

2012

## Response: One Market We Do Not Need

Giovanna Shay

*Western New England University School of Law*, [gshay@law.wne.edu](mailto:gshay@law.wne.edu)

Follow this and additional works at: <http://digitalcommons.law.wne.edu/facschol>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

160 U. Pa. L. Rev. PENnumbra 319 (2012), <http://www.pennumbra.com/responses/3-2012/Shay.pdf>

This Article is brought to you for free and open access by the Faculty Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact [pnewcombe@law.wne.edu](mailto:pnewcombe@law.wne.edu).

---

## RESPONSE

---

---

---

### ONE MARKET WE DO NOT NEED

---

---

GIOVANNA SHAY<sup>†</sup>

In response to Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779 (2012).

Professor Volokh is right that American prisons are considered to be “low quality,” and that they suffer from “high violence rates, bad medical care, [and] overuse of highly punitive measures like administrative segregation . . . .”<sup>1</sup> But his proposed solution—a system of “prison vouchers” that would permit prisoners to choose their facilities and thus create a market for prison services—would provide only an illusion of choice. Even worse, such a system runs the risk of strengthening the self-interested forces that drive our overgrown system of incarceration.

I commend Professor Volokh for drawing attention to the problem of abysmal prison conditions and for making the important, and too often ignored, point that “bad prison conditions often indirectly hurt the rest of society.”<sup>2</sup> And I thank him for creating the opportunity for a thoughtful exchange about these critical issues. However, his proposal—though fascinating—is flawed.

It is easy to quibble with the specifics of Professor Volokh’s proposal and to suggest ways in which it will not work. In the piece, he identifies and counters some of the critiques that I will expand on in this brief

---

<sup>†</sup> Associate Professor of Law, Western New England University School of Law. Thanks to James Forman, Jr., for helpful comments.

<sup>1</sup> Alexander Volokh, *Prison Vouchers*, 160 U. PA. L. REV. 779, 784 (2012).

<sup>2</sup> *Id.* at 784-85; see also James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1004 (2010) (book review); Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 352-61 (2009) (describing the impact of prison policies on prisoners’ families and communities).

Response. But the central problem of the proposal is not the possibility of “market failure” or “market success.”<sup>3</sup> Fundamentally, what makes me uneasy about Professor Volokh’s proposal is that it reinforces a market mindset toward prisons and the people that they contain.

In their book *Priceless: On Knowing the Price of Everything and the Value of Nothing*, Frank Ackerman and Lisa Heinzerling argue that economic analysis is not appropriate for every policy choice.<sup>4</sup> Some decisions should be made “on the basis of rights and principles,”<sup>5</sup> and some goods, like human life, are “priceless.”<sup>6</sup> To be sure, Professor Volokh is not suggesting that prisoners bid to obtain minimum conditions or essential medical care. However, his proposed voucher system, rooted in a faith in markets, takes us one step closer to such a world.

Moreover—and this is really my greatest concern—if markets are successful, they can grow. And I fear that embracing a market mentality in this area will contribute to the one thing that America really does not need now: more growth in our system of prisons. Professor Volokh does a good job of outlining the problems with *conditions in* American prisons. But he does not acknowledge the primary *condition afflicting* American incarceration. That problem has been analogized to obesity: the system is just too big.<sup>7</sup>

It has become almost trite to talk about the unprecedented scale of American incarceration. At 2.3 million prisoners, our nation has the largest absolute number of incarcerated people, and the highest incarceration rate, in the world.<sup>8</sup> Commentators across the ideological spectrum, from Angela Y. Davis<sup>9</sup> to Justice Kennedy<sup>10</sup> to Newt Gin-

<sup>3</sup> Volokh, *supra* note 1, at 792.

<sup>4</sup> FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* 234 (2004).

<sup>5</sup> *Id.* at 213.

<sup>6</sup> *Id.* at 8.

<sup>7</sup> See Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1251 (2011) (“Just as obesity can mean that a person has lost the ability to regulate their own appetite for food, mass incarceration is evidence that our collective appetite for punishment is out of whack.”).

<sup>8</sup> See PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 5 (2008), available at [http://www.pewcenteronthestates.org/report/report\\_detail.aspx?id=35904](http://www.pewcenteronthestates.org/report/report_detail.aspx?id=35904) (listing the number of prisoners under correctional supervision in jails and prisons in 2009).

<sup>9</sup> See ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 105-06 (2003) (claiming that the current criminal justice system has an “exaggerated dependence on imprisonment”).

<sup>10</sup> See Carol J. Williams, *Justice Kennedy Laments the State of Prisons in California, U.S.*, L.A. TIMES, Feb. 4, 2010, at AA5 (reporting Justice Kennedy’s disapproval of excessive incarceration in California).

grich,<sup>11</sup> have decried this overreliance on incarceration. In the current economic crisis, this level of incarceration cannot continue. That is why so many jurisdictions, including some that are notoriously “tough on crime,” such as Texas, have adopted measures to curb their use of incarceration without compromising public safety.<sup>12</sup> There are signs that these measures are working to decrease the growth of the prison population. The Bureau of Justice Statistics (BJS) recently released a report explaining that the number of incarcerated people in the United States fell in 2010 for the first time since 1972.<sup>13</sup>

At what could be a critical turning point, I fear that Professor Volokh’s proposal could kick-start prison growth. Although we cannot say for sure what would happen if a system of “prison vouchers” were adopted, there is reason to believe that it could unleash some powerful forces. The notion of vouchers for prisoners further normalizes the idea that corrections is a market and that prisoners are a commodity.<sup>14</sup> It also creates yet another opening for powerful lobbies with vested economic interests, such as private corrections companies and guards’ unions, to advocate policies that promote incarceration.<sup>15</sup>

---

<sup>11</sup> See *Statement on Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles> (last visited Feb. 15, 2012) (declaring that government spending on the criminal justice system and incarceration should be limited, and bearing Newt Gingrich’s signature).

<sup>12</sup> See AM. CIV. LIBERTIES UNION (ACLU), SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 5 (2011) (describing the trend away from incarceration among historically “tough on crime” states because of increased concern for fiscal responsibility in the wake of the economic crisis); Charlie Savage, *Trend to Lighten Harsh Sentences Catches On in Conservative States*, N.Y. TIMES, Aug. 13, 2011, at A14 (same).

<sup>13</sup> See PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, at 1 (2011) (describing the 0.6% drop in number of prisoners under state and federal jurisdiction in 2010).

<sup>14</sup> Commentators criticizing prison privatization have identified the “commodification” of prisoners as one concern. See, e.g., Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 963-70 & n.308 (2004).

<sup>15</sup> See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 532-33 (2005) (describing the power of prison guard unions as a political lobby for incarceration); James Forman, Jr., *The Black Poor, Black Elites, and America’s Prisons*, 32 CARDOZO L. REV. 791, 799-800 (2011) (describing the influence of the Washington, D.C. corrections officers’ union in opposing prison reforms); Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, the Great Recession & Penal Reform*, DAEDALUS, Summer 2010, at 62, 67 (warning that the recession may not produce lasting reductions in prison populations because of entrenched interests). See generally ACLU, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 38 (2011) (describing the “private prison lobby”).

Professor Volokh takes great pains to point out that he is not advocating prison privatization per se.<sup>16</sup> I can understand why he is eager to distance his proposal from private prisons, since conditions in some of them—like conditions in many government facilities—have been roundly criticized. For example, a recent report by the American Civil Liberties Union (ACLU) describes conditions in a Texas youth facility run by a private prison company, the GEO Group, as “horrid.”<sup>17</sup> Independent auditors sent to monitor the juvenile facility reportedly “got so much fecal matter on their shoes they had to wipe their feet on the grass outside.”<sup>18</sup> Another new report by the Sentencing Project catalogues hundreds of brutality complaints at a Mississippi youth facility that is run by the GEO Group and under federal investigation, as well as disturbing reports of staff sexual abuse at a Kentucky Corrections Corporation of America (CCA) facility housing female prisoners from Hawaii.<sup>19</sup>

There is also a troubling “revolving door” between government and private corrections.<sup>20</sup> In one high-profile instance, former Bureau of Prisons Director Harley Lappin left government service after being arrested for alleged drunk driving in 2011; soon afterwards, he began working as CCA’s Chief Corrections Officer.<sup>21</sup>

But a “prison vouchers” system can only promote privatization, by opening yet more arenas in which corrections companies will push to compete.<sup>22</sup> Recent studies have shown how private corrections companies contribute to the growth of incarceration in the United States by advocating policies that promote prisons.<sup>23</sup> Detention Watch Network released a report stating that CCA spent more than eighteen million dollars on lobbying between 1999 and 2009.<sup>24</sup> Private prison

<sup>16</sup> See Volokh, *supra* note 1, at 803-05.

<sup>17</sup> See ACLU, *supra* note 15, at 37.

<sup>18</sup> *Id.* (quoting Doug J. Swanson, *TYC Investigates Staff for Ties to Jail Operator*, DALL. MORNING NEWS, Oct. 6, 2007, at 1A).

<sup>19</sup> CODY MASON, SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 11 (2012).

<sup>20</sup> See ACLU, *supra* note 15, at 36.

<sup>21</sup> *Id.*

<sup>22</sup> See MASON, *supra* note 19, at 16 (“[P]rivate prison companies use their influence to increase profits by taking advantage of and continuing the nation’s long-standing reliance on incarceration.”).

<sup>23</sup> See, e.g., ACLU, *supra* note 15, at 32; see also James Ridgeway, *Locking Up Profits*, AL JAZEERA (Nov. 28, 2011, 11:52 AM), <http://www.aljazeera.com/indepth/opinion/2011/11/20111127105458655442.html> (describing three studies on private prison companies, including reports by the ACLU and Detention Watch Network).

<sup>24</sup> DETENTION WATCH NETWORK, THE INFLUENCE OF THE PRIVATE PRISON INDUSTRY IN THE IMMIGRATION DETENTION BUSINESS 3 (2011), available at

companies make political contributions as well—according to the Sentencing Project, “an average of over \$430,000 per election cycle, with nearly 70 percent going toward Republican candidates.”<sup>25</sup> CCA lobbyists have even drafted laws to promote more draconian immigration policies and enforcement in order to expand the pool of Immigration and Customs Enforcement detainees.<sup>26</sup> The American Legislative Exchange Coalition, which reportedly includes CCA and Wackenhut among its members, has been described as “the most powerful lobby you’ve never heard of,”<sup>27</sup> sponsoring so-called “truth-in-sentencing” reforms, which have produced longer sentences in some forty states.<sup>28</sup> It is not only private corrections companies that are invested in expanding the market in prisoners. Guards’ unions, such as the California Correctional and Peace Officers Association (CCPOA), also lobby for harsher sentences.<sup>29</sup> In a speech to Los Angeles lawyers, Justice Kennedy lamented the fact that the corrections officers union was the sponsor of California’s three-strikes law, saying, “that is sick!”<sup>30</sup>

Creating an even more explicit market in prisoners through prison vouchers can only compound these troubling trends. Professor Volokh might counter that his proposal at least will improve conditions by permitting inmates to vote as to the most humane prisons by exercising choice.<sup>31</sup> But getting accurate information about conditions on the ground in any prison facility is truly daunting.

In describing the problems of America’s prisons, Professor Volokh’s paper cites the report of the Commission on Safety and Abuse in America’s Prisons,<sup>32</sup> a commission convened by the Vera Institute and composed of corrections experts. Although the commission’s report commends the BJS’s data collection efforts, it also acknowledges that there simply is no information available about many aspects of

---

<http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/PrivatePrisonPDF-FINAL%205-11-11.pdf>.

<sup>25</sup> MASON, *supra* note 19, at 15.

<sup>26</sup> See DETENTION WATCH NETWORK, *supra* note 24, at 3.

<sup>27</sup> Dolovich, *supra* note 15, at 523, 526 (citing Nick Penniman, *Outing ALEC: The Most Powerful Lobby You’ve Never Heard Of*, AM. PROSPECT, July 1, 2002, at 12).

<sup>28</sup> *Id.* at 527; MASON, *supra* note 19, at 13 (describing how private prison companies were involved in the drafting of model legislation, including “mandatory minimum sentences, three strikes laws, and truth-in-sentencing, all of which contribute to higher prison populations”).

<sup>29</sup> Dolovich, *supra* note 15, at 530-31.

<sup>30</sup> See Williams, *supra* note 10, at AA5.

<sup>31</sup> See Volokh, *supra* note 1, at 784 (arguing that inmates “would become consumers and thus drive reform by voting with [their] feet”).

<sup>32</sup> *Id.* at 785 n.18.

prison life.<sup>33</sup> The report quotes the BJS chief statistician, Allen Beck, as saying, “The level of assaults is simply not known. I cannot measure well the level of assault using administrative records as they exist today.”<sup>34</sup> Nationwide statistics on prison sexual violence were not even collected until 2004, when the first survey was conducted as a result of the Prison Rape Elimination Act of 2003.<sup>35</sup>

Professor Volokh suggests that prison operators could publicize information regarding their facilities.<sup>36</sup> This response mistakes advertising for accurate information. Private prison companies have marketing departments that churn out only positive stories and Internet sites.<sup>37</sup> As the ACLU points out, “no one would know from CCA’s website that one of its employees sexually abused multiple female immigration detainees, or that one of its facilities is allegedly so violent that it has been dubbed the ‘gladiator school.’”<sup>38</sup> Private prison companies may be exempt from information-sharing mechanisms such as the Freedom of Information Act and some state records laws.<sup>39</sup> CCA has—unsuccessfully—resisted a request to turn over settlement documents and complaints to the leading publication for prisoner rights, *Prison Legal News*.<sup>40</sup> Some private prison companies have even sought to thwart efforts by their shareholders to obtain information about issues such as political contributions.<sup>41</sup>

Professor Volokh suggests that defendants could seek information regarding prisons from “friends or neighbors who have been in prison,” or from their defense lawyers.<sup>42</sup> If a defendant’s friends are incarcerated, then their phone calls and letters almost certainly will be monitored by censors.<sup>43</sup> If the defendant’s friends have been released, then their information will be dated. Moreover, former inmates’ perspec-

<sup>33</sup> See COMM’N ON SAFETY & ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 24 (2006) (“BJS has made significant progress in improving the validity, reliability, and comprehensiveness of the data on violence, but there are still significant weaknesses and blind spots.”).

<sup>34</sup> *Id.*

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

<sup>36</sup> See Volokh, *supra* note 1, at 830.

<sup>37</sup> See ACLU, *supra* note 15, at 40.

<sup>38</sup> *Id.* at 40-41.

<sup>39</sup> *Id.* at 41.

<sup>40</sup> *Judge Favors Plaintiff in Private Prison Case*, ASSOCIATED PRESS, Dec. 1, 2011, available at <http://www.canadianbusiness.com/article/59923>.

<sup>41</sup> See ACLU, *supra* note 15, at 41 (describing a shareholder proposal that CCA defeated, which would have required more transparency about political contributions).

<sup>42</sup> Volokh, *supra* note 1, at 830.

<sup>43</sup> See *Wolff v. McDonnell*, 418 U.S. 539, 574-77 (1974) (upholding a prison regulation monitoring prisoners’ legal mail for contraband).

tives necessarily will be anecdotal and limited to the facilities where they were incarcerated, with little aggregate data or basis for comparison.

If there is one factor that is readily apparent to prisoners, it is location. Paul Wright, editor of *Prison Legal News*, suggests that prisoners will have strong opinions that the best prisons for them will be the ones closest to home, so that they can get visitors.<sup>44</sup> However, this suggests that, in a voucher system, there would be long waiting lists for the facilities closest to large population centers—a far cry from a system in which prisoner choice drives improvements in conditions and programmatic offerings. Professor Volokh might counter that prisoner preference for proximity to home would create a push for more prisons to be built near cities. But given the major investment required to build new prisons, and higher land values near cities,<sup>45</sup> it could be a long wait.

As for defense counsel, they usually are not able to gain access to facilities to evaluate whether their marketing claims are accurate. Even if counsel could tour prisons, attorneys may lack the professional skills to evaluate critical functions such as health care.<sup>46</sup> Moreover, indigent defense systems in many parts of the country are overwhelmed and underresourced.<sup>47</sup> Relying on defense lawyers to evaluate competing claims regarding prison conditions is overly optimistic at best.

Professor Volokh argues that prisoners' decisions to transfer between facilities will serve as an effective mechanism for exercising prisoner choice.<sup>48</sup> But the information barriers for would-be lateral transfers are too high for this mechanism to work smoothly. Prison

---

<sup>44</sup> Email from Paul Wright, Editor, *Prison Legal News*, to author (Dec. 6, 2011) (on file with the author).

<sup>45</sup> Cf. Stephen C. Fehr, *New Motive for Springing Lorton Site: Valuable Real Estate Tied Up at District's Prison Complex*, WASH. POST, June 13, 1996, at B1 (describing how, as Fairfax County became more populous, officials and developers began to consider closing a Washington D.C. prison in the northern Virginia suburbs because of the site's "development potential").

<sup>46</sup> See Margo Schlanger et al., *ABA Criminal Justice Standards on the Treatment of Prisoners*, CRIM. JUST., Summer 2010, at 14, 16-17 (recognizing that the bar has an important but necessarily limited role to play in improving conditions of confinement).

<sup>47</sup> See AM. BAR ASS'N, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 7-14 (2004), available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (describing specific problems defense counsel for indigent clients face, including lack of funding and essential resources, such as expert, investigative, and support services).

<sup>48</sup> See Volokh, *supra* note 1, at 819-23.



regulations typically forbid prisoners from corresponding with inmates at other facilities for security reasons.<sup>49</sup> Prisoners may lack access to the Internet and may encounter difficulty in receiving publications, or in keeping certain amounts of printed material in their cells.<sup>50</sup> For example, *Prison Legal News* is censored in numerous states.<sup>51</sup> To be sure, a correctional facility might have an incentive to keep information about competitors from reaching its residents.

There are also larger structural issues that could inhibit the use of prisoner choice as a means of shaping corrections services. Although Professor Volokh's proposal is not fully identified with privatization, we can look to the current private prisons system to anticipate potential problems in a market created by prisoners' vouchers. Professor Richard Culp of the John Jay College of Criminal Justice recently has commented that the private prisons market is an "oligopoly" in which four companies possess ninety-two percent of the market share.<sup>52</sup> He writes that an oligopoly "is characterized by interdependence, avoidance of competition and a rigid attachment to the status quo among the leading firms"<sup>53</sup>—hardly a recipe for competence,<sup>54</sup> let alone innovation.<sup>55</sup>

Finally, there is the problem of prisoner choice. Researchers have contended that choice is constrained even in free-world contexts, such as school choice.<sup>56</sup> I find it particularly unsatisfying to talk about

<sup>49</sup> See *Turner v. Safley*, 482 U.S. 78, 91 (1987) (upholding a prison regulation prohibiting correspondence between inmates at different institutions).

<sup>50</sup> See Gabriel Arkles, *Correcting Race and Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. REV. (forthcoming Oct. 2012) ("In my experience of communicating with imprisoned people who sought to comment on proposed National Prison Rape Elimination Commission standards, I found that some prisons would not allow the full standards into the jail, at times objecting that they were 'too long.'").

<sup>51</sup> For a map of states in which *Prison Legal News* has litigated for access, see *PLN in Action*, PRISON LEGAL NEWS, <https://www.prisonlegalnews.org/plnmap.aspx> (last visited Feb. 15, 2012).

<sup>52</sup> Richard Culp, *The Failed Promise of Prison Privatization*, PRISON LEGAL NEWS, Oct. 2011, at 1, 4; see also MASON, *supra* note 19, at 2 (reporting that CCA and the GEO Group "manage over half of the [private corrections] contracts in the United States, [resulting in] combined revenues exceeding \$2.9 billion in 2010").

<sup>53</sup> Culp, *supra* note 52, at 3.

<sup>54</sup> See Dora Schriro, *Improving Conditions of Confinement for Criminal Inmates and Immigrant Detainees*, 47 AM. CRIM. L. REV. 1441, 1447-48 (2010) (identifying three key organizational characteristics for safe conditions of confinement: "capacity, competency, and commitment").

<sup>55</sup> See Culp, *supra* note 52, at 1-3.

<sup>56</sup> See Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL'Y 1, 38 (2008) (discussing studies showing that, in choosing among schools, parents "rely on their existing social networks," and that parents' perception of their available choices is determined in large part by their social class).

choice in the context of a criminal punishment system that is inherently coercive and that is marked by persistent, systemic racial and socioeconomic disparity.<sup>57</sup> How are prisoners to exercise choice effectively when their attempts to notify authorities of systemic wrongdoing meet with mockery<sup>58</sup> or retaliation?<sup>59</sup> How are they to do so when they are illiterate,<sup>60</sup> or possess limited proficiency in English?<sup>61</sup> Is choice a realistic concept for the prisoners who have mental illnesses, estimated to be more than fifty percent of inmates?<sup>62</sup> How about for those who are held in segregation?<sup>63</sup> Prof. Volokh argues that "[t]he inmate's family or an appointed legal guardian could make the choice,"<sup>64</sup> but this does not address the barriers that non-prisoners face in obtaining accurate information regarding conditions on-the-ground in corrections facilities. Prisoners are not consumers shopping for home mortgages (although we also could debate whether that market worked). They are the dispossessed of our society, held in situations designed to minimize their access to information and their exercise of autonomy.

The report of the Commission on Safety and Abuse in America's Prisons proposes a different solution to the problem of poor prison

<sup>57</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010) (contending that discrimination that was once directed toward African-Americans is now directed toward "criminal," who are disproportionately African-American); Forman, *supra* note 15, at 795 (arguing that middle class African-Americans should consider ways in which they are also invested in the criminal punishment status quo).

<sup>58</sup> See *Johnson v. Johnson*, 385 F.3d 503, 531 n.20 (5th Cir. 2004) (explaining that, upon reporting repeated rapes, Roderick Johnson was informed by prison authorities, "[w]e don't protect punks on this farm").

<sup>59</sup> See *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 742-43 (6th Cir. 2004) (describing systemic sexual abuse and harassment of prisoners, followed by widespread retaliation against those who reported wrongdoing).

<sup>60</sup> See NAT'L CTR. FOR EDUC. STATISTICS, *LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY* 31 (1994) (observing that sixty-eight percent of prisoners performed at the lowest two levels on the prose literacy scale).

<sup>61</sup> See *id.* at 45 (observing that eleven percent of prisoners report coming from a household in which only a language other than English was spoken, while nine percent report growing up in a house in which both English and another language were spoken).

<sup>62</sup> DORIS J. JAMES & LAUREN E. GLAZE, *BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES* 1 (2006).

<sup>63</sup> See Margo Schlanger, *Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421, 1432-33 (2010) (describing harms of long-term segregation, including physical and mental deterioration).

<sup>64</sup> Volokh, *supra* note 1, at 801.

conditions—external monitoring.<sup>65</sup> This is a measure adopted by some other mature democracies, including the United Kingdom and Sweden,<sup>66</sup> and advocated by the American Bar Association (ABA).<sup>67</sup>

However, the reform that I would prioritize is simpler—fewer prisoners. The greatest inhumanity of our current system is its sprawling size, producing crushing overcrowding in some systems,<sup>68</sup> and multiplying its effects on families and communities on a scale that is hard to fathom.<sup>69</sup> The ABA is working on a state policy initiative designed to reduce states' reliance on incarceration.<sup>70</sup> The ABA advocates measures that have been demonstrated to safeguard public safety while reducing prison populations, such as pretrial detention reform, decriminalization of low-level offenses, use of community corrections, and changes to parole.<sup>71</sup>

Just when it seems that the United States may be turning a corner, Professor Volokh's "prison vouchers" proposal runs the risk of reinforcing entrenched interests that have contributed to prison expansion. This is one market that we do not need.

<sup>65</sup> See COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, *supra* note 33, at 16 ("Every U.S. prison and jail should be monitored by an independent government body, sufficiently empowered and funded to regularly inspect conditions of confinement and report findings to lawmakers and the public.").

<sup>66</sup> See SILJA J.A. TALVI, WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM 236 (2007) (describing the role of Her Majesty's Chief Inspector of Prisons in the United Kingdom); Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291, 304-05, 308-09 (2010) (describing the British Prison Inspectorate and the Swedish Parliamentary Ombudsman).

<sup>67</sup> See AM. BAR. ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS standard 23-11.3 (3d ed. 2010) (advocating external monitoring and inspection by independent agencies).

<sup>68</sup> See *Brown v. Plata*, 131 S. Ct. 1910, 1944-45 (2011) (upholding a lower court decision requiring that the prison population be capped at 137.5% of design capacity).

<sup>69</sup> See Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271, 280 (2007) (describing the disruption in a child's upbringing that a mother's imprisonment can cause); Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 8, 8 (arguing that "mass incarceration . . . deepens disadvantage and forecloses mobility for the most marginal in society").

<sup>70</sup> See *State Policy Implementation Project*, AM. BAR ASS'N, <http://www2.americanbar.org/sections/criminaljustice/CR203800/Pages/statepolicyproject.aspx> (last visited Feb. 15, 2012); see also Shima Baradaran, Op-Ed., *The Right Way to Shrink Prisons*, N.Y. TIMES, May 31, 2011, at A23 (recommending reforms to pretrial detention to reduce prison and jail overcrowding, as advocated by the ABA).

<sup>71</sup> *State Policy Implementation Project*, *supra* note 70.

---

Preferred Citation: Giovanna Shay, Response, *One Market We Do Not Need*, 160 U. PA. L. REV. PENNUMBRA 319 (2012), <http://www.penumbra.com/responses/3-2012/Shay.pdf>.