U.S. at 96-99 (overturning a regulation banning inmate marriages without approval of the prison superintendent).

²³¹ See Lynn S. Branham, “*The Devil Is in the Details*”: *A Continued Dissection of the Constitutionality of Faith-Based Prison Units*, 6 AVE MARIA L. REV. 409, 427-29 (2008) (noting that most prisons have chapels and other spaces set aside for religious practice).

²³² See, e.g., *Cutter v. Wilkinson*, 544 U.S. 709, 716 & n.5 (2005) (detailing Congress’s findings regarding “frivolous or arbitrary” barriers to prisoners’ free exercise of religious beliefs).

²³³ Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5). The “institutionalized persons” section of the Act is codified at 42 U.S.C. § 2000cc-1.

²³⁴ *Developments, supra* note 40, at 1895 (emphasis omitted).

²³⁵ Pub. L. No. 108-79, 117 Stat. 972 (codified at 42 U.S.C. §§ 15601–15609).

²³⁶ Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE (Oct. 1, 2003, 2:07 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2003/10/violence_silence.html.

²³⁷ *But see id.* (arguing that “no one who knows our criminal justice system believes [the Act] will do much of anything to eliminate prison rape”).

²³⁸ See Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. ON POVERTY L. & POL’Y 261, 272 (2006) (noting the low rate of participation among those eligible for work assignments in prison). Federal prisoners, however, are required to work if they’re physically able, not a security risk, not subject to discipline, and not participating in particular rehabilitative programs. Crime Control Act of 1990 § 2905, 18 U.S.C. § 4121 (2006). The

tion. Moreover, they can choose whether to participate in prison programs²³⁹ and whether to accept offers of protective custody.²⁴⁰

Suppose that a prisoner *values* prison and its coercive nature. Perhaps the prisoner's behavior on the outside has been so self-destructive and his impulses so uncontrollable that he experiences prison as a respite from everyday concerns and the overwhelming choices of freedom.²⁴¹ Even such a prisoner may well want to make *some* choices. Aside from the opportunity to use prison to experience religious and spiritual renewal,²⁴² anyone may value being in a place with relatively better medical care or lower assault or rape rates.

There are various reasons for restricting prisoners' freedom, including retribution, incapacitation, and deterrence. One also may want to protect prisoners from other prisoners; rapists may be able to intimidate their victims into stating that the sex was consensual²⁴³ or perhaps the prison system's interest in preventing the spread of STDs might override inmates' interest in sexual freedom.²⁴⁴ One may want to protect prisoners from hidden and subtle coercion from other sources. Given a history of inmate mistreatment by medical research-

same is true in various states. *E.g.*, TEX. GOV'T CODE ANN. § 497.099 (West 2004); *see also* Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law* ("[I]n 1997, ten states created mandatory work programs for inmates."), in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 261, 275 (Jody Freeman & Martha Minow eds., 2009); Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 409 (2009) (examining nonpunitive compulsory labor in prisons within the context of the Thirteenth Amendment).

²³⁹ *See* McKune v. Lile, 536 U.S. 24, 44-45 (2002) (plurality opinion) (allowing a state to require an inmate to choose between participation in a treatment program and losing certain prison privileges and holding that such a choice "does not amount to compulsion").

²⁴⁰ *Harding v. Jones*, 768 F. Supp. 275, 277-78 (E.D. Mo. 1991) (maintaining that a prisoner's decision to participate in protective custody is entirely discretionary).

²⁴¹ *See* MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT 21-23, 26-27, 30-31, 48-50 (1996) (exploring the nearly maternal comfort some inmates derive from incarceration).

²⁴² *See, e.g.*, *Duffy v. State Pers. Bd.*, 283 Cal. Rptr. 622, 629 (Ct. App. 1991) (affirming that religion in prison "subverses the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality"); DUNCAN, *supra* note 241, at 32-37 (considering the prison as a context for "spiritual rebirth").

²⁴³ *See* Smith, *supra* note 224, at 218-22 ("Often, concern for physical safety and well-being is a key motivator for sex between inmates and between inmates and correctional staff."); *cf. id.* at 193-95 (outlining the effects that unduly strict regulations on sexual activity in prisons may have on the environment of consensual prison sex).

²⁴⁴ *See id.* at 229 (discussing public health risks, including hepatitis and HIV infection, associated with sex in prisons).

ers, it's certainly not crazy to want to exercise a bit of paternalism on behalf of relatively powerless prisoners.²⁴⁵ But all this is consistent with a recognition that, in whatever free space is left to them, prisoners are able to make choices that are as autonomous as anyone else's.

One may still argue that, though prisoners of course retain residual liberty, there's no value in such liberty,²⁴⁶ and so there's no reason to treat prisoners like parents of schoolchildren, whose choices we presumptively value.

But nothing in this proposal requires treating prisoners as *morally entitled* to choose. In fact, the same is true of school choice. Some advocates of school choice present vouchers as designed to give parents the choice they are entitled to,²⁴⁷ but others present vouchers as merely an instrumental way of using choice to pursue socially beneficial policies.²⁴⁸ Indeed, this is the standard approach of economists, who usually treat competition and choice as mechanisms that can improve social welfare,²⁴⁹ and not as morally valuable goals in themselves.²⁵⁰

Similarly, we can allow prisoner choice instrumentally, as a policy matter, if we find that the social positives outweigh the social negatives—in other words, using prisoner choice as a means to the end of

²⁴⁵ See Urbina, *supra* note 226, at 1 (reporting on a federal panel that recommended using inmates in drug trials).

²⁴⁶ Cf. Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385, 1401 (2007) (calling an emphasis on prisoner choice “largely beside the point” because punishment is “a coercive measure imposed on offenders as a means of demonstrating their lack of superiority to the state”).

²⁴⁷ See CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *supra* note 118, at 4 (detailing arguments for the proposition that school choice is a “fundamental right”); see also AMY GUTMANN, *DEMOCRATIC EDUCATION* 28-33 (1999) (discussing, and rejecting, the ideal of the “state of families,” which contends that families have an inherent right to control their children’s upbringing).

²⁴⁸ CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *supra* note 118, at 5 (“Saul Yanofsky, superintendent of White Plains, New York, Public Schools, concludes that ‘choice is a means to a variety of ends; it is not the end.’”); GUTMANN, *supra* note 247, at 66-70 (discussing consequentialist justifications for voucher plans).

²⁴⁹ See generally ANDREU MAS-COLELL ET AL., *MICROECONOMIC THEORY* 549-50 (1995) (presenting the first fundamental theorem of welfare economics, which “provides a formal and very general confirmation of Adam Smith’s asserted ‘invisible hand’ property of the market,” showing that competitive equilibria, under certain assumptions, are Pareto optimal).

²⁵⁰ Cf., e.g., LUDWIG VON MISES, *LIBERALISM: THE CLASSICAL TRADITION* 4 (Bettina Bien Greaves ed., Ralph Raico trans., Liberty Fund 2005) (1927) (“[T]here is only *one* argument [against slavery] that can and did refute all others—namely that free labor is incomparably more productive than slave labor.”).

socially desirable correctional policy—even if we don’t actually respect prisoner choice.²⁵¹

2. “Market Failure” Arguments Against Vouchers

If we suppose that there’s nothing about a voucher proposal that’s inherently inconsistent with the idea of incarceration, we may then proceed to the next question: whether prison vouchers would work.

The discussion above of how prisons would accommodate prisoners’ values if the prisons had to compete for prisoners²⁵² assumes that market forces would lead prisons to offer more valued amenities. Here, I discuss possible market failures that could prevent this from happening.

a. *Barriers to Individually Maximizing Decisionmaking*

Information. Convicted defendants may not know the actual quality of prisons, just as parents may not know the actual quality of schools.²⁵³ Does this argument apply with more or less force in prisons than in schools?

²⁵¹ There is a robust tradition of opposition to private prisons on “social meaning” and other nonempirical grounds, recently embodied by, for instance, Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 152 (2010). See also HCJ 2605/05 Acad. Ctr. of Law & Bus., Human Rights Div. v. Minister of Fin. ¶¶ 18, 33 [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.htm (holding that prison privatization violates “the constitutional rights to personal liberty and human dignity of inmates” because of private prisons’ profitmaking aspect, even if the level of human rights violations in each prison “is identical”); DiIulio, *supra* note 195, at 71 (“The question of whether it is ever right to profit from the misfortunes of criminals and their victims is a serious one.”); Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749, 769 (2011) (arguing that certain tasks like imprisonment must be public not because public officials are superior, but because the identity of the agent who performs these tasks has an intrinsic value); Michael Walzer, *At McPrison and Burglar King, It’s . . . Hold the Justice*, NEW REPUBLIC, Apr. 8, 1985, at 10 (arguing that prison privatization is illegitimate because it forces prisoners to interact with private parties with a corporate purpose). I respond to these critiques in other work. Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction* (October 7, 2011) (unpublished manuscript) (on file with author). But nothing in these critiques seems directly on point to the prison voucher idea, especially since choice is conceptually distinct from privatization. See *supra* Section I.B.

²⁵² See *supra* Section III.A.

²⁵³ SMITH & MEIER, *supra* note 15, at 126-27 (“The market solution assumes parents and students will have enough information to make a decision on what school offers the ‘best’ education. This assumption appears to be patently insupportable.” (citing Brown, *supra* note 127, at 293)); Brown, *supra* note 127, at 292 (“Elementary and secondary schooling are excellent examples of input-based relationships between agents

Someone sentenced to prison for the first time may not know much about different prisons. Even repeat offenders might have little direct experience with prisons if they've mostly spent time in jails rather than prisons; even someone who's been in one prison may know nothing about others.

But information is available about prisons from several sources. First, information can spread by word of mouth from friends or neighbors who have been in prison. Second, prisons can advertise, and (possibly anonymous) reviews of prisons by current or former inmates may be available on the Internet.²⁵⁴ Third, there are already ways to evaluate prisons, such as reports from monitoring agencies or the Logan quality of confinement index.²⁵⁵ Prisons could even be required to publish such information as part of their advertising, as well as other information that would result from the voucher program such as the length of the wait list and the rate of transfer out of the prison.²⁵⁶ The *Federal Prison Guidebook* already describes facility characteristics in detail for the benefit of criminal defense lawyers.²⁵⁷ Another possible model would be the federal government's "Nursing Home

(schools) and their clients (students, parents and taxpayers). Furthermore, the relationships are based on an inherent uncertainty in the production process that places the task of monitoring output somewhere between expensive and impossible.”).

Richard F. Elmore observes,

In education and medical care there are at least two *a priori* reasons for skepticism about informed choice. One reason is that the practice of education and medicine, and the organization of that practice, are relatively complex A second reason . . . is that providers . . . have relatively strong incentives to limit clients' access to information.

Richard F. Elmore, *Choice as an Instrument of Public Policy: Evidence from Education and Health Care*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION: THE THEORY OF CHOICE AND CONTROL IN EDUCATION 285, 299 (William H. Clune & John F. Witte eds., 1990) (citation omitted).

²⁵⁴ Cf. Irina D. Manta, *Privatizing Trademarks*, 51 ARIZ. L. REV. 381, 415-17 (2009) (describing how feedback conveyed through the Internet can help consumers pick the highest-quality product).

²⁵⁵ See *supra* note 145 and accompanying text.

²⁵⁶ Cf. Schulhofer & Friedman, *supra* note 8, at 102 (suggesting similar publication requirements for criminal defense attorneys' qualifications and experience).

²⁵⁷ ALAN ELLIS & J. MICHAEL HENDERSON, FEDERAL PRISON GUIDEBOOK (2010–2011 ed. 2010). The publisher's web site describing the Guidebook offers the subtitle: "Federal prison placement, profiles, and tips: How to ensure that your client gets into the best possible prison and is released at the earliest opportunity." *Federal Prison Guidebook*, JAMES PUBLISHING, <http://jamespublishing.com/books/fpg.htm> (last visited Dec. 15, 2011).

Compare” site,²⁵⁸ which conveniently pulls together government-collected information about nursing homes.

Fourth, if the voucher program allows an inmate to transfer out after a certain amount of time, that inmate will at least have some direct experience of his or her own prison. If that experience is bad enough, it could be worthwhile to gamble on another prison.²⁵⁹

So far, the arguments here look similar to those for schools. But the informational problem seems to be less severe in the prison context because the people who choose the prison are *the same people* who experience the service.²⁶⁰ With schools, by contrast, there is an agency problem: the parents make the choice, but because they don’t experience the school directly, they have less of an incentive to become well informed and are less able to do so. Parents are imperfect agents of their children, whereas inmates are perfect agents of themselves.²⁶¹

A convicted defendant may also have some help from his lawyer, just as lawyers now try to get their clients’ sentences reduced by enrolling them in drug treatment programs or enlisting them in the military.²⁶² The government could also provide a default assignment or a

²⁵⁸ *Nursing Home Compare*, MEDICARE.GOV, <http://www.medicare.gov/NHCompare> (last visited Dec. 15, 2011).

²⁵⁹ See *supra* text accompanying note 110.

²⁶⁰ Morley, *supra* note 127, at 1797-1800 (cataloguing barriers to parents’ ability to monitor the quality of their child’s school).

²⁶¹ See Brown, *supra* note 127, at 294 (highlighting that parents, not students, are the “ultimate consumer” because they pay for schooling); see also Burton A. Weisbrod & Mark Schlesinger, *Public, Private, Nonprofit Ownership and the Response to Asymmetric Information: The Case of Nursing Homes* (noting similar agency problem with respect to nursing homes), in *THE ECONOMICS OF NONPROFIT INSTITUTIONS* 133, 138-39 (Susan Rose-Ackerman ed., 1986); cf. Sigler, *supra* note 251, at 160 (pointing out the agency problems under the current model of assigned prisons, where inmates “are not the purchasers of prison services”). I take no position here on who—parents or children—should choose if vouchers are used for juvenile detention facilities. Of course, parents may also choose differently than their children would because they value different things, perhaps for good reason. In this sense, an “agency problem” in school selection may be positive. And one can argue the same for prison—the absence of an agency problem isn’t all good, since prisoners will have some preferences that are socially undesirable. On this, see *supra* text accompanying notes 243-44.

²⁶² Natasha Saulnier, *Recruiting at Any Cost: How the Pentagon Keeps the New Recruits Coming*, COMMONDREAMS.ORG (Dec. 10, 2004), <http://www.commondreams.org/views04/1210-20.htm> (“In the Vietnam era, Judges often offered enlistment as an alternative to prosecution and jail time. But after Vietnam, Congress passed legislation to prevent this practice. But former recruiters and military lawyers affirm that it is still taking place in a more covert form, with judges often working in concert with recruiters to drop charges.”). But see 3 DEPARTMENT OF JUSTICE MANUAL § 9-8.010 (2d ed. 2010–2011) (“Plea or sentence bargaining agreements should not be contingent on, or contain provisions designed to facilitate, enlistment in the Armed Services.”).

list of recommendations,²⁶³ although the bureaucrats who currently make inmate assignments may well be less favorably disposed toward prisoners than education bureaucrats are toward schoolchildren.

Ultimately, what convicted defendants lack in information, they may make up for in motivation, both to acquire information and to act on it.²⁶⁴ Even if these information problems persist, this argument favors having prisons run by the nonprofit sector, just as information problems in education are often taken as an argument supporting nonprofit schools.²⁶⁵

Competitiveness. In addition to this lack of information, there might also be insufficient competitiveness, meaning that inmate choice might still fail to meet inmate desires.²⁶⁶

Although I've stressed that prison choice needn't involve private provision,²⁶⁷ making the market competitive enough to respond to "consumer demand" might require the participation of private prisons. Public prisons, after all, may not even want more prisoners. Today, corrections departments actually ask for *fewer* prisoners.²⁶⁸ They may do this because of inadequate funding, which would be alleviated if an adequate voucher accompanied each prisoner. This solution would require total voucher funding to do more than merely match the current funding for the correctional system. Or perhaps they're just advocating a less incarcerative penal policy in general and not taking a position on whether they, as opposed to someone else, should

²⁶³ Cf. Schulhofer & Friedman, *supra* note 8, at 103 (describing how courts could create a list or registry of criminal defense attorneys to assist defendants in making more informed choices).

²⁶⁴ Cf. *id.* at 86, 107 (arguing that, though criminal defendants have trouble determining who the best lawyer is, he "might be better off making his own, poorly informed, choice" than relying on the choice of a defender or judge who is better informed but doesn't have the defendant's interests at heart); Trebilcock & Iacobucci, *supra* note 124, at 1448 (describing how consumer choice disciplines private actors into disclosing useful information).

²⁶⁵ See *supra* sources cited in note 127.

²⁶⁶ Elmore, *supra* note 253, at 308-09 (discussing the Dutch system of school choice, which some argue "does not operate as a quasi-competitive market offering options to its clients, but rather as a cartel of interlocking interests supported by the state which limits competition and improvements in quality").

²⁶⁷ See *supra* Section I.B.

²⁶⁸ See Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1235-37 (2008) (describing several examples of state correctional officers who have requested reductions in the prison population, including by suggesting alternate sentencing schemes).

get existing prisoners.²⁶⁹ But in general, it's not obvious that public prisons benefit from having more prisoners,²⁷⁰ and in any event, public prisons may have less flexibility than private prisons to respond to market incentives. To combat this problem, rewards and penalties for public prisons should be structured so that it's in their best interest to attract more people and so that they have the freedom to experiment with different models.

One shouldn't overstate the difference between the public and private sectors: private and public school curricula often look quite similar, perhaps because adopting similar curricula allows parents to minimize the risk that their children will be unprepared to compete against their peers in college admissions and in the job market.²⁷¹ This may apply to prisons too: prisons are traumatic places even in the best circumstances, and inmates who will spend a few years in one may not want to experiment.

But this doesn't mean that competition is useless or that schools (or prisons) won't differ in their treatment of students (or inmates). First, *some* schools (or prisons) will cater to those parents (or inmates) whose uncertainty or risk tolerance differs from the norm.²⁷² Similarly, inmates may have heterogeneous rates of substitution between, for example, the risk of violence and the quality of medical care. Second, schools still vary in "location, presence of religious instruction, and, perhaps most importantly, whether a school is a 'good' school or a 'bad' one in terms of technical efficiency."²⁷³ All these factors are relevant for inmates as well. The third factor—the actual productivity of the prison—may most significantly drive prison improvements.

²⁶⁹ Cf. *id.* at 1220-21, 1227-30 (distinguishing between pro-incarceration advocacy, which seeks to increase man-days in prison, and pro-privatization advocacy, which seeks to acquire a greater proportion of the *existing* man-days).

²⁷⁰ Cf. Schulhofer & Friedman, *supra* note 8, at 104 (explaining that public defenders may be motivated to perform poorly in order to reduce their caseload). Compare WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971) (arguing that bureaucrats are largely motivated by a desire to maximize their budgets), with Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 932-34 (2005) (questioning the Niskanen hypothesis by proposing alternate motivations for bureaucrats, such as matching the budget of their agency with the minimum cost of operations).

²⁷¹ See Brown, *supra* note 127, at 287-88.

²⁷² See *id.* at 297 n.1 (arguing that art and science magnet schools exist in large cities because "the desire to specialize is a rare trait, which can be accommodated only under the most unusual circumstances of large scale systems").

²⁷³ *Id.* at 291.

b. *External Effects of Individually Rational Decisionmaking*

The previous market failure arguments focused on the plight of the individual inmate-consumer who wouldn't know how to choose or who would be faced with unresponsive suppliers. Other market failure arguments could be based on externalities. Even if inmates choose rationally for themselves, the results may be suboptimal because individual decisions negatively affect other prisoners.²⁷⁴

The administrative burden on the system poses one obvious externality (in this instance on the taxpayer).²⁷⁵ I only flag this briefly, because the administrative costs of running the system seem minor relative to the overall advantages or disadvantages of the system itself.

Another effect of prison choice could be distributional across inmates. The better informed inmates will tend to get better prisons, and this population is likely made up of repeat prisoners and those with the best connections in the criminal world.²⁷⁶ This objection is strongest when there's a single, unidimensional measure of prison quality. If "best" is different for different prisoners—if some prisoners prefer proximity to family while others prefer good medical care and still others prefer particular job training programs—choice serves a valuable matching purpose.²⁷⁷ In the extreme case, *everyone* could have his or her top choice. Moreover, even if there's some redistribution from less- to more-informed prisoners, a rising tide could lift all boats: if prison vouchers lead to quality improvements, the uninformed may become better off as well—much like school choice can improve public schools even for students who *don't* use vouchers.²⁷⁸

²⁷⁴ Of course, there are also external effects on third parties outside of the prison system. I defer that discussion to the next section on "market success" problems. See *infra* subsection III.B.3.

²⁷⁵ Cf. Schulhofer & Friedman, *supra* note 8, at 111 (noting that the administrative burden on the courts may motivate judicial decisions regarding freedom of choice).

²⁷⁶ Cf. *United States v. Davis*, 604 F.2d 474, 478-79 (7th Cir. 1979) (acknowledging the risk that letting defendants choose their own counsel may disproportionately benefit repeat offenders); Schulhofer & Friedman, *supra* note 8, at 110 (arguing that freedom of choice for appointed counsel may disproportionately benefit "well-informed defendants," which in turn "may include a disproportionate share of repeat offenders"). For an example of the distributive argument against choice in the educational context, see CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *supra* note 118, at 25-27.

²⁷⁷ Cf. Schulhofer & Friedman, *supra* note 8, at 109 (noting that freedom to choose appointed counsel could better match attorneys based on defendants' idiosyncratic preferences).

²⁷⁸ See *supra* text accompanying notes 215-19; see also H. Spencer Banzhaf & Garima Bhalla, Do Households Prefer Small School Districts? A Natural Experiment 9-10 (Sept. 2009) (unpublished manuscript), available at <http://papers.ssrn.com/=1247822>

Similarly, some have argued that, to the extent that the weakest and most vulnerable inmates “escape” into safer environments, the burden of rape and violence falls onto the next weakest remaining inmates. The result is a redistribution of rape.²⁷⁹ This is a plausible concern, although rape and violence tend to become a costlier enterprise for the predator when the remaining potential victims are, on average, less obvious targets and are better able to put up a fight.²⁸⁰ Overall the redistribution would probably also reduce the extent of the problem.²⁸¹

The rest of this subsection focuses on a particular dynamic that seems especially relevant in the prison context: self-segregation of prisoners based on their level of violence, gang membership, or race.

In schools, the quality of one’s fellow students helps determine the quality of one’s education. Thus, students (or usually their parents) seek out schools with “better” students, which tends to cause pressure to stratify.²⁸² Of course, the empirical importance of these pressures depends on the design of the particular voucher program.²⁸³

If such stratification occurs in schools, it can have a variety of effects. First, the mere existence of segregation is significant—as when students seek out other students of their own social class, ethnicity, religion, or race. However, voluntary segregation, even if some consider it undesirable in itself, doesn’t necessarily affect educational outcomes.

Second, because of the peer effects discussed above, stratification can affect the overall quality of the system. In schools, this is so even if

(suggesting that educational choice might not only improve educational quality through competition but also serve an independently valuable function in allowing consumers to sort themselves).

²⁷⁹ See Jeannie Suk, *Redistributing Rape*, 48 AM. CRIM. L. REV. 111, 111-13 (2011) (presenting this point as a critique of Sharon Dolovich’s advocacy of programs like the Los Angeles County gay segregation unit, or even of broader-based units that segregate vulnerable inmates generally); see also Dolovich, *supra* note 74, at 80-82 (responding to Suk’s concerns about weaker men becoming targets for rape). Dolovich and Suk argue in the context of assigned jails, but similar arguments could be made about vouchers.

²⁸⁰ Dolovich, *supra* note 74, at 82.

²⁸¹ However, I later discuss how a reallocation of prisoners can lead to increased violence. For instance, incomplete segregation by violence level, race, or gang affiliation may disrupt an existing balance of power in a prison and leaves minority gang members at the mercy of the majority gang. See *infra* text accompanying notes 293-307.

²⁸² See Helen F. Ladd, *School Vouchers: A Critical View*, J. ECON. PERSP., Autumn 2002, at 3, 13-14 (arguing that the “peer effect” of parents choosing schools based on social and ethnic composition, coupled with peer pressure from other parents, will lead to racial and socioeconomic stratification between schools).

²⁸³ See Hoxby, *supra* note 1, at 54-56 (comparing achievement outcomes across schools using different types of voucher programs).

parents don't select directly based on the school's test scores, so long as they choose based on something correlated with high achievement like socioeconomic status.²⁸⁴

Whether this applies to prisons depends on the significance of stratification pressures and peer effects. As an initial matter, the predicted stratification effect for schools arises—if at all²⁸⁵—not only because of peer effects but also because of tuition. Rich people can afford to pay more for their children to receive a better education. Personal achievement increases when a student is surrounded by smarter peers. Thus, private schools can benefit by attracting high-ability students with low tuitions and then charging high tuitions to rich students who want to benefit from the resulting positive peer effect.²⁸⁶

Since prisons won't charge fees, they can't utilize a tuition-based stratification mechanism. If prisons can't be selective in their "admissions,"²⁸⁷ stratification will only be based on differences in taste. If everyone had identical preferences for prisons, then everyone would rank prisons equally, and a random cross section of inmates would

²⁸⁴ See Hoxby, *supra* note 198, at 1214-16 (examining the factors parents consider when making choices in the education market).

²⁸⁵ Whether school vouchers would actually increase stratification is disputed, since public schools are already stratified because of patterns of residential segregation. See MERRIFIELD, *supra* note 128, at 6 (disputing, based on existing "de facto segregation" in public schools, claims that vouchers would increase stratification); Caroline Minter Hoxby, *Are Efficiency and Equity in School Finance Substitutes or Complements?*, J. ECON. PERSP., Fall 1996, at 51, 69 (noting the prevalence of "homogenous school districts" and of students with high human capital at certain schools); cf. Dennis Epple & Richard Romano, *Neighborhood Schools, Choice, and the Distribution of Education Benefits* (stratification engendered by neighborhood schooling without intradistrict choice is comparable to stratification engendered by "a universal and laissez-faire voucher system with vouchers of sufficient magnitude"), in THE ECONOMICS OF SCHOOL CHOICE, *supra* note 70, at 227, 234-35 [hereinafter Epple & Romano, *Neighborhood Schools*]; *id.* at 272 ("Even a cursory look at the stratification of households across neighborhood schools in large urban districts is sufficient to put to rest the notion that there is no stratification among schools in a district when expenditures are equalized."); Dennis Epple & Richard Romano, *Educational Vouchers and Cream Skimming*, 49 INT'L ECON. REV. 1395, 1426-27 (2008) (claiming that different voucher designs can have radically different stratification effects and that vouchers that place no restrictions on tuition or admissions will result in "cream skimming that adversely affects poor and less able students," while other decisions might minimize stratification); Hoxby, *supra* note 198, at 1210 (observing that reforms extend, rather than introduce, choice, and that the stratification effects likely materialize more slowly and more incrementally than anticipated).

²⁸⁶ E.g., Dennis Epple & Richard E. Romano, *Competition Between Private and Public Schools, Vouchers, and Peer-Group Effects*, 88 AM. ECON. REV. 33, 43-47 (1998) (suggesting that high-income students will subsidize high-ability students when vouchers are available); Epple & Romano, *Neighborhood Schools*, *supra* note 285, at 235.

²⁸⁷ See *supra* Section I.C.

end up in the best prisons. If stratification occurs, it will be because prisons differ in what they offer and prisoners differ in what they value.²⁸⁸ Prisons with effective violence-prevention policies will acquire the prisoners who place the highest relative value on low violence (bearing in mind that prisoners can still only select within their security classification); prisons with good medical care will acquire the prisoners who put the highest relative value on such care.

Would self-segregation of the prison system by violence level—into “safer” and “more violent” prisons—be beneficial?

First, let’s flesh out what it means to talk about safer prisons. Relatively nonviolent prisoners would prefer a prison with low violence rates—but so would violent predators.²⁸⁹ As a result, a prisoner who values safety should select a prison that has *policies* that encourage lower violence and should avoid prisons that merely *happen* to be less violent, for example, because of their inmate composition. Such policies may include continuous monitoring of admitted inmates to weed out the fakers²⁹⁰—although the effectiveness of such a scheme isn’t guaranteed.²⁹¹ Prisoners may not be able to tell from the outside whether a low violence level at a particular prison is due to good policies or good prisoners, but advertising, testimonials, and experience might effectively inform them. A prison with effective security policies would thus tend to attract nonviolent prisoners and deter predators, who would prefer to stay in prisons with comparatively ineffective policies.

What would such stratification do to the overall “quality” of the inmates? Caroline Hoxby writes, in the context of human capital seg-

²⁸⁸ Cf. MERRIFIELD, *supra* note 128, at 12 (discussing, in the school voucher context, the preferences for subject- or pedagogy-focused schools and the multidimensional abilities of students).

²⁸⁹ See, e.g., Dolovich, *supra* note 74, at 21-22 (noting that the lack of procedural controls under an early Los Angeles County gay segregation program meant that “all a would-be predator needed to do to gain access to potential victims was to aver his homosexuality on entrance to the Jail”).

²⁹⁰ See *id.* at 23 (reserving the power under a later iteration of the gay segregation program for “[j]ail officials to determine whether those men who claimed to be gay belonged in the unit reserved exclusively for ‘homosexual inmates’”); *id.* at 32, 43 (observing that it is less important to be perfectly accurate in classifying gay inmates than it is to demonstrate an “official commitment” to “accurate classification” and “persistent monitoring”).

²⁹¹ See *id.* at 32 (noting that even if nongays could be excluded from the gay segregation program, “heterosexuals and bisexuals have no monopoly on sexual predation”). But see *id.* at 33 (reporting that the gay segregation unit is “well-known to be the safest place in the Jail,” which means that “many of those seeking admission under false pretenses only want a respite from the gang politics and consequent pressure and volatility that define daily life in [the general population]”).

regation (the tendency of high-quality students to live near and attend school with other high-quality students):

[W]ithout knowing how spillovers work, we do not know whether the equilibrium has too much or too little segregation. Consider the “one bad apple” scenario. If a single household with low human capital in the district could make everyone else learn substantially less, yet would only experience small human capital gains itself, there would obviously be too little segregation. The converse scenario might be called “one shining light.” If a single household with high human capital could make everyone else learn substantially more, yet its own children would not learn any less (despite being surrounded by children from deprived backgrounds), there would obviously be too much segregation.²⁹²

Prisons seem more like the “one bad apple” scenario. High-violence inmates exert a bad influence on low-violence prisoners and—now switching metaphors—“the bad eggs seem to have more of an influence on the good eggs than vice versa.”²⁹³ Stratification by violence level may then be desirable to mitigate this problem.

However, this solution may not hold true if stratification is incomplete. Imperfect stratification might be extremely bad for some low-violence inmates who are denied their preferred choice of prison and remain among an increased population of high-violence inmates. So, violence-based self-segregation may be beneficial in the extreme case, but it could be either beneficial or harmful in the imperfect cases.

What if inmates self-segregate according to race and ethnicity? This resembles self-segregation according to gang membership, because race substantially drives prison violence²⁹⁴ and prison gangs typically organize along ethnic and racial lines.²⁹⁵

Estimates of prison gang membership vary widely.²⁹⁶ Some sources report that prison gangs account for no more than 5% or 6% of pris-

²⁹² Hoxby, *supra* note 285, at 63.

²⁹³ Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1055.

²⁹⁴ THE COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, *supra* note 18, at 23 (linking race to violence in prisons but suggesting that good prison leaders can adopt policies that mitigate race-related violence); *id.* at 26 (contrasting Sheriff Lee Baca’s view attributing the 2006 Los Angeles jail riots to racial tensions, with Jody Kent’s view that “inter-racial violence was in large part a reaction to institutional problems, particularly crowding, which had created stressful living conditions and a near total absence of programming and productive activities”).

²⁹⁵ See Dolovich, *supra* note 74, at 49-50 (defining “gangs” as interchangeable with “race” in California prisons); Chad R. Trulson et al., *Gang Suppression and Institutional Control*, CORRECTIONS TODAY, Apr. 2006, at 26, 26-27 (noting that race and ethnicity represent two of the primary determinants of inmate behavior and gang membership).

²⁹⁶ Some prison systems manipulate their gang density by counting only “validated gang members.” See KNOX, *supra* note 21, at 435. Additionally, many researchers fail to

on inmates.²⁹⁷ Others estimate that mean gang density at male institutions rose from 9.4% in 1991 to 24.7% in 1999, and 3.5% to 7.5% at female institutions.²⁹⁸ The 24.7% figure at male institutions masks variation by security level:²⁹⁹ in male institutions membership was 16.1% in minimum-security prisons, 23.6% in medium-security prisons, and 32.7% in maximum-security prisons.³⁰⁰ And even these numbers do not account for substantial regional variation (states have reported numbers as divergent as 75% in California prisons³⁰¹ and 90% in Illinois³⁰²) and variation among individual prisons³⁰³ (some have reported a gang density of zero and others 100% membership³⁰⁴), although such stark divergence may also reflect differences in reporting stand-

recognize the difference in reporting mechanisms. *See id.* The error leads them to “grossly underestimate the scope and extent of the prison gang problem to the point of officially disseminating totally inaccurate information in their government funded research reports.” *Id.*

²⁹⁷ *E.g.*, AM. CORR. ASS’N, GANGS IN CORRECTIONAL FACILITIES: A NATIONAL ASSESSMENT 8 tbl.1 (1993) (estimating total gang membership to be 5.9% in 1992); Trulson et al., *supra* note 295, at 26 (“[S]trictly prison-based gang members accounted for 1.2 percent of all state and federal prison inmates Gang-related inmates constituted less than 5 percent of all prison inmates across the country.”); *cf.* KNOX, *supra* note 21, at 434 (calling the 1993 American Correctional Association report “notoriously unreliable and more fictional than factual”). Knox noted that other researchers found gang membership rates in 1993 to be double the ACA’s estimate. *Id.* at 446.

²⁹⁸ KNOX, *supra* note 21, at 448; *see also* Knox, *supra* note 107, at 8 (reporting that prison wardens surveyed estimated 25.9% gang density among new arriving male inmates and 6.28% among female inmates). Gang allegiances shift over the course of incarceration, with inmates joining or quitting gangs. The Knox survey reported an adjusted gang density of 24.8% for male institutions and 4.09% for female institutions. *Id.*

²⁹⁹ George W. Knox & Edward D. Tromanhauser, *Gangs and Their Control in Adult Correctional Institutions*, PRISON J., Fall–Winter 1991, at 15, 19 (providing empirical support for the intuition that “the higher the security level, the higher the density of gang members”).

³⁰⁰ KNOX, *supra* note 21, at 449.

³⁰¹ *Id.* at 434.

³⁰² Knox & Tromanhauser, *supra* note 299, at 20 (citing Michael P. Lane, *Inmate Gangs*, CORRECTIONS TODAY, July 1989, at 98). Even the 1993 American Correctional Association report, which has been criticized as severely underestimating gang membership, reports 48.1% gang membership in Illinois in 1992, an order of magnitude higher than in any other state. AM. CORR. ASS’N, *supra* note 297, at 8 tbl.1.

³⁰³ *Cf.* REID H. MONTGOMERY & GORDON A. CREWS, A HISTORY OF CORRECTIONAL VIOLENCE: AN EXAMINATION OF REPORTED CAUSES OF RIOTS AND DISTURBANCES 25 (1998) (noting that 80% to 90% of inmates “in many prison systems have some affiliation with street gangs” but also that affiliation differs from membership and that street gangs aren’t the same as prison gangs (citing GANGS: A CRIMINAL JUSTICE APPROACH (J. Mitchell Miller & Jeffrey P. Rush eds., 1996))).

³⁰⁴ KNOX *supra* note 21, at 448.

ards. Estimates of gangs' contribution to prison violence also vary greatly, from less than 30%³⁰⁵ to over 50%.³⁰⁶

The prevalence of prison gangs—even if the low estimates are right, there are *some* systems with high gang density—suggests that racial/ethnic or gang-based segregation is a realistic possibility. It's plausible that an inmate will seek out other inmates of the same race or ethnicity, if only to be victimized less by opposing gangs.

This would tend to make voluntary self-segregation, either by race or gang affiliation, a positive force purely from the perspective of prison security.³⁰⁷ However, imperfect segregation could be bad for inmates of the minority racial or ethnic group or of the minority gang who don't get their first-choice prisons.

At least one study has found that racial integration may not actually increase prison violence. In Texas, where the prison system has been progressively desegregated since the late 1970s, the inmate-on-inmate assault rate was found to be lower among inmates who were racially integrated in double cells; moreover, the rate of racially motivated inmate-on-inmate assaults decreased as the prison system became more desegregated.³⁰⁸

This is an interesting result, although the study had some limitations. First, inmates were ineligible for placement in racially integrated double cells if they were members of racial or ethnic gangs or if

³⁰⁵ See *id.* at 463 (29.2% in 1999, up from 20.4% in 1993); Knox, *supra* note 107 (estimating that 26.3% of prison violence is gang-related).

³⁰⁶ See AM. CORR. ASS'N, *supra* note 297, at 16 tbl.5; Robert S. Fong & Salvador Buentello, *The Detection of Prison Gang Development: An Empirical Assessment*, 55 FED. PROBATION, March 1991, at 66, 66 (citing C. G. CAMP & G. M. CAMP, CRIM. JUST. INST., MANAGEMENT STRATEGIES FOR COMBATING PRISON GANG VIOLENCE (1988)).

³⁰⁷ Cf. MONTGOMERY & CREWS, *supra* note 303, at 73 (detailing a current practice whereby prison administrators use interfacility transfers to separate rival gangs); Dolovich, *supra* note 74, at 49 n.250 ("The California Department of Corrections does its best to house [rival gang members of the] Surenos and Nortenos in separate facilities."). Self-segregation by gang could thus achieve the result that prison administrators already intend, unless the strategy is in fact to selectively transfer inmates to achieve a "balance of power" among gangs. See *infra* text accompanying notes 354-56. In prisons with rival gangs, officials "tolerate and even facilitate gang control." See Dolovich, *supra* note 74, at 52 (referring to Los Angeles County jails, where rival gangs have organized to share jail amenities, "since for much of the time it ensures order and stability"). With more segregation by gang affiliation, this tolerance for gang control would presumably be less necessary, although such segregation might have deleterious effects on the outside world. See *infra* text accompanying notes 350-60.

³⁰⁸ See Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons*, 36 LAW & SOC'Y REV. 743, 762 (2002) (dubbing their theory explaining this trend the "contact hypothesis").

they had had previous race-related problems in prison.³⁰⁹ Second, because not all interracial assaults were coded as “racially motivated,”³¹⁰ it’s possible that some interracial assaults weren’t considered to be directly motivated by race but were nonetheless motivated by membership in opposite-race gangs. Such membership may not have been known to the prison authorities so as to disqualify the member from integrated double-celling.

Even if prisons do become racially more homogeneous, it may make little difference. To the extent it does make a difference, it might actually reduce violence, although life could become worse for those who remain in an otherwise racially homogenous prison.

Finally, regardless of the effect on violence, some might still find the “social meaning” of such racial stratification objectionable.³¹¹ But this voluntary self-segregation wouldn’t be unconstitutional,³¹² and even liberal scholars have been more willing to accept some degree of racial segregation in prisons (for instance, on a temporary basis after race riots) than in other contexts.³¹³ Moreover, while there’s widespread agreement that children benefit from being exposed to a diverse set of their peers,³¹⁴ no similar consensus exists for prisoners.

³⁰⁹ *Id.* at 755. For instance, when Texas was starting to desegregate, gangs pressured inmates to resist desegregation efforts: “In some cases, serious assaults were perpetrated on cell partners to earn a ‘racial restriction’ and be placed in a single-race cell.” Trulson et al., *supra* note 295, at 28

³¹⁰ Trulson & Marquart, *supra* note 308, at 767-69.

³¹¹ Cf. Sarah Spiegel, Comment, *Prison “Race Riots”: An Easy Case for Segregation?*, 95 CALIF. L. REV. 2261, 2276-85 (2007) (objecting to racial segregation within prisons as a policy that carries pernicious social meanings).

³¹² Cf. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding, in the context of a written exam to join the District of Columbia police force, that a rule’s disproportionate impact alone does not signal a due process violation).

³¹³ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 148 (1980) (concluding that racial separation after a prison riot would meet strict scrutiny); see also Spiegel, *supra* note 311, at 2263-64 (noting that Paul Brest and John Hart Ely laid the foundation for accepting “racial segregation” as a legitimate response to prison rioting (citing Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 15 (1976))); *id.* at 2264 (“Not a single voice, either from the legal academy or from the courts, has contested the characterization of prison race riots as the prototypical example of a situation that satisfies strict scrutiny.”).

³¹⁴ See *Brown*, *supra* note 127, at 297 (“[G]rouping students with different traits may have desirable effects and create a kind of external benefit which would be lost if students could group themselves.”); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-94 (1954) (asserting that segregation in schools is detrimental to children regardless of the equality in tangible resources). *But see* U.S. COMM’N ON CIVIL RIGHTS, *THE BENEFITS OF RACIAL AND ETHNIC DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION* 15-17 (2006), available at <http://www.usccr.gov/pubs/112806diversity.pdf> (finding little

3. “Market Success” Arguments Against Vouchers

Suppose that the “market failures” discussed in the previous section are relatively harmless, and that the sort of competition described above really would improve prisons from a prisoner’s perspective. If whatever allocative harms some prisoners suffer from being in the “wrong prison” are outweighed by the benefits of being in a prison that is of higher overall quality, would the project be worthwhile?

Some of the preferences prisoners likely share seem unequivocally desirable. Prisoners probably prefer less violence and sexual abuse, better health care, and better vocational training. They may also prefer prisons close to their families to facilitate visits.³¹⁵ These all seem unobjectionable, on either humanitarian or rehabilitative grounds, though many commentators favor more brutal and abusive prisons on “retributive” or deterrence grounds.³¹⁶ I put “retributive” in quotation marks to distinguish the casual, popular, “more is better,” “harsh justice”³¹⁷ approach to punishment from the more serious retributivism of criminal theorists.³¹⁸

to no evidence that diversity in elementary and secondary schools results in significant academic or social benefit).

³¹⁵ In the school context, the fact that parents often choose a school based on proximity as opposed to “quality” is often cited as a negative aspect of voucher programs. This only shows that parents have a broader view of quality than the experts. Indeed, to the extent a shorter commute makes life more pleasant for the child and his family, why not consider proximity a valid component of quality?

³¹⁶ Cf. Schulhofer & Friedman, *supra* note 8, at 120 (acknowledging arguments that improvements in indigent defense may not be socially desirable because some guilty defendants may go unpunished). *But see* Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 563-64 (2006) (citing prison rape jokes in popular culture and questioning their social acceptance).

³¹⁷ See, e.g., JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 15-16 (2003) (arguing that continental European punishments are milder than American ones because of sociopolitical traditions inherited in Europe but rejected by the American Revolution).

³¹⁸ The latter sometimes cuts in the direction of more punishment, but at other times argues in favor of less punishment on justice grounds. See, e.g., David Gray & Jonathan Huber, *Retributivism for Progressives: A Response to Professor Flanders*, 70 MD. L. REV. 141, 145 (2010) (“[W]e think that American justice is harsh as measured by retributive standards and that it would be less harsh if policymakers took more seriously the constraints on punishment that retributivism recommends.”); Robert A. Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501, 1513-23 (1981) (offering an example of retributivism counseling in favor of a less harsh punishment). *But see* Chad Flanders, *Can Retributivism Be Progressive?: A Reply to Professor Gray and Jonathan Huber*, 70 MD. L. REV. 166, 167 (2010) (“[A]re Gray and Huber correct that Kant gives us a ‘retributivism for progressives’? I am skeptical.”); Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 89 (2010) (characterizing as “deeply

To the extent we favor these unobjectionable preferences, prison vouchers would beneficially remove prison reform from the hands of unresponsive democratic majorities and place it in the more responsive hands of impersonal market forces—that is, of competitive prisons and shopping inmates.

But not all prisoner preferences should be satisfied. (If prisoners had nothing but praiseworthy preferences, why would we have locked them up?)³¹⁹

First, some prisoner preferences shouldn't be satisfied, even though they may be morally neutral. Consider amenities like gym facilities and television. These are commonly derided as “country club” amenities,³²⁰ although they can be beneficial in maintaining prisoner discipline.³²¹ Similarly, conjugal visits, far from being a frivolous luxury, may be important on rehabilitative grounds. Conjugal visits may reduce the incidence of prison rape, and helping the prisoner maintain family connections and marital ties may also reduce recidivism.³²²

Nevertheless, the concern over prisoners' enjoyment of amenities—for example, pleasant weather conditions—may be sound.³²³

correct” a critique that at least some types of retributivist philosophy have contributed to harsh American punitive practices).

³¹⁹ Although I don't give any normative weight here to the satisfaction of prisoners' preferences in themselves, some have argued that an optimal policy should give equal weight to all happiness, including the happiness criminals derive from committing crimes. See Louis Kaplow & Steven Shavell, *Economic Analysis of Law* (including gains from wrongdoing in social welfare), in 3 HANDBOOK OF PUBLIC ECONOMICS 1661, 1748 (Alan J. Auerbach & Martin Feldstein eds., 2002); A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 48 & n.12 (2000) (same); DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 229-31 (2000) (same). But see George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970) (suggesting that illicit utility should not enter the social welfare calculus).

³²⁰ See, e.g., Nygel Lenz, “Luxuries” in Prison: *The Relationship Between Amenity Funding and Public Support*, 48 CRIME & DELIN. 499, 502, 503-05 (2002) (explaining that the objects of media complaint—the so-called “Club Feds”—tend to be medium- and low-security prisons, and that a system of rewards and punishments is important in any prison system).

³²¹ In 1995 and 1999, surveyed correctional administrators were almost evenly split on whether to eliminate weight lifting for inmates. KNOX, *supra* note 21, at 463-64.

³²² See Rachel Wyatt, Note, *Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?*, 37 CASE W. RES. J. INT'L L. 579, 597-602 (2006) (explaining that conjugal visits serve a greater purpose than just providing a sexual outlet, and that prison rape may be motivated by more than just a need for sex); see also Suk, *supra* note 279, at 113-14 (suggesting that prison rape may be the result of a lack of legitimate sexual outlets).

³²³ Cf. *California to Allow Prisoners to Serve Sentences Online*, ONION (Sept. 26, 2011), <http://www.theonion.com/articles/california-to-allow-prisoners-to-serve-sentences-o,26173> (satirizing California's prison system).

Any amenity that improves the prison from the prisoner's perspective also presumably dilutes its deterrent value, and therefore may be undesirable from an optimal deterrence perspective.³²⁴ Similarly, from a retributive perspective, even small pleasures should be eliminated precisely because they're pleasant.

This reduction in deterrence may be ameliorated by increasing the prison term, but this solution would be expensive relative to making prison stays shorter but less pleasant. In fact, considering the high social costs of imprisonment,³²⁵ and ignoring any negative effects of bad prison conditions on rehabilitation, it may be more efficient for deterrence purposes to concentrate on making prison conditions worse than to lengthen prison terms.³²⁶

Of course, the full policy analysis is more complicated. Partisans of prison brutality and rape may be right on deterrence grounds but wrong on rehabilitation grounds, as brutalization may make prisoners more likely to reoffend after their release.³²⁷ Having a high-amenity prison may, on balance, be socially desirable. Further, if the deterrence skeptics are right,³²⁸ then we don't have to worry about ameni-

³²⁴ On prison amenities, see Lenz, *supra* note 320, at 502, 518. This issue recently became newsworthy following the arrest of Norwegian mass murderer Anders Behring Breivik and the "posh" conditions of Norwegian prisons, which are "among the cushiest in the world." See, e.g., *The Super-Lux Super Max*, FOREIGN POL'Y (July 25, 2011), http://www.foreignpolicy.com/articles/2011/07/25/the_super_lux_super_max (exhibiting the relatively upscale conditions of Norway's prisons, including amenities like personal trainers, recording studios, and a rock-climbing wall).

For evidence that prison conditions, as proxied by prison death rates, have a deterrent effect, see Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 331 (2003). See also Kelly Bedard & Eric Helland, *The Location of Women's Prisons and the Deterrence Effect of "Harder" Time*, 24 INT'L REV. L. & ECON. 147, 159-61 (2004) (demonstrating that distance between a prison and female inmate's home city also has a deterrent effect); cf. Katz et al., *supra* at 322 ("We cannot stress enough that evidence of a deterrent effect of poor prison conditions is neither a necessary nor sufficient condition for arguing that current prison conditions are either overly benign or unjustifiably inhumane.").

³²⁵ See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 492 (2004) (asserting that nonmonetary sanctions, such as imprisonment, are socially costly, both in their operation costs to the state and in the opportunity costs suffered by the incarcerated).

³²⁶ Cf. *id.* at 484-88 (suggesting that, because law enforcement is costly, "sanctions should be raised until they are maximal," and the probability of detection should be correspondingly reduced).

³²⁷ See sources cited *supra* note 17.

³²⁸ See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 64 (1990) ("The most important normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong; a second factor is the person's feeling of obligation to obey the law and allegiance to legal authori-

ties weakening deterrence effects at all. Even so, it is possible that access to *some* amenities should be restricted.

Second, some prisoner preferences may be affirmatively harmful to the outside world. I've already mentioned that we may want to force certain prisoners into certain services, like psychological services for the mentally ill.³²⁹ The prisoners likely would not choose this service for themselves; mentally ill prisoners' distaste for psychiatric treatment would thus be socially negative. More generally, prisoners may not value rehabilitation, even if it works (aside from immediately useful rehabilitation like vocational training). Some sort of training may have to be mandated.

In a sense, this is similar to mandated curricula in the school context: just as parents can't always be trusted to choose the best for their children, so too are prisoners perhaps inadequate selectors of their own best punishment. Imagine how much more we might mandate in the curriculum if the students themselves could make curricular choices. Solving the agency problem³³⁰ by allowing prisoners to choose may exacerbate these negative externalities.

A related concern is that self-selected prisons could be breeding grounds for racially separatist or extremist religious movements. Many already complain that prisons are "'fertile grounds for radical Muslim chaplains to recruit' adherents as inmates are already disaffected with America."³³¹ Thus, critics may fear that prison vouchers could lead to inmates self-selecting into a prison for Muslim radicals. Compare this to the debate about school vouchers, and the fear that parents will have socially undesirable plans for their children's education³³² and send their kids to witches' coven schools or madrassas,³³³ or

ties."); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953-56 (2003) (identifying three prerequisites to criminal deterrence and arguing that potential offenders do not meet the prerequisites). *But see* sources cited *supra* note 324.

³²⁹ See *supra* text accompanying notes 106-07.

³³⁰ See *supra* text accompanying note 261.

³³¹ DeGirolami, *supra* note 48, at 34 (quoting MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 145 (2005)); see also John W. Popeo, Comment, *Combating Radical Islam in Prisons Within the Legal Dictates of the Free Exercise Clause*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 135, 148-50 (2006) (describing the current Bureau of Prisons policies in place to allow Muslim inmates to freely practice their religion while simultaneously discouraging violence and terrorism).

³³² E.g., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *supra* note 118, at 12-14 (noting that many parents don't cite academic concerns for choosing schools); GUTMANN, *supra* note 247, at 30-31 (suggesting that historically parents have not taught their children the value of mutual respect and tolerance); Elmore, *supra* note

schools whose student makeup matches their children's race or socioeconomic class.³³⁴

Is this concern over radicalization mere paranoia? Perhaps, but I don't know for sure. A 2004 report from the DOJ's Office of the Inspector General shows that conversion and radicalization of inmates does happen sometimes—domestic terrorists Richard Reid and Jose Padilla are the highest-profile recent examples.³³⁵ But the report doesn't reveal just how common these examples are. At least one informed observer—Paul Rogers, president of the American Correc-

253, at 306-09 (citing strong parental preferences for close geographic proximity between home and school).

On the other hand, Caroline Hoxby argues that parents' preferences for their children's schooling tend to be rational. Caroline M. Hoxby, *The Effects of School Choice on Curriculum and Atmosphere* (arguing that parental choice of school districts encourages more parental involvement, "more challenging curriculums, stricter academic requirements, and more structured and discipline-oriented environments," but not necessarily "sports or extracurricular activities"), in EARNING AND LEARNING: HOW SCHOOLS MATTER, *supra* note 204, at 281, 311-12; see also Banzhaf & Bhalla, *supra* note 278, at 8 & n.6 (collecting sources documenting that "households are willing to pay . . . more for housing in districts supplying more educational services").

³³³ E.g., William J. Bennett, *Perspective on School Vouchers*, L.A. TIMES, Oct. 19, 1993, at B7 ("In the increasingly shrill world of the NEA and the CTA, allowing parents to pick the schools their children will attend raises the specter of 'David Koresh High School,' science courses in which students learn how to make Molotov cocktails, witches' covens, etc."); Neon Mama, *School Vouchers Create Madrassas Here*, DAILY KOS (Oct. 23, 2006, 2:50 PM), <http://www.dailykos.com/story/2006/10/23/260889/-School-Vouchers-create-Madrassas-here> (passionately asserting the view that school vouchers are a mechanism to segregate and brainwash children); cf. Paul Thoreson, Letter to the Editor, *Cartoon on Vouchers Was Unfair and in Poor Taste*, SAN DIEGO UNION-TRIB., Oct. 5, 2001, at B9, available at LexisNexis (search "San Diego Union-Tribune" database for "Cartoon on Vouchers") (condemning a cartoon that drew a connection between school vouchers and religious terrorism).

³³⁴ See, e.g., *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 439-41 (1968) (holding that a "freedom of choice" school assignment plan was not an end in itself but only a means by which to achieve segregation); GUTMANN, *supra* note 247, at 119-21 (discussing possible parental preferences for racial and religious separatism); Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 568 (2001) (discussing use of school choice to evade desegregation). One can argue against this position in various ways. For instance, perhaps government shouldn't care about children's religious education; also, housing patterns under the current system already induce racial or class segregation in schools. See Hoxby, *supra* note 285, at 68 ("[M]any city residents are likely to use vouchers to exercise the degree of self-sorting that suburban residents already exercise."); Shleifer, *supra* note 12, at 146 (identifying the potential for segregation as a critique of voucher programs). But cf. Elmore, *supra* note 253, at 307-08 (discussing a choice system in Cambridge, Massachusetts that "resulted in substantial reduction of racial isolation and substantial reduction in the previous racial identification by schools").

³³⁵ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF THE FEDERAL BUREAU OF PRISONS' SELECTION OF MUSLIM RELIGIOUS SERVICES PROVIDERS 6-9 (2004).

tional Chaplains Association—commented that the problem has been “blown out of proportion.”³³⁶

But to the extent this fear is warranted, prison vouchers may actually alleviate the problem. Some of the concern stems from the activities of Muslim clerics,³³⁷ but many blame primarily an inmate-driven “breed of ‘Prison Islam’ that distorts [traditional] Koranic teaching to promote violence and gang loyalty.”³³⁸ The heavy influence of radicalism in Muslim observance in prison, in turn, may be caused by an “acute [Muslim] clerical shortage”—as of 2006, there was only one chaplain for every 900 inmates.³³⁹ Moreover, fears about Muslim religious activity in prison are founded not only on the radicalization of existing Muslims, but also on the conversion of non-Muslims.³⁴⁰ Allowing Muslim prisoners to self-segregate may alleviate the clerical shortage through economies of scale in chaplaincy and may reduce recruitment among non-Muslims.

Thus, this concern might not be well-supported with regard to Muslims; but perhaps it may still be justified in other cases.

Moving on to other examples of undesirable prisoner preferences: would prisoners prefer prisons that help them escape? Clearly they would, but this preference is easy to control. Prison escapes are eventually, even if not immediately, highly public affairs,³⁴¹ so voucher prisons could simply be heavily penalized for escapes. But while this example may seem silly, it has a serious core: sometimes (though not for

³³⁶ *Terrorism: Radical Islamic Influence of Chaplaincy of the U.S. Military and Prisons: Hearing Before the Subcomm. on Terrorism, Tech. & Homeland Sec. of the S. Comm. on the Judiciary*, 108th Cong. 32 (2003) [hereinafter *Radical Islamic Influence of Chaplaincy*] (statement of Paul E. Rogers, President, Am. Corr. Chaplains Assoc.).

³³⁷ See Popeo, *supra* note 331, at 140 (observing that Muslim chaplains provided by the Bureau of Prisons were alleged to have been connected to terrorism and Wahhabism); *id.* at 150 (discussing former New York State Department of Corrections chaplain’s support of Wahhabism and pro-terrorism preaching after 9/11).

³³⁸ *Primary Sources: “Prison Islam,” ATLANTIC MONTHLY*, Sept. 2004, at 48 (citing U.S. DEP’T OF JUSTICE, *supra* note 335, at 8), available at <http://www.theatlantic.com/magazine/archive/2004/09/primary-sources/3427>; cf. Knox, *supra* note 107, at 15 (stating that about half of prisons surveyed allow inmates to serve as spiritual leaders).

³³⁹ Popeo, *supra* note 331, at 138 (quoting *Primary Sources: “Prison Islam,” supra* note 338); see also *Radical Islamic Influence of Chaplaincy, supra* note 336, at 33 (identifying state budget deficits as a reason behind the elimination of correctional chaplains).

³⁴⁰ See Popeo, *supra* note 331, at 136 (explaining that Wahhabi organizations focus on radicalizing prisoners).

³⁴¹ *But see* JOEL DYER, *THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME* 204, 211, 221 (2000) (noting some private prisons’ successful efforts to cover up problems, such as CCA’s concealment of escapes from its Youngstown facility); *Developments, supra* note 40, at 1884 (same).

escapes) undesirable activities are hard to observe. In such cases, voucher prisons may have broad scope to cater to prisoners' antisocial preferences.

One example is easy access to contraband. Voucherized prisons may not have much of an incentive to control contraband like pornography, but this likely wouldn't be terribly harmful. For contraband like drugs or tobacco, voucherized prisons may again have little incentive to limit proliferation, except to the extent that drugs make prisoners violent. In that case, at least some prisons would have an incentive to control drugs in order to attract security-conscious inmates. This last point also applies to weapons. If prisons are motivated to improve security, they will also be motivated to control the flow of weapons into the prison.

Even if voucher prisons would have few incentives to control contraband, public prisons already do a bad job. It is no secret that prisons can't effectively control the flow of drugs, even into high-security prisons.³⁴² Inmates often have drug ties, and the stakes of the in-prison trade are high, as illegal drugs and tobacco can be sold for up to ten times their street value in prison.³⁴³

Prisons may also choose to cater to criminals interested in running their criminal enterprise from within the prison. Prisons could attract such criminals by loosely monitoring incoming and outgoing mail, phone calls, and visits.³⁴⁴

Cell phone smuggling is a related problem, as "[i]llegal cell phones are used to circumvent supervision of conversations, and can be used by inmates to orchestrate criminal activity, plan escapes, and

³⁴² See Cindy Carcamo, *Keeping a Close Watch*, FRESNO BEE, Mar. 31, 2003, at B1, available at 2003 WLNR 2843074 (estimating that "inspectors catch only about 5% of drugs sent through" Corcoran State Prison in California).

³⁴³ See IRA SILVERMAN, CORRECTIONS: A COMPREHENSIVE VIEW 240 (2d ed. 2001) (explaining that a small bag of tobacco worth less than a dollar outside of prison can sell for twenty-five dollars inside); Carcamo, *supra* note 342 (noting that a hit of heroin sold for \$10 on the streets goes for about \$50 inside Corcoran State Prison); Greg Garland, *Contraband Floods Md. Prisons: Officials Struggle to Stem Inflow of Drugs, Tobacco*, BALTIMORE SUN, July 6, 2005, at A1, available at 2005 WLNR 10576160 ("A pound of loose tobacco that costs \$100 to get into a prison can bring upward of \$1,000 once inside.").

³⁴⁴ To some extent, prisons do try to control inmates' attempts to continue their outside criminal activities from the inside. See, e.g., U.S. DEP'T OF JUSTICE, *supra* note 63, at V-10 (stating that inmates who utilize the telephone for criminal activities are subject to increased security measures).

be a menace outside of prison walls.”³⁴⁵ Inmates have always been able to plan criminal activity or intimidate witnesses through prison visits by confederates, calls on approved prison phones, and other means, but communication with the outside has its costs. La Nuestra Familia members resort to various methods, including use of the Aztec language, “micro writing,” codes, messages hidden in artwork, and relaying messages sent through paroled members.³⁴⁶ Cell phones can reduce these costs substantially, and detecting progressively smaller modern cell phones has become more difficult in recent years.

To the extent cell phones encourage disorder and violence within the prison, we might expect voucher prisons to police cell phone smuggling. Unfortunately, this may not hold true since the main disadvantages of cell phone smuggling likely flow to people on the outside, such as intimidated witnesses or future crime victims. Cell phone jamming technology may provide a technological resolution to this problem, although implementation would require a change in the law.³⁴⁷

The bottom line on smuggling is that prisons will have incentives to control some forms of smuggling but not others.³⁴⁸

³⁴⁵ *Lawmakers Push to Criminalize Prison Cell Phone Smuggling as Problem Spreads*, CAL. DEP’T CORR. & REHAB. (Apr. 14, 2009), http://www.cdcr.ca.gov/News/Press_Release_Archive/2009_Press_Releases/April_14.html.

³⁴⁶ David Skarbek, *Putting the “Con” into Constitutions: The Economics of Prison Gangs*, 26 J.L. ECON. & ORG. 183, 195 (2010).

³⁴⁷ One commentator notes:

The FCC, and therefore the wireless industry, has interpreted the Federal Communications Act of 1934 to prohibit intentional interference with any wireless signal: “[T]he [marketing, sale or operation] of transmitters designed to prevent, jam or interfere with the operation of cellular and personal communications service . . . telephones . . . is unlawful” under Section 333 of the Act. . . . The federal government is exempted from this prohibition . . . , but the exemption does not apply to state and local entities.

Erin Fitzgerald, Comment, *Cell “Block” Silence: Why Contraband Cellular Telephone Use in Prisons Warrants Federal Legislation to Allow Jamming Technology*, 2010 WIS. L. REV. 1269, 1282-83 (quoting 47 U.S.C. § 333 (2006) and Public Notice, Sale or Use of Transmitters Designed to Prevent, Jam or Interfere with Cell Phone Communications is Prohibited in the United States, 20 FCC Rcd. 11134, 11134 (June 27, 2005) (alteration in original)); see also Jack Dolan, *Blocking Cells in Cellblocks*, L.A. TIMES, Apr. 11, 2011, at AA 1 (detailing the California prisons’ plans to pursue a deal with companies providing in-prison phone services to install cell phone signal-blocking technology); *Prisons and Mobile Phones: Bricking the Intruders*, ECONOMIST, Oct. 16, 2010, at 39 (noting that a bill allowing state prisons to jam mobile phone signals is unlikely to pass).

³⁴⁸ Smuggling can still be measured, albeit imperfectly. The government could try to smuggle contraband into the prison—perhaps by using a fake inmate who would try to acquire drugs or a cell phone, or by using a real inmate whose cooperation has been purchased. A prison that is discovered to be tolerating smuggling could thus expect to suffer

Recall the discussion above about self-segregation by race or ethnicity.³⁴⁹ There, I argued that such self-segregation may not be bad for inmates, since whatever benefits diversity provides to students, such benefits are probably smaller for adult prisoners. Given the correlation between race and prison gangs, self-segregation may actually have the beneficial effect of reducing violence.

But self-segregation has negative effects beyond prison. Being around members of one's own community, and members of one's own outside criminal community, makes prison less undesirable, and therefore constitutes an amenity that reduces prison's deterrent value. Further, many gangs, like the Mexican Mafia, La Nuestra Familia, or the Nazi Low Riders, operate on the outside as well as in prison.³⁵⁰ In fact, various outside gangs may have originated in prison.³⁵¹ Thanks to telephone and mail monitoring and other measures,³⁵² gangs that operate across prisons and in the outside world experience difficulties in communicating.³⁵³ Concentrating gang members in one place would

penalties. This strategy will only be as effective as inmates' willingness to serve as conscientious double agents, so some smuggling—particularly the kind that is harmful but not contrary to the interests of prison administrators—may continue to be a problem.

³⁴⁹ See *supra* text accompanying notes 282-95.

³⁵⁰ See, e.g., *United States v. Shryock*, 342 F.3d 948, 970 (9th Cir. 2003) (noting that the Mexican Mafia gained influence outside of the prison system by taxing drug dealers and collecting dues from Mexican street gangs); CAL. DEP'T OF JUSTICE, ORGANIZED CRIME IN CALIFORNIA: ANNUAL REPORT TO THE CALIFORNIA LEGISLATURE 2004, at 8-11, available at http://ag.ca.gov/publications/org_crime2004.pdf (explaining how California gangs maintain criminal contacts inside and outside of prison); Fong & Buentello, *supra* note 306, at 66 (arguing that prison gangs have developed into organized crime syndicates); James B. Jacobs, *Foreword: Focusing on Prison Gangs*, CORRECTIONS MGMT. Q., Winter 2001, at vi (highlighting the danger of prison gangs working to bolster street gangs); David Skarbek, *Governance and Prison Gangs*, 105 AM. POL. SCI. REV. 702, 709-14 (2011) (describing broad categories of Mexican Mafia activity occurring inside and outside of prison). The Mexican Mafia also provides socially useful services by "regulat[ing] drive-by shootings, which bring law enforcement and media attention." *Id.* at 711 (citing TONY RAFAEL, *THE MEXICAN MAFIA* 37 (2007)). According to George Knox, not all prison gangs also operate in the outside world: in Illinois, the Southern Illinois Association and the Northsiders, both white "self-protection" gangs that formed in response to minority gangs, are exclusively prison gangs. KNOX, *supra* note 21, at 431-32.

³⁵¹ See Knox & Tromanhauser, *supra* note 299, at 15 (citing LAWRENCE J. BOBROWSKI, *COLLECTING, ORGANIZING AND REPORTING STREET GANG CRIME* (1988)); Steve Daniels, *Prison Gangs: Confronting the Threat*, CORRECTIONS TODAY, Apr. 1987, at 66.

³⁵² See AM. CORR. ASS'N, *supra* note 297, at 21 tbl.8 (showing frequent use of telephone monitoring in prisons); KNOX, *supra* note 21, at 464 (stating that in 1999, 91.4% of surveyed correctional administrators believed telephone monitoring and 91.5% believed mail monitoring stopped gang members from maintaining ties to outside gang members).

³⁵³ See *supra* text accompanying note 346.

probably reduce these communication costs. This is why various prison systems try to disperse gangs throughout many different institutions.³⁵⁴ Individual prisons also try to isolate gang leaders or members³⁵⁵ by transferring them among prisons or even out of state.³⁵⁶

Concentrating gang members might not be all bad. Just as dispersing a gang increases its recruitment opportunities,³⁵⁷ self-segregation may reduce the gang's power.³⁵⁸ Other aspects of the prison voucher system might also reduce the power of prison gangs. Prison gangs control street gangs in large part by threatening violence against gang members who don't pay and by offering protection to gang members who do.³⁵⁹ To the extent that prison vouchers lead to a more secure prison environment,³⁶⁰ gangs' carrot-and-stick scheme would be less effective, thus reducing their influence.

This whole discussion implies a continuing role for government regulation to prevent prisons from offering amenities that are too attractive and to prevent prisons from catering to prisoners' socially undesirable preferences.³⁶¹ One way to implement this would be to create an oversight agency with the ability to prevent prisons from

³⁵⁴ Peter M. Carlson, *Prison Interventions: Evolving Strategies to Control Security Threat Groups*, CORRECTIONS MGMT. Q., Winter 2001, at 10, 21. California separated different groups in the 1970s, but moved to integrated yards in the 1980s, which reduced violence. *Id.* at 16.

³⁵⁵ *E.g.*, KNOX, *supra* note 21, at 437 (explaining that a maximum-strength model for a zero-tolerance gang policy would include removing from the general population all active and verified gang members and placing them in isolation); *id.* at 466 (showing institutions increasingly consider gang membership in inmate classification); Knox, *supra* note 107, at 27 (“[T]wo-thirds [of surveyed prisons] have classification systems that consider gang membership”).

³⁵⁶ *See* AM. CORR. ASS'N, *supra* note 297, at 20-21; KNOX, *supra* note 21, at 448, 467-68; MONTGOMERY & CREWS, *supra* note 303, at 27; *see also* Knox & Tromanhauser, *supra* note 299, at 17 tbl.1, 19 (showing that 54.2% of administrators had used transfers to control gang activity); Mark S. Fleisher & Scott H. Decker, *An Overview of the Challenge of Prison Gangs*, CORRECTIONS MGMT. Q., Winter 2001, at 7-8 (discussing use of out-of-state transfers to disrupt gang activity).

³⁵⁷ *See* Fleisher & Decker, *supra* note 356, at 8 (stating that transfers may function to spread gangs rather than control them).

³⁵⁸ Not all prison systems rely on dispersing inmates. *See, e.g.*, Carlson, *supra* note 354, at 21 (describing Connecticut system of disincentives for inmates in gang activity). Knox lamented in 2000 that “[t]here has been absolutely no evaluation research whatsoever reported on the efficacy of any of [the common] techniques or strategies for dealing with gangs in the correctional environment.” KNOX, *supra* note 21, at 441.

³⁵⁹ Skarbek, *supra* note 350, at 702.

³⁶⁰ *See supra* Section III.A.

³⁶¹ *See supra* text accompanying note 148.

offering, or competing based on, particular amenities that it finds to be undesirable.³⁶²

This proposal would be a total reversal of the current political dynamic, where political forces work to keep prison quality low, and improving it is extremely difficult.

But government regulation, by agency or otherwise, is an imperfect fix because not all undesirable amenities can be monitored. The “market success” argument against prison vouchers is strong, since social losses stemming from satisfying undesirable prisoner preferences may be great. The question is whether this residual amount of undesirable activity outweighs the desirable consequences of prisoner choice, such as reducing prison assaults and rapes, improving medical care, alleviating overcrowding, and providing better job training.

IV. THE POLITICS OF PRISON VOUCHERS

I have already discussed how prison vouchers could completely reverse the current political dynamic, which conspires to keep prisons low quality. Government instead would have to intervene to keep prisons from becoming too “good” from the prisoners’ perspective and maintain prison’s deterrent force.

The revolutionary potential of vouchers may be more important for prisons than for schools. There seems to be more hope to reform schools politically, without using choice, because society at large empathizes with students in failing schools.³⁶³ Prisoners, by contrast, are generally despised, tend to come from communities without political power, and are often disenfranchised.³⁶⁴

This proposal is of course subject to the same critique as all reform proposals seeking to remedy a politically insoluble problem. If the problem is politically insoluble, there are likely constituencies opposed to any remedy at all, and therefore any reform, even if perfect, may never be adopted.³⁶⁵ Section A presents a practical vision of how prison vouchers could be adopted. Essentially, if it is true that vouch-

³⁶² For an argument that this is politically feasible, see *infra* text accompanying note 385.

³⁶³ See *supra* note 24.

³⁶⁴ See, e.g., Sigler, *supra* note 251, at 160 (explaining that inmates are virtually powerless to effect changes in prison conditions because they do not have a strong political position); *Developments*, *supra* note 40, at 1942-49 (describing various states’ felon disenfranchisement laws).

³⁶⁵ Cf. *supra* text accompanying notes 26-28.

ers would improve prison quality and would also make faith-based prisons constitutional, vouchers could be adopted by a coalition of groups interested in prisoner welfare and groups interested in prison ministry—a coalition that would not exist for prison reform alone. Section B speculates on the political fate of vouchers once they are adopted. One possibility is that funding might decrease if prison quality improves; another is that the political system could regulate prison quality to prevent it from becoming too good, perhaps by administrative agency.

A. *An Adoption Coalition*

One can tell a plausible story about how prison vouchers might succeed politically. Support for prison vouchers is different than support for arbitrary prison-conditions reform; the political infeasibility of the latter need not imply the political infeasibility of the former.

The “cultural cognition” literature suggests how to mobilize constituencies by cleverly packaging reforms to convince different groups that their concerns are being heard. For instance, Dan Kahan and his coauthors argue that conservatives during the George H.W. Bush administration were convinced to support the Clean Air Act Amendments of 1990 because environmental improvements were packaged with an emissions permit–trading scheme.³⁶⁶ Similarly, packaging nuclear power as a way to reduce reliance on fossil fuels responsible for global warming not only convinces environmentalists to become more supportive of nuclear power, but also convinces those generally unsympathetic to environmental concerns to become more supportive of action to address global warming.³⁶⁷

³⁶⁶ See Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1097-98 (2006) (reviewing CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005)) (dubbing this phenomenon the “self-affirmation effect”).

³⁶⁷ *Id.* at 1098; see also, e.g., *id.* at 1098-99 (discussing similar mechanisms that led both pro-life and pro-choice factions to support an abortion law in France); *id.* at 1099-1100 (exploring potential packaging mechanisms as options to achieve consensus on gun policy); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 168-70 (2006) (using the success of abortion reforms in France and the emergence of political consensus favoring tradeable emissions as examples of self-affirmation); Amanda Leiter, *The Perils of a Half-Built Bridge: Risk Perception, Shifting Majorities, and the Nuclear Power Debate*, 35 ECOLOGY L.Q. 31, 47-48 (2008) (reviewing the self-affirmation theory through the lens of air pollution regulation and nuclear power policy).

Prison vouchers could take advantage of a similar dynamic. People on the left may not be inclined to support vouchers, but some could change their view if the program were packaged as a way to improve prison conditions. Economic conservatives may not be interested in improving prison conditions, but they might approve of vouchers being tested in a new field, both to allow market forces to operate and because prison vouchers, if successful, may strengthen the case for vouchers in other areas, such as education. Furthermore, social conservatives may support prison vouchers because such a program could make faith-based prisons constitutional.³⁶⁸ Such a left/right prison-reform coalition isn't unheard of: a bipartisan coalition enacted RLUIPA based on reports revealing the heavy-handed treatment of prisoners' religious claims,³⁶⁹ and the Prison Rape Elimination Act was likewise a bipartisan effort (indeed, it passed unanimously).³⁷⁰ As Robert Weisberg and David Mills write, "The clear interest of [conservative evangelical organizations] in promoting religion among inmates has helped create a strange-bedfellowship with leftist prisoners' rights groups."³⁷¹

This scenario is possible even without relying on "cultural cognition" theory. Cass Sunstein has disputed Kahan's account of the Clean Air Act, arguing that conservatives supported emissions trading not because of any clever crossover packaging, but rather because the Bush White House was under pressure to pass air quality legislation and emissions trading was the cheapest option.³⁷² Similarly, there needn't be anything cultural about voucher support; the left and different wings of the right can support prison vouchers for rational reasons, even if those reasons are different for each group.

This sort of coalition provides one explanation of how vouchers could be enacted—with all the potential beneficial effects for prisoners—even though there isn't enough of a political constituency to improve prisoner welfare by more direct means. The entire coalition needn't be motivated by prisoner well-being. And once vouchers are enacted, the need to urge legislators or administrators to act contrary to their political self-interest evaporates; rather, the changes happen automatically, through market mechanisms. In addition, "vouchers"

³⁶⁸ See *supra* Section II.A.

³⁶⁹ See *supra* text accompanying notes 231-34.

³⁷⁰ See Weisberg & Mills, *supra* note 236.

³⁷¹ *Id.*

³⁷² Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110, 1120-21 (2006).

needn't be an all-or-nothing proposition; politics would also determine *which type* of voucher scheme would be adopted.

School vouchers are an instructive example. Universal school vouchers have repeatedly failed at the polls, in part because of opposition from upper-income homeowners.³⁷³ Under a system of assigned neighborhood schools, the value of local schools is capitalized into home values. Homes in good areas—areas which, under a system of local property tax-funded schools, tend to also have good schools—are worth even more, and homes in bad areas are worth even less: the rich get richer.³⁷⁴ Universal school vouchers partially break the connection between where one lives and where one attends school, although distance still counts for something. Thus, vouchers will reduce home prices in good areas and increase them in bad areas.³⁷⁵ Small wonder that upper-middle-class homeowners, whose schools are already good, don't support universal vouchers.

In a sense, this is good news for prison vouchers, which do not imply reallocations of property-based wealth.³⁷⁶ More to the point, the political problems of universal school vouchers have led to the adoption of targeted vouchers, for instance to students in failing schools.³⁷⁷ Thus, even if universal prison vouchers don't have a constituency,

³⁷³ Thomas J. Nechyba, *Introducing School Choice into Multidistrict Public School Systems*, in *THE ECONOMICS OF SCHOOL CHOICE*, *supra* note 70, at 145, 189-91.

³⁷⁴ Eric Brunner et al., *Capitalization and the Voucher: An Analysis of Precinct Returns from California's Proposition 174*, 50 J. URBAN ECON. 517, 519-21 (2001).

³⁷⁵ *See id.* at 519 (explaining that the quality of a community's public schools affects home value); Nechyba, *supra* note 373, at 189 (noting that "homeowners in good districts experience relatively large capital losses" in a voucher system while those in poor districts experience gains).

³⁷⁶ Actually, this isn't quite true. To the extent that corrections officials tend to assign inmates to prisons near their homes and families—and to the extent that inmates would choose different prisons under a voucher system—prison vouchers, like school vouchers, would break the link between place of residence and place of incarceration (or education), which can alter residential patterns. Criminals who expect to be eventually incarcerated wouldn't need to live near a high-quality prison—they could just choose it with their vouchers. Frankly, I find this mechanism quite speculative, to say the least. But I thought it worth mentioning as a potential intriguing implication of the system. *Cf.* MARIO PUZO, *THE LAST DON* 56 (1996) (describing the fictional Don Clericuzio, who upon hearing that Americans believed it was better to let a hundred guilty men go free than to convict one innocent man was "[s]truck almost dumb by the beauty of the concept . . . [and] became an ardent patriot"); Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 204 (1997) (advising criminals to move to New Mexico or Oklahoma, where the presumption of innocence, judging by state courts' statements of the Blackstone ratio, seems strongest).

³⁷⁷ *See* Nechyba, *supra* note 373, at 189-91.

there may still be a possibility for vouchers targeted, for example, to prisoners at the worst-performing prisons.

B. *Post-Adoption Coalitions and Politics*

However, if there is a fundamental constituency opposed to good prison conditions, whether for deterrence purposes or because of populist “tough-on-crime” retributivism,³⁷⁸ that constituency won’t stay silent. Even if the pro-voucher constituency remains intact, so that vouchers, once adopted, aren’t repealed, the voucher scheme will still be responsive to popular politics.

First, much depends on how generously the vouchers are funded. As noted above, the per-pupil value of school vouchers is less than per-pupil costs in public schools,³⁷⁹ and it’s unclear at what level prison vouchers would be initially funded. If vouchers indeed improve prison conditions, what funding level should rational voters choose?³⁸⁰

Over time, voters would most likely decrease funding because as prison spending is more productive, the resulting savings could be applied to other social goals like welfare, education, the military, or tax reduction.³⁸¹ Economic conservatives might accept funding decreases to pay for more worthy causes or provide tax relief. Religious conservatives might accept funding decreases so long as they don’t threaten the viability of faith-based prisons, which may already be cheaper due to subsidies from local churches. Finally, although “tough on crime” and deterrence-minded voters who *want* prison conditions to be bad may not have been part of the coalition that enacted vouchers, they will join the coalition to defund them. This latter constituency may assert itself through populist outrage at the amenities enjoyed by inmates.

These funding decreases will reduce the ultimate extent of any improvement vouchers may offer. In the extreme case, funding may fall to keep prisoner welfare constant; all the benefits will thus accrue to the taxpayers, and none to the prisoners themselves. This extreme

³⁷⁸ See *supra* text accompanying notes 315-18.

³⁷⁹ See *supra* note 128.

³⁸⁰ For a discussion of endogenously determined voucher parameter levels under different sorts of school voucher schemes (a universal lump-sum voucher, a means-tested voucher, and a means-equalizing voucher), see Raquel Fernández & Richard Rogerson, *School Vouchers as a Redistributive Device: An Analysis of Three Alternative Systems*, in *THE ECONOMICS OF SCHOOL CHOICE*, *supra* note 70, at 195, 221-24.

³⁸¹ Cf. Hoxby, *supra* note 198, at 1236-37 (arguing that, empirically, Tiebout choice improves school productivity by increasing quality while decreasing spending).

case seems especially likely if prisoner welfare helps no one but prisoners. However, given that prisoner welfare does have some positive spillover for the rest of society such as rehabilitation, prisoners may reap at least some part of the gains.

This argument is highly speculative. The main point is that the level of funding is endogenous, so defenses of vouchers that rely on predicted quality improvements for a given level of funding³⁸² may be mistaken.³⁸³

So far, I've assumed that the only political avenue open after vouchers are approved involves fine-tuning the level of funding. However, there are also regulatory alternatives, which may be more attractive to deterrence- and retributivism-minded voters.

I mentioned above that there's a continuing role for regulation to play in preventing prisoners from choosing amenities that are positively harmful, or amenities that are neutral but dilute the deterrent value of prison.³⁸⁴ One way to implement such regulation would be to designate an agency—possibly the Department of Corrections or some independent agency³⁸⁵—to oversee prison offerings and to prevent specified amenities from being offered or advertised. There's probably an overlap between amenities preferred by efficiency-minded voters (where the rehabilitative value outweighs the decrease in deterrence value) and those preferred by retributivist voters (where the amenity is consistent with the moral purposes of punishment). If such a system works, then both deterrence-minded and retributivism-minded voters should have more confidence that, to the extent prisoner welfare increases, such increase is acceptable. The more effective such regulation, the less pressure there will be to reduce the level of the voucher.

³⁸² Cf. Schulhofer & Friedman, *supra* note 8, at 118-19 (“Until now we have put to one side the question of how generously indigent defense services will be funded; we have simply argued that, with whatever resources society allocates to indigent defense, freedom of choice will enhance the quality of the services delivered.”). *But see id.* (arguing also that a voucher system will alleviate funding inadequacies by making them more visible).

³⁸³ Some privatization critics charge that prison privatization will make prisoners worse off because it will send the message that prisoners are “not our problem.” *See* DiIulio, *supra* note 195, at 74 (“[S]ocietal pressures against inmate abuse and political corruption will be at low ebb when these largely underclass and minority populations of offenders are placed in nonpublic hands.”). However, these concerns, even if true, are not issues here, since vouchers don't need to change the level of prison privatization.

³⁸⁴ *See supra* text accompanying notes 361-62.

³⁸⁵ *See* HARDING, *supra* note 145, at 161-65 (proposing a prison model where private and public prisons are governed by an independent authority).

In other work, I've considered the argument that prison privatization increases pro-incarceration political advocacy on the theory that private prisons, unlike public prisons, benefit from having more inmates and keeping them behind bars longer.³⁸⁶ I've argued that this increase is unlikely: public corrections officers' unions are already major pro-incarceration lobbyists, and introducing more private prisons could decrease the total amount of political advocacy, since any benefits from lobbying for increased incarceration would have to be shared with the rest of the prison sector.

This conclusion depended on the assumption that "targeted" lobbying is difficult—that a private prison firm or a public corrections officers' union will find it difficult to lobby for an increase in incarceration that would benefit the lobbying group exclusively.³⁸⁷ If, hypothetically, a single private prison firm, or the whole private-prison industry acting as a bloc,³⁸⁸ operated all minimum-security prisons while public prisons operated all maximum-security prisons, the private firm *would* get all the benefit of its lobbying if it advocated a particular pro-incarceration measure that only affected minimum-security prisoners, like increased penalties for white-collar crime. However, I considered that possibility to be fairly remote since private firms currently operate a range of facilities similar to the public sector.

In a world with vouchers, though, there may be more and more specialized prisons catering to identifiable niches of prisoners. In such a world, the possibility that private firms might lobby in favor of incarceration could emerge as a realistic possibility. Depending on one's view of self-interested, pro-incarceration lobbying,³⁸⁹ this possibility might affect one's opinion regarding the desirability of vouchers.

³⁸⁶ See Volokh, *supra* note 268, at 1220-21 (arguing that prison privatization will not lead to more pro-incarceration advocacy); see also Alexander Volokh, *Privatization, Free Riding, and Industry-Expanding Lobbying*, 30 INT'L REV. L. & ECON. 62, 65-66 (2010) ("[C]oncerns that privatization will increase the amount or effect of advocacy . . . are unfounded . . .").

³⁸⁷ Volokh, *supra* note 386, at 67.

³⁸⁸ See Volokh, *supra* note 268, at 1237-40 (describing the different possible forms of cooperation among private prisons); see also Volokh, *supra* note 386, at 64 (explaining how each form of collusion would affect industry-expanding advocacy).

³⁸⁹ See Volokh, *supra* note 268, at 1203 (assuming, for purposes of the analysis, "that economically self-interested pro-incarceration advocacy is undesirable"); *id.* at 1248-49 (advancing the idea that pro-incarceration advocacy is not always self-interested, or if self-interested, is not necessarily bad).

CONCLUSION

In the Introduction, I invited the reader to speculate on prison vouchers by drawing an analogy with school vouchers. Throughout, I've cited the education literature to see how it can inform our predictions as to the operation of prison choice. Let's briefly do the same exercise in reverse and see whether thinking about prisons can shed any light on education.

In today's political environment, school voucher proponents and partisans of private education typically identify with the right, in part because most private schools are religious. The status quo of public schools is identified with the left, although many on the left favor reforming public education from within. Reinforcing this dynamic, vouchers are associated with economic arguments about the benefits of competition, which tend to be associated with the free market right.³⁹⁰

However, for prisons, the political valence is reversed. Prison reformers are usually associated with the left, though privatization proponents (who are usually on the right) argue strenuously that privatization would improve prison quality. Opposition to prison reform (the status quo) is associated with the law-and-order right.

Suppose that prison vouchers would improve the well-being of prisoners, particularly regarding prisoner health care and freedom from assault—shortcircuiting the unsympathetic political and judicial processes. Further suppose that the negative effects discussed above don't outweigh the positives, so that vouchers end up actually being a good idea. If so, from a prison-reform perspective, vouchers would have worked a humanitarian miracle. Might the left then reconsider its opposition to vouchers in general, even as a tool of school reform?

It may seem fanciful to think that people would change their minds entirely. After all, education and prisons are distinct topics, with different policy concerns.³⁹¹ What works in prison reform might not work in education. But at least, if some people had been uncomfortable with the very idea of vouchers, due to a general unease with market-based arguments, perhaps a positive experience with prison vouchers would make these people more willing to entertain arguments in favor of vouchers in other areas.

³⁹⁰ But this is not necessarily so. See Forman, *supra* note 3, at 1309-12 (discussing the supportive contributions of progressives to the school voucher debate).

³⁹¹ See Schulhofer & Friedman, *supra* note 8, at 76-77 (concluding that varying policy considerations animate support for or opposition to privatization in different areas).

Consider the same issue from the other side. People on the right who are unsympathetic to prisoners may oppose the idea of prison vouchers because vouchers give unwarranted decisionmaking authority to prisoners. Depriving prisoners of decisionmaking authority may be considered another form of punishment, supported on retributivist grounds. Or perhaps this opposition comes from the disconnect between prisoners' and nonprisoners' preferences: after all, social welfare does not include only prisoner welfare, but also (and perhaps primarily) the welfare of victims and members of society as a whole.

But this last point is the exact argument made by the anti-school-voucher left. While some on the right have treated parental choice as an end in itself, communitarian arguments have stressed the interests of the children left behind, the true interests of children (such as racial balance) that some parents may not adequately value, the presence of antisocial values among certain parents, and the interests of society as a whole. Perhaps greater exposure to communitarian arguments against prison vouchers will make school voucher advocates more accepting of communitarian arguments generally—which might, in the long run, undermine their own arguments in favor of school choice.

On the constitutional side, under a voucher system, I've noted that everyone should be entitled to a spot in a prison that provides the whole usual complement of rights. This means that (focusing on the Establishment Clause) they're entitled to a secular prison spot; it also means that (focusing on the other constitutional rights) they're entitled to not be offered "deals" that wouldn't pass muster under the unconstitutional conditions doctrine as it's currently applied in prisons.

So far, this issue rarely, if ever, comes up for schools. Students almost always have the option of going to a government-run public school, which by nature must already be compliant. But imagine a voucherized world where education is still compulsory but government no longer provides it, or even a nonvoucherized world where the government assigns students to a private school.³⁹²

In such a world, it seems that the government should be required to provide a compliant school experience to any student who wants one, either by running a public school of last resort or by contracting with a private school to provide constitutional rights. This require-

³⁹² See, e.g., *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 24-25 (1st Cir. 2002) (providing an example of a school district that had no public high school and contracted with a private school to educate its students).

ment of constitutional compliance should exist as long as education is compulsory; the government could relieve itself of this duty by making education noncompulsory (not an option for prisons, of course).

At least, that's the rule that *I'd* like. Unfortunately, it seems to fit uneasily within current state action doctrine. The "traditional public function" doctrine isn't well suited to schools, and it seems excessive (under current doctrine) to make all schools into state actors just because of compulsory education laws. But the analysis here suggests a possible change to state action doctrine: with respect to their status as custodians of school children subject to compulsory education, schools *should* be considered state actors. Of course, these schools would still be able to benefit from a liberal unconstitutional conditions doctrine as long as any student can demand a "constitutionally compliant" school; students' parents would still be able to agree to waive their children's rights as the "price" of whatever educational benefits the school offered.³⁹³ The intuitive reason is the same as for prisons: as long as education is compulsory, children are *forced* to attend school just as inmates are forced to go to prison.³⁹⁴

Even now, the education system contains both "voluntary" and "compulsory" students, depending on whether they're above or below the compulsory education age. In a fully voucherized world without public schools, a private school might then have some students with

³⁹³ Or perhaps, transcending state action doctrine entirely, the duty to provide the constitutionally compliant alternative should merely remain with the government itself, rather than with the school. See Metzger, *supra* note 120, at 1457-61 (advancing such a theory as part of a new "delegation" analysis).

³⁹⁴ The Supreme Court has occasionally noted the connection between children's constitutional rights and the existence of compulsory education laws. However, at public schools, this connection hasn't been important, since the mere fact that public schools are staffed by government employees is already sufficient for state action. See *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (explaining that public schools derive their authority from the state, not from parental authority, and therefore are subject to the Fourth Amendment as state actors); *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (stating that, consistent with compulsory education laws, the state has the authority to impose corporal punishment); see also *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in the judgment) (recognizing the distinction between Presidential Proclamations regarding religion aimed at adults "in a noncoercive setting" and "government-sponsored religious exercises . . . directed at impressionable children who are required to attend school"); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring) (arguing that public-school Bible readings are unconstitutional in part because "school attendance is statutorily compelled"); cf. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 209 (1948) (noting disapprovingly, in the context of a religious education program in public schools, that "[t]he operation of the State's compulsory education system . . . assists and is integrated with the program of religious instruction carried on by separate religious sects").

unadulterated due process rights (based on a constitutional-school-of-last-resort contract with the government), other students who (or whose parents) have traded away their due process rights, and still other students (above the compulsory education age) who lack due process rights entirely.

* * *

Some advocates for vouchers have been extremely optimistic about the ability of vouchers to improve quality of service. School vouchers, for instance, promised to remove education reform from the hands of unresponsive democratic majorities, obstructionist teachers' unions, and an unsympathetic legal system. As early voucher advocates John Chubb and Terry Moe put it: "Without being too literal about it, we think reformers would do well to entertain the notion that choice *is* a panacea It has the capacity *all by itself* to bring about the kind of transformation that, for years, reformers have been seeking to engineer in myriad other ways."³⁹⁵

I don't make any such strong claims about prison vouchers (though I do agree with Chubb and Moe about the revolutionary potential of market forces). I do believe that prison vouchers, if enacted, could radically change how prisons work; the question is whether that change would be for the better. I believe the constitutional effects—making faith-based prisons constitutional and loosening the unconstitutional conditions doctrine—would probably be positive. But the effects on prison quality are much less clear.

Potential social positives include improvements in the desirable aspects of prisoner welfare, like lower rates of prison rape and better prison medical care, along with the benefits that this would yield for society at large, such as more effective rehabilitation and thus lower crime rates and less spread of communicable disease. These have all been extremely difficult to attain in the current political climate, as reformers have had to rely on pro-prisoner legislation, administrative action, or judicial decisions to effect change. These benefits are substantial.

The negatives include reductions in deterrence from higher prison quality or "improvements" in the antisocial aspects of prisoner welfare that can't be controlled through regulation. These, too, are probably substantial.

³⁹⁵ JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS 217 (1990).

If undesirable actions were fully observable, the negative effects of prison vouchers could be controlled by regulation,³⁹⁶ for example, preventing prisons from competing on ease of escape by penalizing escapes, or mandating cell phone jamming technology. If inmates, not prisons, are responsible for the undesirable behavior, the regulation could either act on inmates directly (for example, forbidding sex offenders from transferring into a prison without sex offender treatment), or control inmates indirectly by acting on prisons (reducing or eliminating voucher revenues from sex offenders if the prison doesn't have sex offender treatment).

The real problem arises when undesirable actions are unobservable.³⁹⁷ It's hard to tell how much contraband gets into a prison. We don't know who's a gang member or gang leader,³⁹⁸ so we can't control gang members' movements if transfer is easy. While some of the negative effects of prison vouchers can be controlled, some uncontrollable and residual effects will remain that we would just have to live with.

The question is whether these residual negative effects outweigh the positives. Perhaps they do; perhaps they don't. I hope this thought experiment stimulates further inquiry along these lines to investigate whether prison vouchers are a desirable reform proposal after all.

³⁹⁶ These regulations could be promulgated by the regulatory agency discussed above. See *supra* note 385 and accompanying text.

³⁹⁷ This is the theory of "incomplete contracts." See Shleifer, *supra* note 12, at 137 (referring to the government's inability to "anticipate, describe, stipulate, regulate, and enforce exactly what it wants" as an incomplete contract).

³⁹⁸ Several systems keep databases of gang members, but these are naturally quite incomplete. See, e.g., AM. CORR. ASS'N, *supra* note 297, at 8 tbl.1.