

PRISON VOUCHERS

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School vouchers have been proposed as a way of bypassing the political pathologies of school reform and making schools better by transforming students and their parents into consumers. What if we did the same for prisons—instituted a system under which convicted criminals could choose which prison to go to rather than being assigned by a Department of Corrections bureaucrat?

*Voucherized prisons would continue to be “state actors” for purposes of the First, Fifth, and Eighth Amendments, so (unlike schools) a private voucherized prison wouldn’t automatically be exempt from these constitutional requirements. However, it would probably have the ability to “offer” at least some “constitutionally noncompliant packages” that would be attractive to inmates, to the extent this is allowed under the unconstitutional conditions doctrine. As for the Establishment Clause, religious prisons would probably be constitutional under *Zelman v. Simmons-Harris*, which offers a way forward for faith-based prisons. Under both doctrines, the government probably needs to offer a “constitutionally compliant” spot for any inmate who wants one, either by direct public provision or by contract with private prisons.*

Would prison vouchers be a good idea? In the first place, one may ask whether prisoner choice would succeed in improving prisons from prisoners’ perspective. The argument that it would is similar to the argument as to schools, though this the case is arguably stronger as to prisons because prisoners would probably have fewer informational problems, the agency costs present in schooling choice are nonexistent, and peer effects are probably less significant. In the second place, one may ask whether, assuming this happened, it would be a good thing, since prisoners may have antisocial preferences. Even if prisons would compete along certain antisocial dimensions in ways that cannot be controlled by direct regulation, prison vouchers may still be a good idea as long as the prosocial competitive pressure (chiefly as to physical security, medical care, and job training) outweighs the antisocial pressure.

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I. INTRODUCTION

Prison quality is very bad.¹ Moreover, prison reform is a tough sell politically.² Institutional reform litigation is also difficult.³ Litigation by prisoners themselves is also restricted,⁴ and in any case its prospects are not great, because of the limited content of prisoners' constitutional rights.⁵ Some have suggested privatization as a way of improving prison quality;⁶ others deny that privatization improves prison quality,⁷ and even those who are more sympathetic grant that the evidence is mixed.⁸

In some ways, the complaints about prisons seem similar to complaints about public schools, especially inner-city schools. The quality of some schools, especially in areas inhabited by groups without a lot of political power, is very bad.⁹ These schools have been difficult to reform politically.¹⁰ Litigation has not been promising,¹¹ and in any case any constitutional rights to a good education are generally unenforceable.¹² Privatization of school systems has been tried sporadically, and the results have not been terribly impressive so far.¹³

By proposing vouchers for education, the school choice movement offered a way around these political difficulties (provided, of course, it could overcome its own political difficulties and get enacted!). Its promise was to remove education reform from the hands of unresponsive democratic majorities, obstructionist teachers' unions, an unsympathetic legal system; it attributed the substandard performance of schools to their de facto monopoly status as the only guaranteed free alternative, and proposed to remedy this by giving parents a voucher, funded from the same source

¹ Recite facts about bad conditions in prisons, perhaps from Margo Schlanger report.

² Cite Rachel Barkow?

³ Cite Margo Schlanger?

⁴ PLRA, see Margo Schlanger paper.

⁵ Eighth Amendment test of deliberate indifference, *Turner v. Safley* test for prison rights generally.

⁶ *Changing the Guard* book? Reason study?

⁷ Dolovich, Duke paper ("humanity principle").

⁸ *Developments in the Law* (improvements in some measures and not in others).

⁹ Find some source discussing statistics on achievement, violence, etc.

¹⁰ Some blame teachers' unions [cite]; some blame democratic majorities for being unwilling to expend resources in these powerless areas.

¹¹ Source on this?

¹² Source on this?

¹³ Edison Schools, etc.; see also *Logiodice* (1st Cir.)

that public funds would otherwise come from, redeemable at any school participating in the program.¹⁴ The prediction was that school choice would, by the operation of market forces, improve the performance of schools, where “performance” is defined by the participating parents’ views. Since the idea was proposed, such programs have been implemented in a number of places.¹⁵ Whether such programs have actually lived up their promise is disputed.¹⁶

Interestingly, the subject that has been talked to death as a potential reform for schools—and other government services, like housing or health care¹⁷—has apparently never been discussed for prisons.¹⁸ (But a vouchers idea has been suggested for indigent criminal defense lawyers,¹⁹ and choice exists for halfway houses, mandatory anti-alcohol programs, etc.²⁰) The promise of vouchers in prisons is similar to the promise of vouchers in education: By empowering the prisoners themselves to reward and punish prisons, it would bypass the difficult avenues of political reform or litigation and create powerful market incentives for prisons to become better—by the prisoners’ own standards.²¹

¹⁴ Cite Milton Friedman article and other sources.

¹⁵ Cite.

¹⁶ Cite Hoxby and others.

¹⁷ Housing vouchers. Also various reimbursement schemes in health care look like vouchers. See types of vouchers discussed in Lupu & Tuttle, *Sites of Redemption*. Note definition of vouchers as including some direct funding when guided by beneficiary choice.

¹⁸ See Shleifer (“prisoner choice is not a realistic possibility”). Also, offhand comments and jokes. See <http://gocards44.wordpress.com/2007/03/29/prison-vouchers/> (blogger suggesting it); <http://bugsbutt.blogspot.com/2007/02/even-more-bullet-ins.html> (similar); Bob Schwartz, *Vouchers? Let's Include Some Coupons for Prisons Too*, ALBUQ. TRIB., May 13, 1999, http://web.abqtrib.com/archives/opinions/051399_schwartz.shtml (attributing idea to friend Joe Paone); Bruce Shapiro, *Portfolio Prisons*, NATION, Oct. 20, 1997, at 4, 1997 WLNR 5539173 (joke by Wackenhut CEO George Zoley, characterized by author as “not as facetious as it sounds”); <http://boardbuzz.nsba.org/archives/024645.php> (sarcastic blog comment); http://www2.ljworld.com/onthestreet/2006/mar/26/prisons/#comment_116707 (similar). A search for “prison vouchers” in the JLR database on WESTLAW yields no results. Not to be confused with “prison vouchers,” the money that prisoners can use to buy products in prison. See, e.g., ARTHUR KOESTLER, DARKNESS AT NOON, § 1.11, at 43 (Daphne Hardy trans., Bantam Books 1981) (1941); ARTHUR KOESTLER, DIALOGUE WITH DEATH 147 (Read Books 2007) (1942) (section named “Saturday, March 27th”).

¹⁹ Schulhofer & Friedman.

²⁰ See *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003) (“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 so far as the policy of the establishment clause is concerned, 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.”); source on Alcoholics Anonymous?

²¹ Freeman at 1347 (“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, (continued next page)

It is worth exploring how such an idea would work. This is interesting for three reasons. First, purely as a thought experiment in its own right; this raises interesting issues of how the process would work, how the funding would work, what statutory and constitutional requirements would apply, and how it would change what incarceration would look like and the politics of vouchers and of incarceration policy. Second, it's interesting to see whether and how arguments and counter-arguments in the school voucher (and perhaps other voucher) debates map onto the prison issue. Third, perhaps it would actually make an interesting reform proposal.

Part II clarifies the relationship between choice proposals and the controversial—but separate—debate over prison privatization. Part III explains how a prison choice program might work and how the vouchers would be funded. Part IV discusses the statutory and constitutional restrictions that would govern prison providers under a choice regime. Part V engages the merits and asks whether this would be a good idea—both whether the market would in fact work as claimed to improve prisons from prisoners' perspectives, and whether such an improvement would be desirable overall. Part VI explores the politics of prison vouchers. Part VII concludes.

II. CHOICE IS NOT THE SAME AS PRIVATIZATION

First, a note about what this proposal is not. Arguments about choice are often merged with arguments about privatization. For example, one of the most prominent issues in the school choice debate is the Establishment Clause question of whether vouchers can be redeemed at religious schools. Of course, this question presumes that the school choice plan includes private schools, since a religious public school would be facially unconstitutional to begin with.

More generally, arguments in favor of school choice often include arguments in favor of reliance on the private sector. This is because the factors that are claimed to make school choice work—chiefly flexibility, cost savings, and responsiveness to market in-

welfare received by eligible low-income applicants, and schools occupied by other people's children.”)

centives—seem to be more present in the private than in the public sector.²²

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

For instance, suppose there were no private providers.

- Without choice, everyone could be assigned to a particular public school, perhaps their local public school. Also, this describes public prisons in states without prison privatization,²³ and indigent defense.²⁴
- Or one could have a choice program that is limited to the public system. For instance, some advocate a voucher program limited to public schools,²⁵ and in fact such programs are instituted by the No Child Left Behind Act of 2001.²⁶ (Magnet and charter schools also approximate a system of public-school choice.)

Or, suppose some government-funded services are provided privately (to any degree, up to the entire extent of the service).

- Even then, one could have privatization without choice. For instance, a private company, like Edison, could become the superintendent of an existing (choice-less) public school system.²⁷ Also, the W-2 program for welfare in Wisconsin,²⁸ or prison privatization now,²⁹ or assigned counsel for indigent defendants,³⁰ or a regional health facility to which the state has delegated its entire responsibility for its health care duties under the Medicaid statute.³¹
- Or one can have choice within a regime of (partly or wholly) private provision. This option is the one imagined most often. Food Stamps are a classic example of such a program, since the government plays a minor role in food dis-

²² Cite proponent claiming this.

²³ List some such states.

²⁴ Schulhofer & Friedman 102 & n.93.

²⁵ Cite.

²⁶ See, e.g., 20 U.S.C. §§ 7225–7225g, as added by the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1803–06.

²⁷ Cite Edison and other examples; see note 13 *supra*. How about difficult-to-educate children like in *Rendell-Baker*?

²⁸ See Metzger.

²⁹ See *Developments in the Law*.

³⁰ See Schulhofer & Friedman 92–96. Was this the arrangement in *To Kill a Mockingbird*?

³¹ See *J.K. ex rel. R.K. v. Dillenberg*, 836 F. Supp. 694, 697–99 (D. Ariz. 1993).

tribution.³² Consider also drug or alcohol abuse rehabilitation, or traffic school, where defendants may be sentenced to the program but most or all providers are private.³³ In England and Wales, and also in Ontario, indigent defendant choose their own defense attorneys using public funds.³⁴ In the case of education, school choice proposals often include public schools, but virtually always also allow the vouchers to be redeemed at existing *public* schools.³⁵ (In fact, one of the arguments in favor of school choice is that it will improve the quality of public schools.³⁶)

So in fact, in the real world, we have elements of all four schemes.

One can thus entertain the idea of choice, whether in schools, prisons, or anywhere else, even if one is hostile to private provision. Nonetheless, I will generally use private-sector examples in what follows, since, as explained above, it can be natural to imagine the two reforms going together.³⁷

III. THE MECHANICS

A. Choice

How would the proposal work? The process begins when a criminal defendant is convicted.

Under the current system, he is assigned to a particular prison. In the federal system, prisoner choice seems entirely unavailable; and in the Texas system, it seems extremely limited. The standard regime seems to be that prisoners are allocated to prisons based on a Department of Corrections employee's judgment of which prisons have spaces available and what the needs of this particular inmate are (e.g., proximity to family, substance abuse or sex-offender treatment programs, etc.)³⁸

³² See Trebilcock & Iacobucci n.70 (citing MAURICE MACDONALD, FOOD, STAMPS, AND INCOME MAINTENANCE 1-8 (1977)).

³³ Cite.

³⁴ See Schulhofer & Friedman 110 & nn.123-124.

³⁵ *But see* Logiodice, where there the only publicly funded school was a private school.

³⁶ Hoxby paper.

³⁷ See text accompanying note 22 *supra*.

³⁸ [Are there systems where the defendant can request or the prosecutor can recommend a prison? Where the prosecutor's recommendation of a particular desirable prison can be the subject of negotiations in plea bargaining? Are judges willing to entertain these requests?]

Under prison choice, the ability to choose a prison would rest with the convicted defendant, who would receive a coupon, good for incarceration for the duration of his term, which he would be required to redeem at a participating prison (which, as noted above, may or may not include private prisons³⁹).

Imagine a convicted defendant who is awaiting sentencing, and who has quite a bit of time on his hands.⁴⁰ He spends his time flipping through a book, something like the Yellow Pages, with ads for different prisons: “Come to CCA’s Prison, the low-rape and low sexual assault prison!” “Come to GEO’s Prison, the high medical services prison!” “Come to Cornell’s Prison, the good vocational training and psychological services prison!”⁴¹ “Come to your choice of the following prisons, run by the State Department of Corrections, which offer these arrays of services (individual cells, minimum guaranteed floor space) and have these performance statistics!”⁴²

He makes his choice—consistent with his security level (minimum, medium, or maximum), and possibly subject to certain mandatory conditions (perhaps a mentally ill prisoner must go to a prison with particular psychological services)—fills out a form, and is sent to the prison of his choice, subject to availability. As with schools, popular prisons will have waiting lists, which (provided the voucher amount is high enough) would provide an incentive for the prison to grow, since a prison wouldn’t need anyone’s permission to accept new prisoners if it expands (aside from whatever local construction permits may be necessary).⁴³

Because prisoners may be likely to stay put once they are in a minimally acceptable place, for instance because of social connections they will have forged in prison, it would make sense to at least offer the choice at the beginning of the incarceration period. But because prisoners may not have enough information to make a

³⁹ See text accompanying notes 26, 37 *supra*.

⁴⁰ Any data on how long between conviction and sentencing? Need time to prepare presentence report.

⁴¹ The Corrections Corporation of America, the GEO Group, and the Cornell Companies are the three largest private prison companies. Cornell Companies specializes in vocational and psychological services. Cite.

⁴² 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.” <http://bugsbutt.blogspot.com/2007/02/even-more-bullet-ins.html>.

⁴³ See Barkow, Dolovich (on local community support for new prison construction).

choice before they have served any time, it would make sense to at least offer one transfer after some time, perhaps a year or two, so that they can punish a prison for low quality once they experience it. One may also offer possibilities for transfers that occur at regular intervals—like the “open enrollment periods” for company health plans or like the natural re-enrollment periods in schools based on the school year⁴⁴—perhaps every few years. One could even imagine transfers at will, though the limited transfer may be more likely, to conserve transportation resources.

What happens, under such a regime, to the current policy on involuntary transfers?⁴⁵ It could be kept the same as before, though the principles of prison choice suggest that Departments of Corrections should still look for volunteers.⁴⁶

B. Funding

The voucher amount would be determined based on various observable characteristics of the inmate, for instance security level, nature of the crime, known psychological or medical conditions, known history of violence, sex, and age.⁴⁷ As with school vouchers, the voucher amount could be based on the cost of incarceration at public prisons—either at 100% of this amount or some other percentage.⁴⁸

(If the public prison system itself is voucherized, a public prison loses the amount of the voucher when an inmate switches to a different prison, whether public or private. Or, if the public prison system is unchanged, the voucher funding mechanism only comes into play when the prisoner opts out of the public system.⁴⁹ In the second case, the total cost of the system would be unchanged when

⁴⁴ Do voucher plans require that one spend the whole year at one school? Does this just depend on what contract one signs with the voucher-accepting school?

⁴⁵ Get examples of what such policies are and why prisons would want to transfer prisoners to other prisons. PDP cases say that prison transfers don't implicate property interest?

⁴⁶ [Possibly see *Brandon v. State DOC*, 938 P.2d 1029 (Alaska 1997)—DOC had solicited volunteers but then choose people with terms > 7.5 years for involuntary transfer; Alaska Supreme Court struck down.]

⁴⁷ Check how school voucher amounts are determined, or how people suggest they could be determined (see Hoxby?). *E.g.*, Zelman, according to family income. *See also* Schulhofer & Friedman 113.

⁴⁸ In school voucher plans, is this set at a percentage below 100%, except that if you spend it at a public school, then the public school gets the whole amount? Discuss Lupu & Tuttle, *Sites of Redemption*, on importance of how much the voucher amount is, at 569.

⁴⁹ *Cf.* Schulhofer & Friedman 113.

someone switches, or would drop if the voucher amount is less than 100% of the cost of public provision.⁵⁰)

If the program is to include private prisons, the percentage would have to be high enough to induce enough prisons to want to participate, so as to get meaningful competition.

If a prison can choose whether to take a prisoner, it might observe more than the determinants of the voucher, e.g. if something relevant like race or age isn't taken into account. Then it would be unwilling to take a prisoner for whom the voucher amount is inadequate. So one could either:

- (1) make the voucher amount depend on everything observable (but there's an information problem with the government as to the true determinants of cost—the government may know less than the voucher-accepting prison), or
- (2) require prisons to take all comers, or
- (3) require prisons to choose categories of persons out of which they will take all comers, or
- (4) have an auction system, where the prisons bid on each prisoner, and issue a voucher sufficient to cover a certain number of bids.
- (5) Or, instead of a flat fee, there could be a “per service” voucher amount (by number of medical visits, disruptions, etc.), which would require oversight if the incentives are to have too many or too few services; this dulls incentives and incurs heavy monitoring and informational burden on government.⁵¹ This whole system may require the government to guarantee a prison of last resort.

The voucher amount, which would follow the prisoner, would replace the current “per-diem” arrangements by which private prisons are reimbursed, and may replace the current budgeting process for public prisons.⁵² Now private prison firms win contracts and build prisons to fulfill them,⁵³ or build the prisons in advance, hoping to win the contracts to use them.⁵⁴ Under prison vouchers, they would still need to get whatever local build-

⁵⁰ Cite cases where the voucher amount is less.

⁵¹ Cf. Schulhofer & Friedman 116–17.

⁵² How does budgeting work for public schools in voucher systems? Does the law tie their funding to how many students they get?

⁵³ Build-own-operate contracts.

⁵⁴ Cite.

ing/zoning permissions they currently need,⁵⁵ but otherwise would only need to convince the prisoners themselves to use them. As noted above, popular prisons would have waiting lists and (provided they had the local permissions) would be able to build at will, without having to ask permission of, say, the Department of Corrections; unpopular prisons would close down in whole or in part.

[Would prisoners be able to supplement voucher amount (as in school voucher plans,⁵⁶ or Food Stamps)? Probably no, but cite existing programs where you can supplement (to stay at home?), and outsiders' ability to donate money to inmates to buy prison services; cite also law & economics literature on optimality of lower punishments for the rich?]

IV. THE LAW OF VOUCHERIZED PRISONS

A. *Statutory Restrictions*

Suppose the prison choice plan includes private prisons. What regulations would govern them? We may focus on two possibilities: (1) Anyone may start up a prison, subject to certain security requirements,⁵⁷ or (more modestly) (2) the government may choose who may operate a prison, just like now, but the allocation of prisoners to prisons would proceed by choice instead of by bureaucratic assignment.⁵⁸

In the first place, prisons could be governed by most of the same statutes and regulations that they have now—for instance, guard training and the like.⁵⁹

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.⁶⁰ The quality improvement requirement would be replaced by prisoner choice—quality would no longer be defined by a yardstick imposed by someone else (like the Logan quality of confinement index), and

⁵⁵ See Barkow; Dolovich (rural communities like prisons).

⁵⁶ See Zelman.

⁵⁷ Cf. Schulhofer & Friedman 112–17 (“voucher models”).

⁵⁸ Cf. Schulhofer & Friedman 101–12 (“deregulation”).

⁵⁹ Examples of these?

⁶⁰ Cite state statutes requiring such targets, cited in *Developments*.

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 levels (for instance, if there was a guarantee of floor space or grievance procedures) would take place at the level of contract law—arguably, prisoners would be in a better position litigating as contractual partners than as prisoners.⁶¹

As for cost savings, this requirement was probably unnecessary anyway, since there is already a strong incentive for these under any fixed-reimbursement scheme (whether under choice or not),⁶² and in addition, the government can reduce the voucher amount if it believes there is enough competition for prisoners at a given amount.

Nonetheless, there is nothing to prevent some amount of quality regulation (input, output, or outcome) as a floor, just as there is regulation of private schools.⁶³ Interestingly, under a voucher system, there is actually an argument for government regulation to provide a *ceiling* for quality—but more on this later.⁶⁴

B. The State Action Doctrine and Unconstitutional Conditions

What about constitutional requirements? Consider education: Public schools are considered state actors and therefore subject to the Due Process Clause,⁶⁵ the Equal Protection Clause,⁶⁶ the Free Speech Clause,⁶⁷ the Free Exercise Clause,⁶⁸ and similar constitu-

⁶¹ Cite. This would be independent of any claim that courts would be less deferential to private prisons, *see Developments*, because this would apply to public prisons too. Would you have a contract with a public choice prison? How does it work with public schools chosen under a voucher plan—is there a contract?

⁶² Cite theoretical arguments (Hart, Shleifer & Vishny) and empirical data (e.g. from *Developments*) on cost savings.

⁶³ Examples of this. Minow at 1264–65 says school voucher regulation is low.

⁶⁴ See text accompanying note 128 *infra*.

⁶⁵ *Goss v. Lopez*?

⁶⁶ *See, obviously*, *Brown v. Board*. Public schools' ability to discriminate by sex—for instance, by offering single-sex education—is limited by Title IX, 20 U.S.C. §§ 1681–1688, and its implementing regulations, *see* 34 C.F.R. § 106.34, which apply to all schools that receive federal funds. (Most public schools receive federal funds. [Cite.]) To the extent a public school's single-sex program is valid under Title IX, it may in addition be unconstitutional under *United States v. Virginia*, 518 U.S. 515 (1996). *See id.* at 595–98 (1996) (Scalia, J., dissenting). But this has not yet been litigated, and commentators differ on whether public single-sex education is constitutional. *Compare* Rebecca A. Kiselewich, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217 (2008), with Am. Civil Liberties Union, *New Title IX Regulations Pose a Serious Threat to Civil Rights of Students* (Oct. 25, 2006), <http://www.aclu.org/womensrights/edu/27207res20061026.html>.

⁶⁷ *Pickering* for teachers, *Tinker* for students.

tional requirements.⁶⁹ (Also, the government is responsible for manifestations of religion in schools under the Establishment Clause.⁷⁰ This may be true even if public schools are run by private contractors.⁷¹)

Private schools, on the other hand, have much more leeway to fire teachers or discipline students without due process,⁷² run sex-segregated schools,⁷³ control students' speech,⁷⁴ teach particular religions,⁷⁵ and control religious exercise.⁷⁶ (Some exceptions include constitutional restrictions on funding racially (and possible gender) discriminatory schools, and Establishment Clause restrictions on funding religious schools, though the latter restrictions go away when filtered through individual choice, as in a voucher system.⁷⁷)

Broadly speaking, for the constitutional requirements that are subject to the "state action" test—that is, most of them except for the Establishment Clause—private schools are largely uncontrolled by the Constitution.⁷⁸ It's not that they have the right to violate the Constitution; as long as they aren't state actors, they are in fact incapable of violating the Constitution, even when they take actions

⁶⁸ Cite case.

⁶⁹ What else requires state action? Fourth Amendment? The Supreme Court has said that public school officials are acting on behalf of the state—rather than on behalf of parents—in part because of compulsory education laws. *See* *Ingraham v. Wright*, 430 U.S. 651, 662 (1977); *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985). *Cf.* *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 209 (1948).

⁷⁰ For the case of private programs operating in public schools, *see* *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 207–12 (1948). This is similar to the faith-based prison program in *McCallum*, *see* note 90 *infra*. The Establishment Clause test is different than for state action—structural constraint on government, not recipient's rights as constraint on provider. For instance, "entanglement" for Establishment Clause is different than "entwinement" for state action (*Brentwood Academy*).

⁷¹ Any cases about Edison running Philadelphia schools? Any way to square this with *Logiodice*? Compare also *Blum v. Yaretsky with J.K. ex rel. R.K. v. Dillenberg*, 697–99 (distinguishing *Blum* on this basis).

⁷² *See* *Rendell-Baker; Logiodice*.

⁷³ *See, e.g.*, Nat'l Coalition of Girls' Schools, <http://www.ncgs.org>. Private schools are not subject to Title IX if they don't take federal funds, so they would presumably be free to discriminate by sex even under a state voucher scheme financed from a state's general fund. But see Scalia dissent in *United States v. Virginia*, arguing that there are constitutional restrictions on sex discrimination by any school that accepts government funds, by analogy to racial segregation cases.

⁷⁴ Case of this?

⁷⁵ *See, e.g.*, Ass'n of Christian Schs. Int'l, <http://www.acsi.org>. [Say what percent of private schools are religious.]

⁷⁶ Case of this?

⁷⁷ *Zelman v. Simmons-Harris*.

⁷⁸ The state action doctrine provides the exceptions: if the school is specifically regulated to require or strongly encourage a particular result, or other subtests of the state action doctrine, like "joint participation," "entwinement," etc.

which, if taken by public schools, would be constitutional violations.

Can we say the same of prisons? Public prisons are unquestionably state actors,⁷⁹ and therefore subject to the Due Process Clause,⁸⁰ the Equal Protection Clause,⁸¹ the Free Speech Clause,⁸² and the Free Exercise Clause.⁸³ As for private prisons, the Supreme Court has never held that private prison firms are state actors, though it has assumed it;⁸⁴ but lower courts have held this, mostly based on the “exclusive public function” theory.⁸⁵ Those cases arose not under a voucherized private provision system, but rather under a contracting system. But this doesn’t seem to make a doctrinal difference: As long as the government forces convicted defendants to go to (some) prison, the “exclusive public function” theory should apply.

This makes prisons different from schools. Schooling is *not* an exclusive public function,⁸⁶ so private schools are not automatically state actors. But because incarceration *is* an exclusive public function, private prisons remain state actors, even if they are chosen by the prisoner under a voucher system. Therefore, private prisons are not presumptively exempt from these rights provisions, as private schools are.

However, this is not the end of the analysis. Even though prisons don’t get a pass from constitutional requirements, they still have some leeway to *offer* attractive incarceration packages that involve waivers of constitutional rights. For instance, a prison may want to abandon its grievance system that is required by Due Process—perhaps it is not very useful, very costly, and very easily abused. Merely abandoning the grievance system would, of course, be forbidden. But could a voucherized prison offer a prison pack-

⁷⁹ This follows from *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

⁸⁰ Cite.

⁸¹ Check law on racial segregation in prisons. Any chance this could be different for private prisons? See *Johnson v. California*, 125 S. Ct. 1141 (2005).

⁸² Cite.

⁸³ Cite.

⁸⁴ *Richardson v. McKnight*.

⁸⁵ See, e.g., *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) (applying public function test); *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460–61 (5th Cir. 2003) (agreeing with the Sixth Circuit); *Smith v. Cochran*, 339 F.3d 1205, 1215–16 (10th Cir. 2003) (“[P]ersons to whom the state delegates its penological functions, which include the custody and supervision of prisoners, can be held liable for violations of the Eighth Amendment.”). Cf. *West v. Atkins*.

⁸⁶ See *Rendell-Baker v. Kohn*.

age that involves removing the grievance system and plowing the savings into improved health care or lower rates of victimization?

Whether this sort of thing is allowed is governed by the unconstitutional conditions doctrine, which generally delimits when the government may condition the grant of discretionary benefits on the waiver of constitutional rights.⁸⁷ Unfortunately, there is no single coherent theory of the unconstitutional conditions doctrine. The test differs according to the constitutional provision involved, and in fact there is no single “doctrine” from the Supreme Court’s point of view. Academic commentators seem to treat the doctrine as being justifiable, if at all, by a concern for preventing the government from making end-runs around constitutional prohibitions by using its great power to offer conditional benefits.

Even so, the potential for abuse is very context-specific, and it’s not clear that the current caselaw on unconstitutional conditions in prisons will be enlightening on what conditions will be constitutional in a voucherized world. In a choice-based setting with adequate competition between prisons, the concerns for abuse may be weakened enough to allow prisons to offer such packages, at least for some constitutional provisions.

To guarantee that “choice” can be exercised in this context, the government should guarantee a “constitutionally compliant” spot for any prisoner who wants one—otherwise, there will be no way for the prisoner to turn down the waiver of constitutional rights if he doesn’t think it’s worthwhile. More on this requirement in a later subsection.

[This section will go on to analyze the existing caselaw, and also discuss what *should* be allowable, both based on first principles and based on the principles discussed in Richard Epstein’s and Kathleen Sullivan’s articles on unconstitutional conditions.]

⁸⁷ See Epstein article; Sullivan article.

C. The Establishment Clause and the Applicability of Zelman

How about the Establishment Clause?⁸⁸ Would a voucher system driven by the prisoner’s “true private choice,” *à la Zelman*,⁸⁹ eliminate Establishment Clause concerns,⁹⁰ avoiding the potential unconstitutionality of current faith-based prison programs?⁹¹ If so, the same organization that runs such a (probably unconstitutional) program in a public prison—say, Prison Fellowship Ministries—may just want to open up its own choice prison and advertise inmate rehabilitation through intensive exposure to religion. In fact, one may debate whether it would be constitutional under the Free Exercise Clause to *exclude* religious prisons from a voucher program, just as it continues to be an open question whether exclusion of religious schools from a voucher program is constitutional.⁹²

The Establishment Clause is a guarantee that would be asserted against the government as a whole, not against the individual actor—even if the actor himself is not a state actor, the government is at fault for wrongly permitting an establishment of religion. So the fact that voucherized prisons would continue to be “state actors” isn’t necessarily relevant to whether the Establishment Clause prohibits private faith-based prisons under a voucher regime.

True, there are cases disapproving “enmesh[ing] churches in the exercise of substantial governmental powers,” because of the entanglement implications.⁹³ This might mean that the Establishment Clause prevents a private religious voucher prison. But the theory behind *Larkin* and *Kiryas Joel* isn’t that broad. *Larkin* held that a church couldn’t, in essence, exercise the zoning power by being able to veto the siting of nearby bars. But surely a system

⁸⁸ See *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 422–23 (8th Cir. 2007) (even voluntary prison ministry program run by private organization inside public prison held to be acting under color of state law for purposes of Establishment Clause inquiry where private program acted jointly with public prison officials, including in imposition of discipline). [Is “under color of state law” necessary in Establishment Clause case?]

⁸⁹ *Zelman* at 650.

⁹⁰ *Cf. Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 882–83 (7th Cir. 2003) (state funding of religious halfway house constitution where institution was chosen by parolee from set of providers that included non-religious options). (See also *In re Garcia*, 24 P.3d 1091; *O’Connor v. California*, 855 F. Supp. 303?)

⁹¹ See, e.g., *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 423–26 (8th Cir. 2007); Semyonova article.

⁹² See *Zelman*; *Locke v. Davey*; article arguing that exclusion of religion is unconstitutional even after the narrow exception of *Locke*.

⁹³ See *Larkin v. Grendel’s Den*; *Kiryas Joel*.

that allowed *all* nearby property owners, whether religious or secular, to veto the siting of nearby bars wouldn't be unconstitutional. Similarly, *Kiryas Joel* found fault with the drawing of political boundaries specifically to favor an Orthodox Jewish community. But several opinions in that case, representing a majority of the Court, seemed to agree that the problem was not the religious nature of the community itself but rather the favoritism shown toward a particular religious community in drawing boundaries. A neutral state law allowing any community to set up its own school district would surely be constitutional, even if one exercise of that law would be by an Orthodox Jewish community.

Similarly, a voucher law that neutrally allowed anyone, religious or secular, to run a prison should not run afoul of the Establishment Clause, even though prisons are state actors and even though some prisons would be run religiously. *Zelman* should still control.

(Note also that “state actor” for purposes of the state action doctrine isn't literally the same as “governmental power” for the purposes of the Establishment Clause cases. One can be a state actor without wielding government power;⁹⁴ the state action doctrine merely says that a private party is properly treated as being subject to constitutional provisions. Even “exclusive public function” for purposes of the state action doctrine may not be doctrinally identical to “governmental powers.”⁹⁵ When a prison is mandated, the two may coincide; but when the prison is chosen under a voucher regime, where every prisoner has the guarantee of a spot in a constitutionally compliant prison if he wants one, perhaps not.⁹⁶)

D. The Importance of “Constitutionally Compliant” Spots

The ability of prisons to do things that (if done by a mandatory prison) would be unconstitutional isn't necessary to the success of a prison voucher scheme, but it could be an advantage, just as for

⁹⁴ See cases where one is held to be a state actor merely for invoking state property law, e.g. *Lugar v. Edmonson Oil Co.*, where the private party's action was held to be “under color of state law” because of his joint action with the sheriff—who *really* was exercising government power there.

⁹⁵ Check the state action cases to see whether they characterize state action as “governmental functions.”

⁹⁶ Check cases about religious arbitration?

schools. Prisoners may well want to choose a prison with some constitutionally noncompliant features. For instance, like a school,⁹⁷ a prison may advertise itself as having better discipline because of its summary punishment procedures that would violate the Due Process if a public prison instituted them. There may also be some constitutional requirements whose “violation” would not be valuable to inmates in itself, but that may simply be costly to comply with, so a prison could save money by not complying with the requirement and invest the money into other programs that are valued by prisoners, like gym equipment, cable TV plans, library facilities, health care, or vocational programs.

But what if all prisons violate some constitutional requirement, for instance by being overcrowded or not having a grievance system? Even if no prison is a state actor, this state of affairs—given that prisoners are required to be in some prison⁹⁸—is likely unconstitutional.⁹⁹

The reason for this would be twofold. For the rights subject to “state action,” as we have seen, the ability of a prison to offer a constitutionally noncompliant package would be governed by the unconstitutional conditions doctrine. A precondition of this doctrine is that the recipient of the benefit-with-strings-attached must be able to turn down the benefit. This could mean that a prison that offers a noncompliant package must itself offer the possibility for an inmate to turn it down and remain within the prison. Or (which is more likely) it could mean that the system as a whole must offer such a feature, meaning that one can turn down any constitutionally noncompliant prison and be guaranteed a constitutionally compliant spot. The duty to provide the compliant spot would belong to the government, not the individual provider.¹⁰⁰

The government should be able to fulfill this requirement either by running public prisons or, in a hypothetically world of complete private provision, contracting with prisons to accommodate “con-

⁹⁷ Example of such a school?

⁹⁸ Lupu & Tuttle, *Sites of Redemption*, also stress requirement to go to drug treatment, at 561, or requirement to work if you get TANF, at 563.

⁹⁹ *Cf.* *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007) (stressing only one choice); *Freedom from Religion Found. Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003) (stressing several choices). *See Zelman?*

¹⁰⁰ *Cf.* Metzger (arguing that rather than considering private actors to be state actors, one should be able to sue government for delegating governmental power to private actors without proper safeguards).

stitutional” prisoners. For instance, a Christian prison may choose to accept “constitutional” prisoners, who could be kept in a different wing, and be exposed to different material, than its “voluntary” prisoners.¹⁰¹

The guarantee of constitutionally compliant spots is also important for the Establishment Clause for a related reason, though with a slightly different doctrinal hook. In *Zelman*, the Court stressed that 100% of the participating schools weren’t religious, which strengthened the claim that parents choosing religious schools were exercising their free and independent choice.

Again, this requirement should probably be automatically satisfied if the government continues to run public prisons, or by contract with private prisons.

This is an insight that can be translated back to educational policy. Imagine a voucherized world where the government has abandoned the provision of education.¹⁰² It seems that, in such a world, there should be a similar requirement for the government to maintain at least enough public school spaces for anyone who wanted one, or do so by contract with a private school—as long as education is compulsory.¹⁰³

The government could avoid this requirement by making education non-compulsory (which is of course not an option for prisons). Even now, the educational system contains both “compulsory” and “voluntary” students, depending on whether they are above the statutory compulsory education age. A private school, in a fully voucherized world without public schools, might then have some students with whom it must observe due process, and students with whom it needn’t.

This situation doesn’t crop up very often today: public schools are subject to constitutional requirements, regardless of the status of their students;¹⁰⁴ and private schools aren’t subject to constitu-

¹⁰¹ See possibly Lupu and Tuttle on this—do they discuss schools, focusing on *Zelman* language? Probation programs? Alcoholism programs where there must be an option other than AA, which is religious?

¹⁰² Not so fanciful—consider that in *Logiodice*, the government did not run its own school, though there was no choice element. See also note 13 *supra*.

¹⁰³ See note 69 *supra*. To document compulsory education laws, see sources cited in Rebecca Aviel, *Compulsory Education and Substantive Due Process: Asserting Student Rights to a Safe and Healthy School Facility*, 10 LEWIS & CLARK L. REV. 201, 204 n.13.

¹⁰⁴ But see Strauss article questioning (not in the education context) why this should be. Would there be any room for different tiers of constitutional requirements depending on whether the education is compulsory? Is compulsoriness used as an argument in the cases? On Establishment Clause, (continued next page)

tional requirements as long as there's a public school alternative for anyone who wants it, which is almost always the case. However, in *Logiodice*, the First Circuit encountered an unusual situation in which a private school was being used as the public school for a district. The First Circuit found no state action there, even though education was compulsory up to a certain age and there were no other free schools on offer. The fact pattern in *Logiodice* may be a strong case for reforming doctrine along the lines suggested here—constitutional requirements should attach at least to any compulsory-education students who desire them (and possibly to all compulsory-education students if a particular noncompliant package is barred by the unconstitutional conditions doctrine), but the above-age students, who aren't required to go to school at all and are merely getting a subsidized private-school education, would have no constitutional rights.

V. THE MERITS

Now that the constitutional considerations are out of the way, we may ask whether prison vouchers would be a good idea. [This section of the paper should eventually be longer. I have some material that I just haven't had the time to incorporate into this section yet; but I would also appreciate comments on this section.]

The claim in favor holds (1) that prisoner choice would improve prison quality from the prisoners' perspectives, and (2) that this would be desirable. One can dispute this claim on two grounds. Section A discusses the counterarguments that the quality of prisons may not improve from the prisoners' perspective because of various market failures. Section B discusses the counterarguments that, even if prisons do become better from the prison-

Lupu & Tuttle take a more law view—look at the market as a whole, so if there's a good competitive market the Establishment Clause isn't implicated (even if at a snapshot there's no secular choice). I would take a stricter view—requiring a non-constitutionally-compliant option at any time is unconstitutional—whether for Establishment Clause or any rights-based provision. (But see Lupu & Tuttle, *Sites of Redemption*, at 566 n.97—maybe we don't really differ?) Conversely, when the situation is such as to implicate the Establishment Clause (e.g. “compulsion with transformation,” or even just transformation without compulsion), they take a stricter view—require “meaningful” choice, include secular choices *of comparable quality*. (I would say that at least one secular choice of adequate quality is all that's required.) They propose focusing on government efforts to bring secular providers in, rather than actual end result: otherwise, they say the program could be “constitutional one year and unconstitutional the next,” at 597–98.

ers' perspective, this is undesirable to the extent that prisoners' views differ from our own.

A. Would Market Forces Improve Prisons?

Would market forces would in fact improve prisons?

The principal claim of a voucher proposal is that vouchers would improve the quality of prisons from the prisoners' perspective. This is because, under the current system, without choice, prisons are chosen by someone other than the prisoner, which prevents the prisoners' preferences from being taken into account.

Public prison quality depends on the humanity and professionalism of prison officials,¹⁰⁵ which aren't always present; and prison officials are often opposed to the interests of prisoners for political reasons.

Prison quality under privatization can be controlled through the process of competitive bidding and reputation building, but the criteria taken into account are again those of the officials who run the bidding, which aren't identical to those of prisoners and sometimes are opposed (for the same reasons as noted above).¹⁰⁶

It can also be controlled by litigation from within (or without, e.g. institutional reform), but this is onerous, hard to win, and of limited usefulness even if you win.

By contrast, under a prison voucher system, the choice of prison (within constraints of security level and possibly certain mandatory assignments as explained above, e.g. psychological treatment for the mentally ill¹⁰⁷) resides with the prisoner alone, and it's in the prison's interest (provided the voucher amount is high enough) to attract as many prisoners as possible. (Also reduce corruption?¹⁰⁸) A choice prison would thus have even less incentive to reduce quality than a mandatory prison, because it relies on reputation that it can advertise.

Even though I've mentioned above that prison choice needn't involve private provision, this point might require the participation

¹⁰⁵ See DiIulio.

¹⁰⁶ Cf. Schulhofer & Friedman at 78, 83–96 (discussing conflicts of interest between indigent defendant and those who choose his defender under the current system). See Scalia dissent in *McKnight*.

¹⁰⁷ See text accompanying note 43 *supra*.

¹⁰⁸ Cf. Schulhofer & Friedman 111, cite private prison corruption claims.

of private prisons. Do public prisons want more prisoners? Now, in fact, DOCs ask for *fewer* prisons.¹⁰⁹ It might be that they do this (1) because of inadequate funding (a problem that would be alleviated if an adequate voucher accompanied each prisoner), and (2) they could be talking about penal policy in general, not whether they (as opposed to someone else) should get the existing prisoners. Still, it's not clear how they benefit from more prisoners,¹¹⁰ unless one makes sure to structure rewards and penalties for public prisons so that it's in their interest to attract more people using any legitimate means at their disposal, while simultaneously giving public prisons the freedom to experiment with different models.

Let's consider various market failure arguments from the school choice debate [I'm going to incorporate a discussion of how how these arguments apply, or don't apply to prisons]:

Informational problems. Parents may not know about the actual quality of schools. Does this argument apply with greater or lesser force in prisons? Someone sentenced to prison for the first time may not know (even repeat offenders mostly spend time in jails, not prisons). But one can find out about prisons (1) if one has a lot of friends or people in one's community who have been in prison, and that information can spread; (2) by looking at advertising, reviews on the Web, etc.; (3) already existing ratings of prisons? (from monitoring, Logan quality of confinement index, etc.); (4) after one has experienced a prison and has the possibility of transferring out after some time. The informational problem also seems to apply with lesser force because the "consumer" of the service, the prisoner, is the same as the "customer," while in schools we rely on parents to choose schools for their children. Even if the government is better at knowing what's best, it's not as well motivated to implement this as the prisoner himself—might be better to have less knowledge with better motivation.¹¹¹ Maybe to facilitate prisoner choice, one can require that prisons publish information on wait list length, rate of transfer out, etc.¹¹² [Need to check what's required for schools.] Also, one expects that the con-

¹⁰⁹ See Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, Stan. L. Rev. (2008).

¹¹⁰ Compare Niskanen with Daryl Levinson on Empire-Building; cf. Schulhofer & Friedman 104.

¹¹¹ See Trebilcock & Iacobucci; Schulhofer & Friedman 86, 97, 107.

¹¹² Cf. Schulhofer & Friedman 102.

victed defendant would have help from his lawyer, just as the lawyer now tries to get the defendant into drug abuse programs, Army enlistment, etc. Also, government could provide presumptive assignment, or list of recommendations.¹¹³

Peer effects. Removing good students from classes pulls down the quality of the students remaining. Whether this applies to prisons depends on how important peer effects are in the prison context. [Find out about this.]

Agency problems. Parents not being good agents of their children (e.g. not motivated enough). As noted above, this doesn't seem to be an important consideration for prisons, where the person who chooses the prison is the same person who experiences the prison.

Feedback effects on popular politics. Perhaps it is a mistake to keep the amount of funding constant in this analysis. Critics of privatization and vouchers charge that such schemes tend to make prisoners "not our problem" by making us think that they're not worth taking care of through a socialized system. Thus, in turn, could lead to reductions in quality. A similar concern would be that people would be outraged at certain amenities chosen and enjoyed by inmates, and this might make the voting public turn against inmates even more than they currently do. I find this argument highly speculative and not quite convincing, but it merits additional analysis. (One possibility is that this system would actually make the prison system more transparent, which would have attendant benefits to the politics of the prison system.¹¹⁴)

[Get other arguments from anti-voucher literature.]

Other, non-market-failure, disadvantages include the following.

Distributional effects. The better informed will get better prisons (this includes especially repeat prisoners).¹¹⁵ But "best" is different for different prisoners, this serves valuable matching purpose.¹¹⁶ Also, this can make uninformed better off, just like school choice can improve public schools.¹¹⁷

¹¹³ Cf. Schulhofer & Friedman 103, 114.

¹¹⁴ Cf. Schulhofer & Friedman 118–19.

¹¹⁵ Cf. Schulhofer & Friedman 105, 109; *United States v. Davis*, 604 F.2d 474, 478–79 (7th Cir. 1979).

¹¹⁶ Cf. Schulhofer & Friedman 109.

¹¹⁷ See Hoxby. Cf. Schulhofer & Friedman 109–10.

*Administrative burden.*¹¹⁸ Of course, a system of choice would have some administrative costs to run. This seems like a minor problem.¹¹⁹

B. Should We Respect Prisoners' Preferences?

But let's suppose that the market failures aren't too bad, and this sort of competition really would improve prisons from the prisoners' perspectives. Would this be good?

There are certain areas where prisoners' preferences seem desirable. It seems likely that prisoners prefer less violence and sexual abuse, better health care, and better vocational training. They also may prefer prisons close to their family,¹²⁰ to facilitate family visits. These all seem desirable, either on humanitarian grounds or on rehabilitation grounds,¹²¹ though many can be found who quietly—and sometimes not so quietly—favor more brutal and abusive prisons on retributive or deterrence grounds.¹²² To the extent we favor these preferences of prisoners—and to the extent the political process slights them—this is an advantage of prison vouchers, which would beneficially remove prison reform from the hands of unresponsive democratic majorities and put it in the more caring hands of impersonal market forces, that is, of prisons catering to the praiseworthy desires of prisoners.

But not all preferences of prisoners should be satisfied. (If all prisoners' preferences were praiseworthy, why would we have locked them up?)

First, let's consider prisoner preferences that shouldn't be satisfied, even though they are morally neutral. Consider amenities like gym facilities and television choices. These are commonly derided as “country-club” amenities,¹²³ though they are beneficial in maintaining prisoner discipline.¹²⁴

¹¹⁸ Cf. Schulhofer & Friedman 111.

¹¹⁹ Get some stats here.

¹²⁰ Compare schools: concern for proximity often said to be undesirable because parents should choose based on “quality.” But all this shows is that parents have a broader view of quality than the experts, and indeed, to the extent that a shorter commute makes life more pleasant for the child and his family, why not consider it a valid component of quality?

¹²¹ Cite criminologists saying how all those are good.

¹²² Cite, perhaps from popular culture. Cf. Schulhofer & Friedman 120.

¹²³ Cite.

¹²⁴ Cite.

But in general, the concern over prisoners' enjoyment of amenities in general can be sound. 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. (On the other hand, this is a complicated question. The partisans of prison brutality and rape may be right on deterrence grounds but wrong on rehabilitation grounds, as brutalization may make prisoners worse people when they exit prison.¹²⁵ So having a high-amenity prison may, on balance, be socially desirable. But it's possible that certain amenities should be kept low.)

One can undo the effect of increased amenities by, say, increasing the prison term, but this is highly expensive relative to making prison stays shorter but less pleasant.

Now, let's consider prisoner preferences that are even less desirable. I've already mentioned that we may want to force certain prisoners into certain services, like psychological services for the mentally ill.¹²⁶ They may not choose that for themselves; mentally ill prisoners' distaste for psychological 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, just as some argue that portions of the school curriculum should be mandated because parents' can't be trusted to choose what's best for their children.

Or, prisoners may prefer prisons that help them escape. This is a silly example because it's so easy to fix: Prison escapes are highly public affairs,¹²⁷ and so private prisons could simply be heavily penalized (up to losing the firm's losing the right to operate) for escapes. Other problems may be harder to fix. For instance, prisoners may prefer easy access to contraband, or may prefer to be able to continue to run their criminal enterprise from within their prison cell. To the extent the contraband is guns, we may not need to worry about this so much if they already have good incentives to improve security. To the extent the contraband is pornography, perhaps voucherized prisons wouldn't have much of an incentive to control them but perhaps this would be harmless, or even bene-

¹²⁵ Keith Chen & Jesse Shapiro article on prison conditions and recidivism.

¹²⁶ See text accompanying note 43 *supra*.

¹²⁷ But cite case of private prison escape that the prison firm tried to cover up.

ficial. [Figure out how prisons enforce against this sort of thing now, what incentives they have.]

Other concerns include self-selected prisons as breeding grounds for racially separatist or religiously extremist movements.

Therefore, there may be a continuing role for government regulation, to prevent prisons from offering amenities that are too attractive (without countervailing benefits for society as a whole), and to prevent prisons from catering to prisoners' socially undesirable preferences.¹²⁸ If this is right—if market forces would make prisons good from the prisoners' perspective, while government has to intervene to keep them not so good—this would be a total reversal of the current political dynamic, where political forces keep prison quality low, and it's an uphill battle to improve prison quality.

Throughout, I haven't been giving any normative value to the satisfaction of prisoners' preferences in themselves, though some argue that optimal policy should give equal weight to everyone's happiness, including criminals' happiness from committing crimes.¹²⁹ My perspective so far has been that criminals' preferences should only be valued to the extent they agree with ours.

Thus—assuming the market-forces argument works—the desirability of the resulting state of affairs is less certain than in the school-choice context, where we do value the views of parents, among others. Nonetheless, the concerns raised here are broadly similar to criticisms of some parents' views on their children's education; voucher proposals have been criticized for encouraging undesirable religious movements¹³⁰ or racial or class separatism.¹³¹

¹²⁸ See text accompanying note 64 *supra*.

¹²⁹ See Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, 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. LIT. 45, 48 & n.12 (2000); DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 229–31 (2000). *But see* George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970) (illicit utility shouldn't count).

¹³⁰ Cite concerns about witches' covens and madrassas.

¹³¹ But counterarguments are that government shouldn't care about religion, and that racial or class separatism already happens under the current system based on housing patterns (see Hoxby).

VI. THE POLITICS OF PRISON VOUCHERS, PRISONS, AND VOUCHERS

I have already discussed how, to the extent prison vouchers improve prisons from prisoners' perspective, and if the desirable elements of prisoners' perspective outweigh the undesirable ones, the political dynamic may be turned around—where government actually has to intervene to keep prison quality from getting too high.¹³² This may be all the more important in the prison context than in the school context: there seems to be more hope to reform schools politically, without using choice, because at least society at large empathizes with students in failing schools,¹³³ whereas prisoners are generally despised, often come from communities without a lot of political power, and are themselves (at least felons) often disenfranchised.¹³⁴

This proposal, of course, is subject to the same critique as all reform proposals that propose to remedy a politically insoluble problem. If the problem is already politically insoluble—presumably because there are political constituencies opposed to remedying the problem—why should this reform, even if it's perfect, ever be adopted?

In the first place, it's worthwhile discussing the reform as a thought experiment even if it has no chance of being adopted. In the second place, the foregoing discussion gives us clues as to how a voucher system might be adopted politically. I consider each of these in turn.

A. Prison Vouchers as a Thought Experiment

In the first place, thinking about prison vouchers as a mere thought experiment gives us insight into how constitutional law doctrines work and how voucher schemes would work, and may give us additional perspectives on areas where vouchers already exist.

How might thinking about prison vouchers change our thinking about school vouchers? Education is the main area where vouchers are debated today. School choice is usually advocated in conjunc-

¹³² See note 128 *supra*.

¹³³ See, e.g., both the title and the substance of the No Child Left Behind Act of 2001.

¹³⁴ See *Developments* section on felon disenfranchisement.

tion with private (and religious) provision. And in today's political environment, school-voucher proponents (and partisans of private education) are identified with the right (including the social conservative right), while the status quo of public schools is identified with the left (though of course the left contains many who would reform public education from within). Moreover—reinforcing this dynamic—vouchers are associated with economic arguments, which also (today) tend to be associated with the free-market right.¹³⁵

However, the political valence of prisons is reversed. Prison reformers are usually associated with the left (though privatization proponents, who are usually on the right, do marshal prison-quality arguments). The status quo, that is, opposition to prison reform, is associated with the law-and-order right.

Suppose it is true that prison vouchers would improve the well-being of prisoners, particularly as regards prisoner health-care and freedom from assault, sexual and otherwise—short-circuiting the unsympathetic political and judicial processes. If so, from a prison-reform perspective, vouchers would have worked a humanitarian miracle. Might the left reconsider its opposition to vouchers as a tool of school reform?

Perhaps it is fanciful to think that people would change their minds entirely. After all, education and prisons are different issue areas, with different policy concerns. It could be that what works in prison reform wouldn't work in education. But at least, if some people had been opposed to the very idea of vouchers, perhaps on expressive grounds related to a distrust of market-based arguments generally, their opposition could change from a *general* opposition to vouchers to a *specific* opposition to *school* vouchers only. Their opposition might become more sensitive to empirical argument specifically geared toward the school context.¹³⁶

On the other hand, people on the right who are unsympathetic to prisoners may oppose the idea of prison vouchers as giving unwarranted decisionmaking authority to prisoners. Perhaps depriving prisoners of decisionmaking authority is another form of punishment, which one might support on retributivist grounds. After

¹³⁵ But this isn't necessary: see James Forman on politics and history of school choice. See also Schulhofer & Friedman 76–77 (different areas of privatization have different considerations).

¹³⁶ Compare to politics of tradable emission permits.

all, the social good is not merely composed of the good of prisoners; it's also composed of the good of victims and people in society as a whole.

But this is exactly the argument that the anti-school-voucher left has been making with respect to schools: Where some on the right have treated parent choice as an end in itself, more communitarian arguments have stressed the interests of the children left behind, the "true" interests of children (such as racial balance) that they and their parents may not adequately value, the presence of anti-social values among certain parents, and the interests of society as a whole. Perhaps making the argument against prison vouchers on communitarian grounds would make the pro-school-voucher right better appreciate the communitarian arguments in education.

B. Prison Vouchers as Popular Politics

However, the foregoing discussion also gives us clues as to how a prison voucher proposal could succeed politically, or at least how the support for a prison voucher proposal would be different from the support for an arbitrary prison-conditions reform, such that the political infeasibility of the latter need not imply the political infeasibility of the former.

As I suggested above, a prison voucher proposal could mobilize the pro-free-market forces that support school voucher proposals, even if these same pro-free-market forces would not support prison-conditions reform as a "left-wing" proposal. The "cultural cognition" literature suggests how constituencies can be mobilized by a clever packaging of reforms that convinces different groups that their concerns are being taken into account. For instance, Dan Kahan et al. have argued 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.¹³⁷ A similar dynamic could occur with conservatives supporting prison reform because they would relish the chance to show that vouchers can work.

¹³⁷ Kahan et al. on the Clean Air Act Amendments in the Harvard Law Review.

The constitutional section above also suggests an important potential source of support for prison vouchers: religious conservatives. If I am right that faith-based prisons are unconstitutional under the current regime but would be constitutional under a voucher regime, a voucher system may be the only way forward for faith-based prisons. Moreover, it would allow religious groups to incorporate religion into their programs to a degree that would be unthinkable under the current system. The religious groups that would be moved by this consideration are also traditionally conservative, though they do not always overlap with the previous group of voucher supporters that would be moved by cultural cognition. (Religious conservatives do typically support school vouchers; but unlike free-market conservatives who support vouchers as a general matter, religious conservatives would probably do so more specifically because of their views on educational policy, so they may be less likely to be moved by an appeal to the idea of vouchers generally.)

If this is right, a prison voucher system could pass if liberals who favor prison reform are convinced by the potential of this system to improve prison quality, conservatives who like vouchers are moved to support another voucher program, and religious groups who like faith-based prisons mobilize to institute a system under which religious prisons would be legal.

VII. CONCLUSION

[This section would conclude, recapping the argument. I haven't written it yet, but you can get a sense of it by rereading the abstract!]