PRIVATE PRISONS: CONS AND PROS

A Report to
The National Institute of Justice

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ABSTRACT

This report gives a descriptive overview of correctional confinement facilities currently or recently operated by private companies under contracts to government agencies. Issues in the debate over private prisons are defined and an extensive but concise compendium of arguments for and against prison contracting is presented. Ten sets of issues are then examined in ten chapters, covering: Propriety, Cost, Quality, Quantity, Flexibility, Security, Liability, Accountability, Corruption, and Dependence.

All issues in the debate over private prisons have close counterparts that apply to prisons run directly by government. It is primarily because they are prisons, not because they are contractual, that private operations face challenges of authority, legitimacy, procedural justice, accountability, liability, cost, security, safety, corruptibility, and so on. Because they raise no problems that are both unique and insurmountable, private prisons should be allowed to compete (and cooperate) with government agencies to discover how best we can run prisons that are safe, secure, humane, efficient, and just.

ACKNOWLEDGMENTS

I am grateful to the National Institute of Justice for the assistance that made this research possible. I am especially indebted to James K. Stewart, Director of the Institute, for his enthusiasm, his intellectual support, and his friendship. No other person has done as much as he to promote nationwide research, discussion, and action on various aspects of private sector involvement in corrections.

Others at the Institute were also helpful in many ways, especially Joel Garner, Dick Linster, Marty Lively, Ed Zedlewski, Renee Trent, and Neille Russell. My monitor, Bonnie Gowdy, was both patient and persistent. Barry Ruback, as a fellow Visiting Fellow, offered much social support and editorial help during the early stages of my work. George Cole, also a Visiting Fellow, was there for me at a later point.

Many government officials involved in prison or jail contracting were generous with time and information. Officials in Bay County, Florida, were very helpful, particularly John Hutt and Larry Davis. In Hamilton County, Tennessee, special thanks go to Floyd (Flop) Fuller, Superintendent of Corrections, and Bill McGriff, County Auditor. Bill contributed so much to my chapter on costs that he is co-author of a separate report derived from it. Bob Schmidt, now retired from the Immigration and Naturalization Service, was a flood of information.

In general, I found that private corrections companies are at least as open to investigation and research as are public agencies, and sometimes more so. While I have talked with people at many companies, including Corrections Corporation of America (CCA), Buckingham Security Ltd, Wackenhut, Behavioral Systems Southwest, U. S. Corrections Corp., and Pricor, my closest contacts have been at CCA and Buckingham. Charles and Joseph Fenton, the founders of Buckingham Security, were open and candid in all conversations.

No study of private corrections today can go very far without access to information on CCA, the industry leader. Fortunately, I don't see how any company or government agency could be more generous with its time and information than CCA, or more open to scrutiny by outsiders, including researchers, journalists, and even critics and opponents of the industry. So many people at CCA were helpful to me in supplying materials and providing access to facilities that I have to apologize to those whose names I omit. At one time or another, I had special help from (alphabetically): Tom Beasley, Linda Cooper, Richard Crane, Don Hutto, Greg McCullough, David Myers, and Peggy Wilson. David Myers, Vice President for Facilities Management, was a crucial link for me in getting information about, and access to, CCA's facilities.

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Finally, I have saved a special thanks to two people very important to this project and to me: Charles Thomas, Director of the Criminal Justice Program at the University of Florida and the leading academic authority on private prisons, who knows more about what is happening inside the industry than anyone else outside the industry, and who was most generous in sharing his information, materials, and contacts with me; and Sharla P. Rausch, my wife and ofttimes co-author, whose pithy advice and editorial brutality were ... well, needed I suppose.

1. Introduction

Americans both love and hate their government; trust and fear it. Traditionally, their political philosophy has been basically libertarian, but not consistently so. They believe in limiting the power of government in many ways, but they also have trouble resisting the temptation to try to use the power of government to pursue various special goals or interests. This ambivalence toward government is particularly evident in the area of criminal justice.

Shortly after the earliest American reformers established a Constitution premised on a lack of faith in the benevolence and wisdom of governors, another group of American reformers established a penitentiary system premised on faith in the reformability of sinners and faith in the benevolence and wisdom of at least some authorities whose job it would be to coercively reform those sinners.

Faith in the good intentions of penal authorities and in their competence to rehabilitate lawbreakers has been strongly challenged in the past two decades, for a variety of reasons. The reason most relevant here is a growing disenchantment with government generally. From the late 1950's to the mid-1970's, self-reported trust in government declined from almost 80% to about 33%.[1] This was part of a general lowering of public confidence in American institutions and leadership.[2] By the 1980's, taxpayers had begun to revolt and a president with a platform of "getting the government off our backs" was elected with great popular support. This was also a time of growing interest in "privatization": the transfer from government to the private sector of assets, services, or the production of public goods.

Imprisonment: Demand and Supply[3]

Imprisonment, since it serves the public as a whole, rather than individual consumers, is a public good. Public goods are generally financed and arranged for (but not necessarily pro-

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[1]E. S. Savas, Privatizing the Public Sector; How to Shrink Government (Chatham NJ: Chatham House Publishers, 1982), p. 1.

[2]Seymour Martin Lipset and William Schneider, The Confidence Gap: Business, Labor,and Government in the Public Mind, (New York: The Free Press, 1983).

[3]This section is adapted from Charles H. Logan and Sharla P. Rausch, "Punish and Profit: The Emergence of Private Enterprise Prisons," Justice Quarterly 2(1985): 303-305.

duced) by government. Like other goods, they can be analyzed in terms of supply, demand, quality, and price. In the case of imprisonment, a clear pattern has emerged, one that is characteristic of goods or services produced under monopoly conditions. Quality is low, prices are high, and the supply has not kept up with demand.

State and federal prisoners totaled 581,609 at yearend 1987, up 76% from 1980. Prison capacity, however, has not kept up with the increasing population. Overall, state prisons in 1987 were filled to somewhere between 105% and 120% of capacity, depending on what measure of capacity is used, while federal prisons were somewhere between 137% to 173% of capacity. Over 12,000 state prisoners had to be held in local jails because the prisons were overflowing.[4] Thanks to a virtual moratorium on new prison construction during the 1970's, these overcrowded prisons are also deteriorating with age. The average inmate resides in a prison that is nearly 40 years old, and 10 percent are locked in prisons built before 1875.[5] Consequently, as of 1983, 41 states and the District of Columbia, either were under court order to remedy prison conditions or were the subject of litigation.[6]

The Cost of Imprisonment

The cost of constructing and operating prisons is enormous, and usually it is underestimated. Cost estimates for construction vary according to region, type of prison and program needs, use of prison labor, recency of data and techniques of adjusting for inflation, reference to past or planned construction, and definition of what is included in "cost." The U.S. Department of Justice, using 1982 dollars, cites average construction costs per bed of $26,000, $46,000, and $58,000, for minimum, medium, and maximum security prisons, respectively. Because they are based on a systematic survey of all states and are specified by prison type, these may be the best set of figures to use for average costs nationally.

Most estimates of construction cost are probably too low because they ignore such considerations as land purchase, site

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[4]U.S. Department of Justice, Prisoners in 1987. Bulletin. (Washington, D.C.: Bureau of Justice Statistics, April 1988).

[5]U.S. Department of Justice, Prisoners in 1983. Bulletin (Washington, D.C.: Bureau of Justice Statistics, 1984).

[6]Ibid.

preparation, financing cost, overruns, and hidden cost.[7] Taking all of these factors into account, plus a conservative estimate of $14,000 per inmate in annual operating cost, one economist has estimated that a 500 bed prison ostensibly costing $30 million to build today could end up costing $350,000 million altogether over a 30-year period.[8]

As with construction, figures on operating costs vary widely. The most common estimates are in the mid-teen thousands, reflected by the American Correctional Association's figure of $15,000.[9], and the federal prison system's figure of $13,000.[10] Most estimates of operating costs are too low because they do not take into account fringe benefits, interagency services, federal grants, and other off-budget items. Studies of state corrections budgets have shown actual expenditures to be about one-third (Indiana) or thirty percent (New York) higher than the official budgets reported.[11]

In short, the current costs of constructing and operating prisons, while difficult to calculate precisely, are obviously quite high and are probably much higher than most people, even knowledgeable ones, assume. Moreover, these costs continue to grow rapidly, more so than other costs. Over the last six years,

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[7]If construction is paid for by a 20-year bond at 10% interest, the real cost will be triple the original figure. To interest costs must be added overruns. In a survey of 15 states, cost overruns on prison construction averaged 39% over the initial budget. Overruns would include the effects of inflation during the years from bid to completion; hidden costs would include such things as architect and agency fees, construction supervision, equipment and insurance. After calculating these costs, a proposed Connecticut prison reported to cost $50,000 per bed would actually have cost $62,000 per bed, almost 25% more. See Bruce Cory and Stephen Gettinger, Time to Build? The Realities of Prison Construction (New York: Edna McConnell Clark Foundation, 1984), p. 16.

[8]Gail Funke, "Who's Buried in Grant's Tomb? -- Economics and Corrections for the Eighties and Beyond" (Alexandria, VA: Institute for Economic and Policy Studies, 1983), p. 3.

[9]Edwin W. Zedlewski, "The Economics of Disincarceration," National Institute of Justice Research in Brief (Washington, DC: Department of Justice, March 1984).

[10]U.S. Department of Justice, Report to the Nation on Crime and Justice: The Data (Washington, D.C.: Bureau of Justice Statistics, 1983), p. 93.

[11]Cory and Gettinger, p. 17.

the budget for care of juveniles in the custody of the Colorado Division of Youth Services has grown by 76.5%, which is over four times as fast as the general rate of inflation, as measured by an increase of 17.9% in the Consumer Price Index over the same period.[12] Nationwide, per capita spending on corrections at the state and local level has grown faster in the last 20 years than government spending in most other categories. From 1960 to 1980, per capita spending in 1980 dollars increased by 115% for corrections. While spending for public welfare increased 210%, most other categories increased less: hospitals and health care, 109%; police, 69%; education, 60%.[13] In Tennessee, the corrections budget has increased 1790% over the last 20 years, compared to an increase of 648% in the total General Fund and an increase of 810% in higher education (the single program with the next largest growth).[14]

The Privatization Option

Faced with overflowing and aging facilities, with court orders demanding immediate reforms, with already straining budgets and voter rejections of prison construction bond issues, and with mandatory sentence laws, toughening public attitudes, and "wars on drugs" that promise even larger prison populations, government authorities are ready to consider many different options to help relieve the strain. Some of these options include: emergency early release mechanisms; policies of selective incarceration and release; community corrections; home confinement with electronic monitoring; intensive supervision probation; increased use of fines; and contracting with other jurisdictions for jail and prison space. All of the options just listed are aimed at either decreasing or making more efficient the use of existing prison capacity.

Another option is to contract with the private sector to finance, construct, own, and operate prisons and jails. This option does not conflict with any of the above options; rather, it supplements them. Its greatest promise is that of flexibility. It promises to do for corrections what entrepreneurial activity is supposed to do best in any field: to anticipate needs and meet them. In response to today's most pressing need, commercial confinement companies offer an immediate prospect of relatively rapid and efficient increases in overall confinement

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[12]Rex Reed and David W. Holm, "The Monopoly Economics of Juvenile Custody; Could Private Competition Keep Costs Down?" Independence Issue Paper No. 15-88 (July 29, 1988), p. 1.

[13]U.S. Dept. of Justice, Report to the Nation, p. 100.

[14]The Tennessee Journal, vol 14, No. 47, November 21, 1988, pp. 2-3.

capacity. However, contracting need not always be aimed at expanding capacity. In places or times where the need for secure confinement is decreasing, or the demand for particular alternatives is growing, it should be easier to alter contracts or change contractors than to restructure entrenched public bureaucracies.

Private prisons and jails are not meant to replace alternatives, but to increase them. One purpose of competition, in addition to cost containment, is to maximize choice. The prison crisis described above has caused government managers to see the need for such alternatives with increasing urgency. In the early 1980's, the private sector began to produce a response to this need, in the form of proprietary (i.e., privately owned) companies specializing in the management of correctional and confinement facilities. These companies, and the facilities they have been running, will be described in the next chapter.

Sources of Opposition

Opposition to contracted prisons comes from several sources. Organizations that have either opposed or called for a moratorium on private prisons include the American Federation of State, County, and Municipal Employees (AFSCME), the National Sheriffs' Association, the American Civil Liberties Union (ACLU), and the American Bar Association (ABA).

It is interesting to note that contracting provoked relatively little controversy during the many years when the only people being confined through the private exercise of state authority were mental patients and juveniles. It may also be significant that most of the adult confinement facilities under private contract in the early 1980's were for the detention of illegal aliens. Finally, in this vein, the first privately contracted state prison holding adults at all levels of security is a facility for females.

It would be a mistake, however, to infer from this pattern that those who object to private prisons care less about the rights and welfare of mental patients, juveniles, aliens, or women than they do about those of normal adult male citizens. Rather, the issues loom larger now because greater numbers, and therefore greater interests, are at stake. Neither governmental monopoly over the confinement function nor government employee monopoly over the relevant jobs was seriously threatened until privatization began to encroach on the vast territory in the heartland of corrections. That's when the real turf battles began and opposition was organized by such groups as the AFSCME and the National Sheriffs' Association.

Employee unions and sheriffs' associations are opposed to private prisons largely for personal reasons: contracting poses

some threat to their jobs, and even more to their power.[15] Correctional officials have mixed reactions. Some see contracting as a challenge to their professional status and as lessening their control. Others see contracting as an extension of their capacities. This latter view may become more prevalent as public managers gain experience in managing contracts.

Probably the most powerful opponent is the AFSCME, which is the sixth largest of all the AFL-CIO international unions.[16] It represents over 50,000 corrections workers nationally.[17] As of 1981, correctional employees were unionized in 29 of 52 jurisdictions (state, federal, and District of Columbia).[18] Union strength is weakest in the southern tier of the U.S., which is where the private prison industry has concentrated most of its efforts. The AFSCME and other public employee unions are opposed to contracting out of virtually all public services, but their opposition to prison privatization seems especially vehement. Unions were the major force behind legislation in Pennsylvania imposing a one year moratorium on new privatization of prisons or jails. In San Diego County, California, the probation and correctional officers union in 1982 prevented RCA Corp. from receiving a contract to run a 100 bed juvenile detention facil-

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[15]Robert Poole makes several points in rebuttal to the broad characterization of contracting out as "destroying jobs." First, it is in the interest of labor as well as taxpayers and consumers, that workers be employed as efficiently as possible. Second, a contract can be made to specify that displaced government workers be given first preference for contracted jobs. This is the federal government's official policy on contracting out. Third, both government and nongovernment workers are given a stake in higher productivity by the existence of competing firms; they may even want to form their own firms through employee stock ownership plans. This is the case with at least one of the private prison contractors, Behavior Systems Southwest. Finally, it should be remembered that the purpose of both government agencies and private contractors is not to provide jobs but to provide services. See Robert W. Poole, Jr., "Objections to Privatization," Policy Review 24(1983): 105-119.

[16]Ralph de Toledano, Let Our Cities Burn (New Rochelle, NY: Arlington House, 1975), p. 49.

[17]Warren I. Cikins, "Privatization of the American Prison System: An Idea Whose Time Has Come?" Notre Dame Journal of Law, Ethics and Public Policy 2(1986): 455.

[18]Todd R. Clear and George F. Cole, American Corrections (Monterey, CA: Brooks/Cole, 1986), p. 306.

ity, by invoking an old county bylaw that prohibits contractors from running public facilities.[19]

The ACLU, a long-time champion of the rights of individuals against encroachment by the state, apparently fears private enterprise even more than government. They are concerned that private prisons would pose more of a threat to prisoners' due process rights than is the case with prisons run by government employees. Indeed, they believe that private prisons are intrinsically threatening to civil liberties.[20] A substantial part of the ACLU's opposition to private prisons, however, stems from their belief that there is already too much imprisonment and privatization would only lead to more.

In February, 1986, the House of Delegates of the American Bar Association passed a resolution recommending that "jurisdictions that are considering the privatization of prisons and jails not proceed . . . until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved."[21] The president-elect of the ABA was quoted at that time as declaring: "I am personally hostile to the notion [of private prisons]."[22] According to Tom Beasley, Chairman of Corrections Corporation of America and a member of the ABA, the Resolution was brought forward with three speakers in favor but without any opportunity for opposing debate.[23] The report that accompanied the ABA Resolution was written by a vigorous opponent of private prisons.

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[19]Kevin Krajick, "Prisons for Profit: the Private Alternative," State Legislatures 10(1984): 14.

[20]American Civil Liberties Union, Policy Guide, Policy #243, Board Minutes, April 12-13, 1986.

[21]Ira Robbins, "Privatization of Corrections: Defining the Issues" Judicature 69(1986): 326. The primary constitutional issue referred to in the ABA resolution is the question of private delegation of state authority. Ironically, the ABA, which as a private organization accredits law schools and thereby determines who can sit for bar exams, has survived repeated attempts to challenge this particular form of private delegation (of the state's licensing authority to the ABA).

[22]Martin Tolchin, "Bar Group Urges Halt in Use of Privately Run Jails" New York Times, February 12, 1986.

[23]Testimony of Thomas Beasley, Chairman, Corrections Corporation of America, to President's Commission on Privatization, Washington, DC, December 22, 1987.

In later chapters, I will examine in detail the issues raised by these and other critics of privatization. Before taking up those issues, however, the following chapter gives a descriptive overview of current or recent contracts for the private operation of secure confinement facilities -- i.e., private prisons and jails.

2. PRIVATE PRISONS TODAY: A DESCRIPTIVE OVERVIEW

"Private prisons" is not a very precise term, though its general meaning is fairly clear. It refers to a place of confinement that is managed by a private company. "Prison" will be used broadly in this report, to include any place of involuntary confinement within the criminal justice system. This would include facilities of the Immigration and Naturalization Service (which is part of the Department of Justice) and juvenile justice facilities, but not places for involuntary civil confinement of the mentally ill. Within the current context, "prison" will be more or less synonymous with "confinement," "correctional," or "penal" facility.[1] These are not primarily residential facilities, like foster homes, group homes, halfway houses, or community treatment centers. They are places of incarceration: prisons, detention centers, jails, reformatories and other such institutions.

The term "private" (or, sometimes, "proprietary") prison implies private ownership, at least of the management company, and sometimes of the facility's buildings and grounds. Private prisons are those that are privately owned, operated, or managed,[2] under contract to government. No prison is completely private, in the sense of being independent of government authority, control, and revenue. Private prisons operate only under contract to government. Hence, they may often be referred to simply as "contractors," "vendors," or "service providers."

Reference to "proprietary" or "commercial" prisons will reflect the fact that these are businesses. However, they may be organized on either a for-profit or a not-for-profit basis. They may be closely held, publicly traded, or employee owned (profit sharing). What they all have in common is that they are private

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[1]Though the term "corrections" became standard during the heyday of rehabilitation, it is still used even by those who regard punishment as the primary purpose of the criminal sanction. "Penal" facility is likewise generic although more closely associated with a punitive orientation. Some would object to calling pre-trial detention or juvenile court placements "penal" and therefore "prisons," because officially they are not punitive. However, in this report, such distinctions will not always be important and the term "prison" will often include jails and juvenile facilities.

[2]Any combination of the elements -- private ownership, private operation, private management -- is possible. There is even one private company that manages a jail owned by the county and staffed (operated) by county employees, thus combining governmental operation and ownership with private management.

entities operating under contract to government. They perform government functions and may be regarded for some purposes as "quasi-governmental," but they are not governmental in organizational form.

As of late 1988, private companies were running at least two dozen confinement institutions totalling over 3,000 beds in at least nine states. These included: secure juvenile facilities; minimum security state facilities for pre-parole cases and for return-to-custody parole violators; jails; county prisons; and detention centers for the Immigration and Naturalization Service.

Correctional facilities can be divided into four general types:

1. Juvenile Open Facilities
2. Juvenile Institutional Facilities
3. Adult Community Facilities
4. Adult Confinement Facilities

The Bureau of Justice Statistics classifies juvenile facilities as "open" or "institutional" based on degree of access to community resources and on degree of security, which includes supervision as well as physical plant.[3] Open facilities are mainly shelters, halfway houses or group homes, and a few ranches. Institutional facilities include detention or diagnostic centers, training schools, and ranches. Adult facilities are classified by BJS as either "community" or "confinement," depending on whether the proportion of residents who are regularly allowed to depart unaccompanied (e.g., for work or study) is greater than half (community) or less than half (confinement).

Proprietary facilities are found among all four of these types. Since they are part of the criminal and juvenile justice systems, they all involve the exercise of state authority and generally at least some deprivation of liberty. Thus, although the concept of "proprietary prisons" is mainly associated with confinement or institutionalization, it could be taken to include open environment and community facilities as well. However, the private community-based and open facilities are so numerous, widespread, and broadly accepted that they will be described here only briefly, in statistical outline. The more recent, unfamiliar, and controversial examples of institutional and confinement facilities will be described in greater detail, including case histories.

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[3]U. S. Department of Justice, Children in Custody. 1982/83 Census of Juvenile Detention and Correctional Facilities (Washington, DC: Bureau of Justice Statistics, September 1986), p. 3.

Juvenile Open Facilities

Private, low security juvenile facilities have served the corrections system in America since the nineteenth century. There has been relatively little controversy about these facilities, whether run by nonprofit or for-profit organizations. Indeed, there has been much praise, even from individuals and organizations opposed to private prisons, for the substitution of private community-based programs in place of state institutions of juvenile justice. For example, Jerome Miller was widely applauded for changing the juvenile justice system of Massachusetts from almost entirely institutional in 1969 to almost entirely community-based programs by 1974.[4] The Massachusetts Division of Youth Services now operates all of its community-based facilities (and half of its secure programs) through private contractors.[5]

The Bureau of Justice Statistics counted 82,272 persons held in 2,900 juvenile detention and correctional facilities on February 1, 1983.[6] The 1,877 private facilities, found in every state but Delaware, outnumbered the 1,023 public facilities almost 2 to 1. While the privates comprised 65% of all facilities, they held just 38% of the juveniles in custody, since they were generally smaller units and provided more long-term care.[7]

For juvenile facilities with open environments, private contracting is now standard practice. Eighty-one percent of such facilities were privately operated as of 1983 and they housed about three-quarters (72%) of the juveniles held in that type of custody[8]

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[4]Michael A. Kroll, "Prisons for Profit." Progressive, September, 1984, p. 22.

[5]The community-based contractors are all nonprofit agencies, by state regulation. So far, the secure facility contractors have also been nonprofit, but "DYS officials assert ... that there would be little opposition to allowing for-profit contractors." Joan Mullen, Kent John Chabotar, and Deborah M. Carrow, The Privatization of Corrections (Washington, DC: National Institute of Justice, February 1985), p. 62.

[6]U. S. Department of Justice, Children in Custody.

[7]Unpublished figures supplied by the Bureau of Justice Statistics for 1985 indicate 34,080 juveniles being held in 1,996 private institutions.

[8]U. S. Department of Justice, Children in Custody.

One reason for the wide acceptance of private facilities with open, or noninstitutional, environments may be that they are not perceived as examples of private exercise of state power. Even open facilities, however, are basically coercive in nature when they are used by the juvenile justice system. That is, they exercise authority backed up by actual or potential use of state force. Any court placement, even in the most open environment (like a group home), carries with it the possibility of subsequent judicial or other official intervention. Only 18% of the 25,855 admissions to private open facilities during 1982 were voluntary admissions, without adjudication.[9] Thus, the vast majority of admissions even to facilities with "open" environments are involuntary commitments.

Since admission is mostly not voluntary, the phrase "open facility" does not imply complete freedom to come and go. Unpublished data from the 1982/83 Children in Custody Census show that all but 44 (3%) of the private open facilities were nonsecure in terms of hardware or guarded exits. In terms of custody, however, about 18% of the private open facilities were classified as medium or strict.[10]

Adult Community Facilities

As of June 30, 1986, according to the ACA's Directory of Juvenile and Adult Correctional Departments, Institutions, Agencies and Paroling Authorities, there were 4,758 adult state correctional inmates in community homes, of whom 61% were in contracted facilities. In addition, all of the 2,791 federal adults in community homes were in contracted facilities.[11] One survey found adult community-based facilities under contract in 32 states.[12] The International Halfway House Association estimates that about 1,000 of its members (private vendors) provide community programs for correctional agencies.[13]

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[9]U. S. Department of Justice, Children in Custody: Advance Report on the 1982 Census of Private Juvenile Facilities, including Comparisons with Public Facilities (Washington, DC: Bureau of Justice Statistics, March 1984).

[10]Data from handwritten and unpublished tables at BJS.

[11]Some of the community treatment centers are contracted to local public agencies, but most are contracted to private providers.

[12]Mullen et al., pp. 56-58.

[13]Kevin Krajick, "Prisons for Profit: the Private Alternative," State Legislatures 10(1984): 10.

Juvenile Institutional Facilities

Juvenile correctional facilities having an institutional environment are most often run by government employees. Still, there are many that operate under private contracts. In the 1982/83 census, there were 808 institutional facilities nationwide, of which 187 (23%) were private.[14] While almost all (91%) of the public institutional facilities were secure in terms of hardware or guarded exits, only 39 percent (73) of the private institutional facilities had that sort of security. What made these facilities "institutional" in BJS terminology was primarily their self-description as having a strict or medium level of custody (true of 92%) of this group).[15]

This category -- private juvenile detention and correctional facilities identified by BJS as having an institutional environment -- may contain several examples of what I am calling "proprietary prisons." Unfortunately, it is impossible to trace the identities of those facilities directly, because of confidentiality guarantees provided by the Bureau of the Census, which gathers these data, and by the Bureau of Justice Statistics, which analyzes them. However, several such facilities have been identified by journalists and researchers in recent years.

Weaversville Intensive Treatment Unit

One of the earliest of the secure institutions of confinement to be fully administered by a for-profit enterprise, and perhaps the first in modern times, is the Weaversville Intensive Treatment Unit, which opened in North Hampton, Pennsylvania, in 1975. When the Attorney General of Pennsylvania ruled that even hard-core delinquents could not be confined with adult offenders, officials turned for help to RCA Services, a division of the RCA Company that had previously run treatment programs for the state. In 10 days, RCA renovated a state-owned building to establish Weaversville and was given a contract to run it.[16]

High security and control are maintained at Weaversville by a fence, locked internal and external doors, intensive supervision

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[14]U. S. Department of Justice, Children in Custody.

[15]All data for this paragraph are from handwritten and unpublished tables at BJS.

[16]Kevin Krajick, "Punishment for Profit" Across the Board 21(March 1984): 23.

(35 staff for 22 youths), and room restriction when necessary.[17] The security is necessitated by the nature of the population: boys aged 15-18 who have failed in or run from other programs and who have committed violent or otherwise serious offenses, such as burglary, robbery, assault, sex offenses, weapons offenses, arson, vandalism, and theft.[18] In spite of the high security, however, the atmosphere is relaxed. Each resident has his own, carpeted room, with his own key.[19] Length of stay averages 6 months. The program emphasizes behavior modification, education, and vocational training.

Contract renewal has been competitive, originally on a yearly basis, later changed to every three years.[20]

Eckerd Youth Development Center

While Weaversville was a first for the private sector in terms of its high security custody for chronic and serious offenders, it remained in the tradition, for private facilities, of very small size. By the end of the 1970's, no private enterprise had yet been put in charge of a large and secure correctional institution.

That threshold was crossed in the summer and fall of 1982, when the Florida School for Boys at Okeechobee, one of Florida's three large juvenile institutions (with 400 to 450 inmates) became the Jack and Ruth Eckerd Youth Development Center. The state retained ownership, but issued separate contracts for operating the program and for managing the facility. Both contracts were awarded (through open competition, but with only one responding bidder) to the Eckerd Foundation, a nonprofit arm of the Eckerd Corporation, a major drug manufacturer and drug-store chain.[21] Prior to 1982, the Eckerd Foundation had for many years run programs in Florida for emotionally disturbed and delinquent youths.

The state had planned to close the Okeechobee school but found that it could not afford to do so. For years it allowed the facility to deteriorate, with no money budgeted for physical

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[17]James O. Finckenauer, Juvenile Delinquency and Corrections: The Gap Between Theory and Practice (Orlando, Florida: Academic Press, 1984), p. 182.

[18]Ibid., p. 178.

[19]Krajick, "Punishment for Profit," p. 25.

[20]Mullen et al., p. 65.

[21]Ibid., pp. 62-63.

improvements. Conditions were bad, and led to a lawsuit filed by the ACLU and other groups, charging "cruel and abusive conditions of confinement." The suit named Okeechobee and two other state-run institutions, but not the Eckerd Foundation, which the critics agree simply inherited the conditions. The Foundation donated $280,000 of its own money to upgrade the staff and worked to improve the physical plant and equipment.[22]

The population, aged 14 to 18, is predominantly hard-core, serious felony delinquents, with a complicating mix of severely disturbed and first-time offenders. High security is provided by close supervision, a fence with electronic sensors, and the isolated location of the training school. The average stay is about 6 months.

Florida Environmental Institute

The Florida Environmental Institute, a program of the non-profit Associated Marine Institutes, is at least partially institutional and secure. Run since 1983 under contract to the Florida Department of Health and Rehabilitative Services, this is a three-phase program for Dade and Broward Counties. The third phase is an open, nonresidential program of participation in one of the marine biology institutes operated by the Associated Marine Institutes. Phases one and two, however, consist of work, vocational, educational, and values training, and occur in tents and trailers in an isolated swamp.[23] These phases are institutional in the sense of having no interface with an outside community, and they have at least a minimal level of security in the form of isolation. The program handles serious juvenile offenders.

Shelby Training Center

Another institutional juvenile facility is managed by Corrections Corporation of America, the leading proprietary prison company in the country (CCA will be described in more detail in the next section). Opened in May, 1986, the Shelby Training Center in Memphis Tennessee was built for Shelby County by CCA-- in 10 months with an investment of $6.5 million of company funds -- to hold male delinquents, primarily property offenders. The Training Center is a secure lockup, with close supervision, locked windows and doors, and a fence, though it looks like a college campus from the street. The complex consists of six housing units with 150 single rooms; six classrooms; library, music and art room, mechanical, woodworking and electrical shop; dining area, and kitchen. It has 84 employees. The facility is

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[22]Krajick, "Punishment for Profit."

[23]Mullen et al., p. 65.

accredited by the American Correctional Association, as is its sister facility, Tall Trees, a 50-bed, nonsecure, community based juvenile facility.

Under a state law effective in 1982, the state pays the county a per diem fee to hold locally offenders that would otherwise be placed in state institutions. The county passes this per diem on to CCA, minus two percent for administration costs. While the facility has a capacity of 150, it has been held to 110; this has been the limit that the state will reimburse, though that may change.[24]

Adult Confinement Facilities

The most recent and most controversial form of proprietary prison is the adult confinement facility, in which most of the population is not permitted to have access to the community unaccompanied. Private versions of these facilities began to appear in the 1980's. They fall into three groups: federally-contracted, state-contracted, and locally-contracted.

Federal Contracts

Hidden Valley Ranch

In 1984, the federal Youth Corrections Act expired, leaving the federal Bureau of Prisons with a number of young adult offenders, aged 18-26, with remaining sentences to serve for such acts as bank robbery and mail fraud. The BOP signed a three-year contract with Eclectic Communications, Inc., a for-profit company, to house about 60 of these offenders at Hidden Valley Ranch, in LaHonda, California. The ranch, located in the mountains on 3.5 acres leased from San Francisco County, has the air of a suburban school, but is surrounded by a 12-foot chain-link and razor-wire fence[25]. The staff of 30 is headed by Tom Keohane, a 27-year veteran of the Bureau of Prisons.[26]

The Bureau of Prisons was not the first federal agency to contract for confinement, nor the one to make the most use of that arrangement. That distinction belongs to the U. S. Immigration and Naturalization Service. The INS has contracted at least half a dozen facilities for the detention of illegal aliens awaiting deportation. These facilities are generally minimum to medium security and often include arrangements for families.

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[24] Phone conversation with William R. Key, Juvenile Court, Memphis, July 6, 1987.

[25] Los Angeles Times, May 29, 1986.

[26] San Jose Mercury News, March 15, 1985.

Contracting provided the INS with a rapid, flexible, and cost-effective response to dramatic increases in illegal immigration,, particularly in the southwest. Jails and other facilities operated by local levels of government could no longer handle the overflow. Even where they could, they were often too expensive, having been built for a higher level of security than the INS needed, and unable to accommodate families.

Behavioral Systems Southwest, INS Contracts

In 1980, the INS awarded its first facility management contract via competitive bidding to a for-profit company, Behavioral Systems Southwest. BSS was founded as an offshoot of a behavioral modification training program by its current President, Theodore R. Nissen, and Vice President, Tamara S. Lindholm. Both Nissen and Lindholm had long careers in the California Departments of Corrections. BSS now manages several holding facilities for the INS, community treatment centers for the federal Bureau of Prisons, and re-entry programs for the corrections departments of Arizona and California.[27] With 130 employees, many of them ex-convicts, BSS oversees 465 inmates.[28]

For its first facility -- the Pasadena Immigration Holding Facility -- BSS converted a former convalescent home to house 125 men, women, and children.[29] Over 3,000 aliens a year are processed by the Pasadena facility.[30]. BSS later won contracts for other INS holding facilities in San Diego and Aurora, Colorado, near Denver. The buildings have locked doors and razor wire on the roof; the staff is not armed.[31] BSS leases its buildings for 10 years on the private market and operates them for the INS on annual contracts, thus exposing itself to some risk if a contract is not renewed.[32] The company did, in fact, give up its contract to run the Aurora facility in 1987, when the INS contracted with Wackenhut to build a new facility there. However, they were able to convert the facility to another use for the remaining two years of their lease. They had originally

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[27]Behavioral Systems Southwest, "Prospectus" (Pomona, CA: Behavioral Systems Southwest, 1985).

[28] Money, May, 1986, p. 32.

[29]Mullen et. al., p. 67.

[30]Behavioral Systems Southwest.

[31]Mullen et al., p. 67.

[32]Ibid.

converted a warehouse into the 85-bed facility at a cost of $150,000.[33]

BSS has been reported to carry insurance of $5 million and its profits have been variously reported as 8% on a gross of $6 million annually,[34] or 3.5% on revenues of $4.5 million.[35]

Corrections Corporation of America, INS Contracts

Another INS contractor is Corrections Corporation of America (CCA), which is now the leading proprietary manager of correctional facilities. As of summer, 1988, CCA owned or leased thirteen correctional facilities in five states with 3,215 beds.[36] Originally financed with $10 million in venture capital from the Massey Burch Investment Group, the same firm that started Hospital Corporation of America,[37] CCA is now a publicly-traded corporation with assets of about $36 million in 1987.[38] CCA is self-insured for $5 million in general liability coverage, which includes personal coverage of company officers while acting in their official capacities.[39]

The company, headquartered in Nas' ville, was founded by Thomas Beasley, a Tennessee businessman, attorney, West Point graduate, and former Tennessee Republican Party chairman.[40] Its Executive Vice President is T. Don Hutto, a former commissioner of corrections in Arkansas and Virginia and a recent President of the American Correctional Association.

In April, 1984, CCA opened the Houston Processing Center, a 350 bed dual-purpose facility holding adult illegal aliens awaiting deportation by the INS and convicted alien offenders in

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[33]Peter Young, The Prison Cell (London: The Adam Smith Institute), p. 8.

[34]Philadelphia Inquirer, April 4, 1984.

[35] Money, May, 1986: 32.

[36]Corrections Corporation of America press release, July 26, 1988.

[37]Krajick, "Prisons for Profit," p. 11.

[38]Corrections Corporation of America, Second Quarter Report 1987 (Nashville, TN: Corrections Corporation of America, 1987).

[39]Corrections Corporation of America, Annual Report, 1986 (Nashville, TN: Corrections Corporation of America, 1986), p. 24.

[40]Hartford Courant, January 3, 1984.

the custody of the Bureau of Prisons. The company owns the facility, and operates it under annual contracts with the INS and the BOP. CCA took just seven months to locate a site, finance, design, and construct the $5 million facility.[41] During part of the construction period, CCA leased a former motel to house 140 aliens temporarily.[42]

On the outside, the Houston facility resembles an office building, including landscaping, while inside it is like a dormitory. Locked doors provide perimeter security and no weapons are carried inside.[43] CCA maintains a staff of 55 full-time employees[44] and provides space for several INS employees, whose duties include on-site monitoring of the CCA contract, in addition to other work for the INS.[45] The Houston Processing Center is fully accredited by the Commission on Accreditation for Corrections,[46] and operates under the regulations and standards of the INS.[47]

In a second contract that began in March 1985, CCA operates the Laredo Processing Center for the INS in Laredo, Texas. CCA built this 200 bed facility in 145 days, for $3 million.[48] The Laredo facility is designed for men, women, and children, unlike CCA's Houston facility, which is restricted to adults.

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[41]T. Don Hutto and G. E. Vick, "Designing the Private Correctional Facility," Corrections Today April, 1984, p. 85.

[42]Mullen et al., p. 68.

[43]Ibid., pp. 67-68.

[44]National Criminal Justice Reference Service, "Privatization Program Search" (Rockville, MD: National Criminal Justice Reference Service, 1985).

[45]Conversation with Robert Schmidt, Immigration and Naturalization Service, May 21, 1987.

[46]American Correctional Association, Directory of Juvenile and Adult Correctional Departments, Institutions, Agencies, and Paroling Authorities (College Park, MD: American Correctional Association, 1987), p. 509.

[47]Mullen et al., pp. 68-69.

[48]Commonwealth of Virginia, "Study of Correctional Privatization" (Richmond, VA: Secretary of Transportation and Public Safety, 1986), pp. 66, 71; Chicago Tribune, May 19, 1985.

Wackenhut Security Company, INS Contract

With its most recent contract, the INS has put an important new player into the game: the $300 million Wackenhut Security Company, one of the nation's largest suppliers of private security services. On May 4, 1987, Wackenhut opened a new immigration holding facility near Denver, Colorado, with 150 beds.[49]

State Contracts

Hidden Valley Ranch

In 1936, Eclectic Communications, Inc. signed a three-year contract with the State of California to incarcerate up to 80 adult, low-risk parole violators at Hidden Valley Ranch in LaHonda.[50] The state pays Eclectic Communications a monthly rent plus a per diem fee to manage the facility and run its programs. In addition to Eclectic's own staff, the state provides six California corrections officers to supervise security. All guards are unarmed.

Despite a lack of enthusiasm for privatization in the Department of Corrections, and opposition from correctional employees' unions in the legislature, the department plans to contract more facilities like this one.[51] Such contracts allow the state to respond quickly to rapid increases in cases, without the long-term commitment of civil service employment and construction.

Artesian Oaks

A second such facility, modelled after Hidden Valley but run by a different contractor, is Artesian Oaks, in Saugus, California. This 100 bed facility for juvenile parole violators is operated by Management and Training Corp., of Ogden Utah, a company that manages federal Job Corps training centers.[52]

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[49]Robert Schmidt, telephone interview, May 21, 1987.

[50]As described above, Hidden Valley was previously under contract to the federal Bureau of Prisons as a training camp for Youth Corrections Act offenders. The state contract began the same year the federal contract ended. Criminal Justice Newsletter, June 16, 1986.

[51]Ibid.

[52]Los Angeles Times May 29,, 1986.

Marion Adjustment Center

The first facility to have the full combination of private ownership, private operation and management, incarceration of adult felons sentenced by a state, and a classification level (on paper) of at least "minimum security,"[53] was the United States Corrections Corporation's Marion Adjustment Center in St. Mary's Kentucky, which began receiving inmates on January 6, 1986.

Without detracting from this distinction, it should in fairness to history be noted that other vendors had previously achieved all of these elements and more, though not yet in full combination at one facility. Of special note would be Corrections Corporation of America, which on October 1, 1985 assumed exclusive possession (but not title) and full operation of the Bay County (Florida) Jail. With a level VI (highest) security wing holding capital murderers and rapists, with postconviction as well as pretrial inmates, including federal and state in addition to county commitments, and with cells for men, women, and juveniles, this facility had it all . . . except for private ownership simultaneous with operation. That element was added later with CCA's construction and ownership of the Jail Annex, which opened on April 30, 1986.[54]

Still, the opening of Marion Adjustment Center was a milestone in the history of proprietary prisons. The mere fact that it is widely referred to as the first contracted state prison--whether the label of "prison" is accurate or not -- makes Marion a political test of public perceptions of proprietary prisons.

On legal, as opposed to political grounds, however, perhaps the U. S. Corrections Corporation (USCC) should not be too eager to accept for itself the title of first privately owned and operated state confinement facility. Under a 1972 statute, the Kentucky Corrections Cabinet is authorized to establish "community residential centers" to hold convicted felons. The state attorney general, however, defines the M.A.C. as a minimum security prison, for which no specific contract-authorizing legislation exists. A citizens' group has brought a lawsuit against the state based on that opinion.[55]

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[53]Actually, this facility, a former college, opened without any fences or armed guards, so its security at that point consisted mainly of supervision.

[54]Another multi-security county jail was taken over by private management on October 1, 1985: the Butler County (Pennsylvania) Prison run by Buckingham Security Ltd.

[55]Bruce Cory, "From Rhetoric to Reality: Privatization Put to the Test," Corrections Compendium, May 1986, p. 11.

USCC was incorporated in January, 1983 by co-owners Milton Thompson, an architect, and J. Clifford Todd, a builder and developer, with an initial investment of $1.9 million.[56] To support their bid for the 2-year contract, they purchased an old seminary, St. Mary's College in St. Mary Kentucky, for $695,000. They were able to open the facility without any remodeling at first; residents were employed at that task later.[57]

The population at Marion is drawn from state prisoners nearing their parole eligibility dates.[58] The state selects cases for Marion on the basis of low risk, and USCC can reject any they regard as unsuitable. This selection process may help explain why 63% of Marion residents are in educational programs, compared to 20% of the inmates in other state institutions.[59] During the first 7 months of operation, there were 4 walk-aways, 3 of whom were recaptured within 24 hours. In a comparison state facility, walk-aways averaged 1.5 per week.[60] The staff in 1986 numbered 46, with 33 of them in security. An on-site state employee monitors the contract.

The facility has a physical capacity of 400 and an authorized capacity of 200.[61] Kentucky guarantees USCC a minimum daily population of 175. This has the advantage, over a minimum payment clause, of ensuring that the state gets what it pays for, while protecting the contractor.[62] USCC carries insurance that will cover up to $1.5 million per incident.[63]

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[56]Louisville Courier-Journal, May 19, 1986.

[57]Ibid.

[58]Charles Ring, Contracting for the Operation of Private Prisons: Pros and Cons (College Park, MD: American Correctional Association, 1987), p. 33.

[59]Courier-Journal, May 19, 1986.

[60]Commonwealth of Virginia, pp. 57-58.

[61]Commonwealth of Virginia, pp. 65, 80; Courier-Journal, May 19, 1986.

[62]Ring, p. 33.

[63]Commonwealth of Virginia, p. 59.

New Mexico's Women's Prison

On July 1, 1988, the State of New Mexico signed a contract with Corrections Corporation of America calling for a new, 200-bed facility to be designed, financed, constructed, and then operated by the company commencing April 1, 1989. Its purpose is to hold all of the state's female felons, anticipated to number about 160 (any excess beds, up to the capacity of 200, may be filled by CCA with inmates from federal or other state jurisdictions). Located on 40 acres in Grants, New Mexico, this prison will have high external security and prisoners at all security levels of custody. It thus will be the first minimum through maximum security state prison to be run in contemporary times by a private contractor.

New Mexico currently keeps its female prisoners in another facility in Grants that doubles as a reception and diagnostic center. When CCA begins operation, all current employees will have the option of either joining CCA's staff, which will number 85 full time equivalent employees, or remaining with the state. The state will be responsible for pre-service training of all new CCA employees.

The contract has a four-year initial term, with an option for successive two-year extensions, up to twenty years. The extension option must be exercised after the first two years and every two years thereafter, thus occurring always in the middle of four year terms. If the contract is terminated, the state will buy the facility and all associated property from CCA, or it may, at its option, make this purchase anytime during the contract, at a declining percentage of the property's initially appraised value. If the contract runs the full twenty years, the state may buy the property for one dollar.

CCA will offer a program of services to include education, recreation, counseling, and medical and dental services. They will run an inmate work program and provide space for an industry program to be run by the state. They also will run a work and school release program and a furlough program.

CCA will provide classification of inmates, using the state's classification manual, and will impose discipline, with grievance procedures, in accordance with New Mexico Corrections Department (NMCD) Policy and Procedures and state law. However, the NMCD retains final review and authority over: classification as it affects custody level; discipline; grievances; allocation or revocation of good time; computation of parole eligibility or discharge dates; and approval of work, medical, or temporary furloughs. CCA may take no action on these without a prior written decision by NMCD. The NMCD will provide a Contract Monitor, who will have office space in and full access to the CCA facility.

CCA must maintain property, general liability, and civil rights liability insurance, naming the state as an additional insured, and agrees to defend the state in any lawsuit. In addition, CCA indemnifies the state against any claims, and all costs of defending against claims, arising out of the operation of the prison.

The contract obliges CCA to seek and obtain ACA accreditation within 24 months of operation.

Local Contracts

While no state has yet contracted for the operation of a medium or maximum security prison, something like that has already occurred on a small scale at the local level, in contracts for the management of jails. By their nature, jails must be prepared to hold and process all types of offenders as they enter the criminal justice system. In addition, jails often serve as temporary catchbasins for the runoff and spillover from all sorts of other institutions. Thus, overcrowding anywhere aggravates the already serious overcrowding in local lockups. Traditionally the poorest level of government, counties have been under the greatest pressure to find alternative solutions to crises in the demand for and supply of incarceration. Despite organized opposition from the National Sheriffs' Association, one solution being explored by counties is private contracting.

Bay County Jail and Annex

A few years ago, Bay County, Florida, was devoting 65% of its budget to its jail, yet it faced overcrowding, medical problems, violations of state regulations, and lawsuits, including one inmate rape case in which corrections officers testified that they had not been on the floor for over two hours.[64] At the suggestion of a local newsman, the county commission considered the option of privatization. After an open and competitive process of Requests for Qualifications and subsequent bids, the county awarded a contract to Corrections Corporation of America.

Under the contract, CCA assumed full management of the Bay County Jail starting October 1, 1985, and agreed to build (and own) a new Jail Annex in addition to renovating the Jail. The Annex opened on April 30, 1986. Its facilities for 200 men, women, and (separately housed) juveniles supplemented the 204 beds for adult men at the main jail. The Bay County/CCA facilities hold all possible types of offender, from misdemeanants to capital murderers. They include both pretrial detention cases and convicted offenders awaiting transfer or serving sentences of

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[64]Site visit and interviews with county officials.

one year or less. They are mainly county inmates, but include also some state and federal prisoners.

Security at the Jail consists of locked exits, locked internal gates, and locked cells. At the Annex, there is a chain-link and razor wire fence, internal gates, and some locked cells in addition to the more open, dormitory-style housing areas. Both facilities have remote monitors and lock-control stations. Consistent with Florida policy followed in all county jails, no arms are carried inside either facility, but some CCA security guards are certified to carry arms outside.

A county employee monitors the contract and has final authority over all recommendations regarding "gain time" made by CCA personnel in disciplinary actions. Rules for inmates and procedures for discipline and allocation of gain time were established in conformity to Florida statutes and Department of Corrections policies. Where not in conflict with Florida law or policy, CCA abides by the often more exacting standards of the American Correctional Association.

Under contract, CCA is required to provide insurance and to indemnify the county against all legal damages resulting from the operation of the jail. At first, CCA carried a purchased policy; later they instituted a self-insurance plan.

Sheriff Lavelle Pitts was strongly opposed to the contract. He retained all of his salary and duties as sheriff except for administration of the jail, but 70 of the 75 deputies who previously worked in his jail became CCA employees on completing 40 hours of training by CCA.[65] CCA paid them for accrued vacation time and gave them raises ranging from 10% to 20%. After one year with the company, employees are eligible to participate in an employee stock ownership program.[66]

The 20-year contract with CCA specifies conditions for termination by either party. The fee charged by CCA may increase with inflation, but by no more than 5% a year. There is a provision, however, for negotiating adjustments every three years in the event of unforseen circumstances. A budget limit is set each year based on projected population size and projected inflation. The fee varies by population level, with lower per diem charges above specified population breakpoints. The contract specifies a minimum payment by the County of an amount equal to the charge for 285 prisoners per month. CCA may rent unused space to other jurisdictions, at a price at least equal to

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[65]Cory, p. 13.

[66]October 22, 1987 communication from David Myers, CCA Vice President, Facility Operations.

that charged to Bay County. Any excess is shared equally by the County and CCA.

Silverdale Detention Center

On October 15, 1984 -- the year before it took over the Bay County Jail -- CCA assumed management of the Silverdale Detention Center, a minimum to medium security work farm for adults under the jurisdiction of Hamilton County, Tennessee, at Chattanooga. Silverdale has a capacity of 400, including 100 beds for females. Since the Hamilton County jail has no arrangements for females, some of the women at Silverdale are pre-trial detainees; the rest of the prisoners are convicted offenders. As reported in The New York Times,[67] Silverdale "houses state prisoners serving long terms for felonies, including murder, county prisoners serving less than a year for misdemeanors, and a growing number of prisoners serving mandatory 48-hour sentences for driving while intoxicated. Also growing in number are second offenders serving a minimum of 45 days and third offenders serving a minimum of 120 days under Tennessee's tough laws on driving while drunk." The maximum sentence is 6 years, and about one-third serve more than one year, but the average stay is short, about 45 days.[68]

As part of the contract, Hamilton County leases the Silverdale facility to CCA. All buildings and grounds remain the property of the county, including the $1.6 million in renovations and additions invested by CCA during its first year of operation. If the county terminates the contract, however, it must reimburse CCA for any remaining unamortized portion of this investment.

The contract runs for 32 years and is automatically renewable at 4-year intervals, though conditions for termination are included. Payment rates, however, are renegotiated every year.

All prior county employees at Silverdale were retained by CCA, but there was 50% turnover within two years.[69] The previous warden of Silverdale under its operation by the county is now the Hamilton County Director of Corrections and the monitor for the CCA contract. Unlike Sheriff Pitts, the displaced warden in Bay County, The Hamilton County corrections director is favorably impressed with the new management of his old facility, in spite

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[67]The New York Times, May 21, 1985.

[68]Jan Brakel, "Amended Proposal on 'Privatizing' Corrections," (American Bar Foundation, September, 1986), p. 20.

[69]Ibid., pp. 19-20.

of his initial skepticism toward the idea of a proprietary operation.[70]

CCA expanded bed space and introduced many changes at Silverdale. A list prepared by the warden identifies 74 innovations effected by CCA during its first year.[71] Public officials doubt that the county could have afforded to make these improvements on its own.[72]

In contractually-mandated pursuit of accreditation, guards receive more training than was previously provided by the county, and many operating procedures are tighter than before.[73] As in all CCA facilities, the guards inside are unarmed; after experiencing a minor disturbance, Silverdale has made riot equipment, including mace, shields, and riot guns, available to be issued if needed.[74] Procedures for the discipline of inmates and the allocation of gain time are specified in CCA's contract and are similar to those for the Bay County Jail.[75]

Santa Fe County Jail

Santa Fe County, New Mexico is the site of a third CCA contract at the local level of government. After running its new jail for a year, the county decided to consider the private alternative. As a result of competitive bidding among five contenders, the county awarded a three-year contract to CCA, commencing August 1, 1986.[76] The jail -- The Santa Fe County

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[70]National Criminal Justice Association, "Private Sector Involvement in Financing and Managing Correctional Facilities" (Washington, DC: National Criminal Justice Association, April 1987), p. 18.

[71]The changes fall under the headings of Security, Medical Services, Recreation, Classification, Programs, Case Management, Food Services, Maintenance, Training and Personnel, and Chaplaincy. Brakel, p. 16.

[72]National Criminal Justice Association, p. 18.

[73]Ibid., p. 18.

[74]Communication from David Myers, CCA, October 22, 1987.

[75]National Criminal Justice Association, p. 18.

[76]The New Mexican, June 21, 1986.

Detention Facility -- has 147 beds, plus a section for juveniles with 20 housing cells and 4 booking cells.[77]

Through supplemental contracts, CCA also rents some of its beds at the Santa Fe County Detention Facility to other jurisdictions, including the city of Santa Fe, the Federal Bureau of Prisons, the U.S. Marshall's Service, San Miguel County, and Pecos and Rio Arriba, New Mexico.[78]

CCA has posted a $325,000 certificate of deposit as collateral on a performance bond for this contract.[79]

CCA assured the staff of 58 that they would retain their jobs and salaries but that there would be retraining and reorganization required. The company "also promised to assume employees' accrued vacation; [to] offer 10 paid holidays [plus optional unpaid holidays], 12 days of annual leave and 12 sick days; [and to] provide comprehensive medical and life insurance and a stock ownership plan".[80]

A 1984 New Mexico statute authorizes contracting for two county jails as pilot projects.[81] The law grants peace officer powers to private jailers but denies them the power to award or take away gain time; that decision is left to sheriffs. It limits contracts to three years. It requires the contractor to assume all liability and to buy enough insurance to cover itself, as determined by the Risk Management Division of the General Services Department. It requires counties to inspect both private and public jails at least two times a year. If these inspections uncover apparent violations of statute, the law requires the district attorney to sue the sheriff, jail administrator, or contractor. Finally, the New Mexico law provides for termination of contracts on 90 days notice, for cause--

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[77]Commonwealth of Virginia, p. 72. Also, David Myers, communication, October 22, 1987.

[78]Corrections Corporation of America, press release, June 26, 1987.

[79]Corrections Corporation of America, 1986 Annual Report, p. 24.

[80]The New Mexican, June 21, 1986.

[81]New Mexico Stat. Ann. 33-3- 1-29 (1984). A 1985 statute also authorizes contracting at the state level: New Mexico Stat. Ann. 33-3-17 (1985).

which may include failure to meet minimum standards or other failures that seriously affect the operation of the jail.[82]

Volunteers of America Regional Corrections Center

Corrections has a long history of volunteers who come into institutions or who work with offenders and ex-offenders in the community. Volunteers of America has been involved in corrections since 1896, when the VOA was founded.[83] September, 1984, however, marks the first VOA contract for the total operation of a jail.

The Volunteers of America Regional Corrections Center, in Roseville, Minnesota, a suburb of St. Paul, has 40 beds, of which about 25 at a time were occupied in 1985.[84] It has a staff or 17 full time, 3 part time, and 12 volunteer workers. All the inmates are women serving sentences of up to one year.[85] The VOA leases its facility -- a former juvenile detention center -- from Ramsey County, and receives prisoners from county, state, and federal courts.[86] Two other counties also place prisoners at the VOA facility, under separate contracts,[87] and some pre-release prisoners are received from the federal Bureau of Prisons.

Butler County Prison

On October 1, 1985 Butler County, Pennsylvania turned over management of its county prison (and jail) to Buckingham Security Limited, under a two-year contract. It thus became one of the first two jails (along with CCA/Bay County) to transfer from public to private management. The contract specifies that Buckingham is responsible for management and operating costs, while Butler County is responsible for capital improvements, medical, and jail employee labor costs.[88]

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[82]All information on the New Mexico statute presented in this paragraph was taken from Ring, Chapter III.

[83] St. Paul Pioneer Press, March 3, 1985.

[84]Ibid.

[85]Ibid.

[86]New York Times, February 17, 1985.

[87]National Criminal Justice Association, Exhibit 2.

[88]Buckingham Security Limited, Private Prison Management: First Year Report 1985-1986, Butler County Pennsylvania (Lewisburg, PA: Buckingham Security Ltd., 1986), p. 4.

Buckingham Security is a Pennsylvania-based company, incorporated in Connecticut by Peter Savin, a Hartford builder, and Joseph and Charles Fenton.[89] Correctional expertise is provided by Charles Fenton, who served as warden at Marion, Illinois and Lewisburg, Pennsylvania during a 23-year career with the federal prison system and who now serves as warden of the Butler County Prison. Buckingham had previously planned to build a 720 bed prison in Pennsylvania to hold protective custody cases from several states. These prisoners require special resources inside a normal prison, where they must be segregated from the general prison population. In a regional facility, however, they can be served more efficiently, due to economies of scale and greater homogeneity of population. That plan, however, foundered on the shoals of siting problems, liability issues, and a one-year moratorium on prison privatization imposed by the Pennsylvania legislature. The moratorium did not affect the pre-existing contract with Butler County.

Butler County Prison is a high-security facility holding both pretrial and postconviction county prisoners, with some state and federal offenders as well. All are adults, male and female. The capacity of the prison is 100, with another 16 beds in a work release center.[90] Buckingham increased the total capacity by over 10% in the first year, without additional staff, and another 50% increase was anticipated soon thereafter.[91] The facility was rehabilitated with inmate labor under Buckingham's supervision, thereby reducing the county's capital improvement costs. Previously, inmates performed no work of any sort.

The contract is monitored by a county employee. Disciplinary protocol is outlined in the contract. However, since the guards are still county employees, there is less of an issue of private delegation than is the case under some other contracts.[92] In contrast to prior Butler County custom, police no longer bring their firearms with them into the jail.[93]

A professional system of key control, head counts, security system checks, cell inspections, and classification, admission, and release procedures has been established for the first time.[94]

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[89]The Hartford Courant, April 1, 1984.

[90]Commonwealth of Virginia, p. 73.

[91]Buckingham Security Limited, p. 5.

[92]National Criminal Justice Association, p. 20.

[93]Buckingham Security Limited, p. 6.

[94]Ibid., pp. 6-7.

Buckingham ended the prior county practice whereby guards and other staff did not venture into living areas, passageways, and recreation yards while inmates were roaming in them.[95]

An interesting feature of this contract is that up until the day before it was to go into effect, Buckingham had intended to replace the staff of unionized county employees with workers of its own choosing and in its own employ. However, a last-hour court ruling required the company to retain the county workers. The resulting contract adjustment left Buckingham in the strange if not unique position of being a private management company supervising public employees who remain on the payroll of the county. In spite of this rocky start, labor relations at Butler Prison are better now than they were before the contract. Every year since the prison workers unionized under AFSCME, negotiations with the county had led to impasse and arbitrators' awards. They now have a contract and higher pay, while management has been allowed to redefine job responsibilities and to eliminate much costly overtime and part-time work.[96] Employee morale is high. During the first few years after Buckingham assumed management, no employee left, in contrast to a turnover of three or four per year previously.

In a first-year report, Buckingham summarized its accomplishments as follows:

> The County Commissioners have saved money and are confident that the prison for the first time is under competent,professional management. The union for the first time in history has a signed contract with the county. Employees have better working conditions, higher pay and greater pride. The sheriff has fewer hassles and less expense. The prison board is confident that they have a smoothly running prison, functioning in accord with local, state and federal laws. Inmates have brighter, cleaner, safer and more peaceful living conditions. New programs have been instituted that have positively impacted on work release, health, education, cleanliness, physical fitness, work and recreation.[97]

While Buckingham might be expected to toot its own horn, this assessment has been confirmed by county officials. In a letter to Warden Fenton dated November 13, 1986, the Chairman of the County Commission, Richard M. Patterson, said:

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[95]Ibid., p. 6.

[96]Ibid., p. 3.

[97]Ibid., p. 1.

> Less than one year ago, we had a great deal of concern about the Butler County Prison. It occupied our time almost daily. Control was in question. Both the employees and the prisoners were in a serious state of turmoil. Court action was involved, and the public was agitated by negative media comment.
>
> Within three months, due only to the professionalism of Buckingham Securit[y], the whole matter has made a one-hundred-eighty degree turn, and all is quiet and all is under control, including the cost.[98]

The case histories in this chapter do not cover all facilities, nor has it been possible to give more than a general overview of each. One major (and deliberate) omission from the descriptions was information about costs. This important and complex matter will be examined in detail in chapter 5.

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[98]Ibid., p. 2.

3. ISSUES AND ARGUMENTS IN THE DEBATE OVER PRIVATE PRISONS

This chapter gives a concise overview of arguments on both sides of the controversy over private prisons. It defines the issues and lists in summary form a series of claims and counter-claims on the issues that will be examined in detail in the remainder of the report.

Private Prison Issues

Privately contracted prisons raise many philosophical, empirical, and policy questions. These cover at least the following range of issues:

1. propriety
2. cost
3. quality
4. quantity
5. flexibility
6. security
7. liability
8. accountability
9. corruption
10. dependence

1. Questions of propriety may be philosophical, political, or legal. Is it proper for imprisonment to be administered by anyone other than officials and employees of government? How might private delegation of authority affect its legitimation in the eyes of prisoners or the public? Is the "profit motive" more or less compatible with doing justice than are the motives to be found within state bureaucracies, employee unions, or nonprofit agencies? Should prison contracts permit the private exercise of quasi-judicial authority (e.g., classification, discipline, allocation of gain time)?

2. Is cost as likely to be reduced with the privatization of corrections as it has been with some other public services? Or does experience with privatization in other areas suggest that the net costs may actually be higher in the long run, as a result of "low-balling" or due to the added costs of supervision and of the contracting process itself? Can the process of contracting help clarify the true costs of both public and private service delivery in corrections?

3. Will privatization increase the quality of imprisonment due to innovations by private companies? Or will commercial companies cut corners to save costs and thereby lower quality? What are the advantages and disadvantages of government control versus competition as a quality control mechanism? Can the advantages of competition be obtained without involvement of the private sector? How can the contracting process be used to specify and clarify standards?

4. How might privatization affect the quantity of imprisonment? Will it merely help meet an independently determined

demand, or will commercial companies lobby to increase the demand?

5. Will private contracts bring with them the greater flexibility of small businesses and entrepreneurs? Do they reduce red tape and avoid the perpetuation of agencies and programs commonly found in government? Can the private sector more accurately anticipate and more rapidly respond to the correctional needs of government? Or will contracts bring with them their own form of rigidity, as restrictions on what can be expected or demanded? Do contracts encourage short-term, over long-term, planning?

6. Can security be ensured in private prisons? What are the legal limits to the delegation of authority to use deadly force? How does the training of government correctional personnel compare to that of the staff of private companies? What steps can be taken to prevent, insure against, or deal with a possible disruption of private prison operations due to strikes or bankruptcy?

7. Does a private prison contract simply extend and add to the liability of government, or does it defray and reduce liability costs, through insurance and increased incentives to avoid expensive lawsuits?

8. Is accountability decreased because private prisons are less accessible to public scrutiny, or increased because the private sector is more vulnerable to legal controls than is the state? Do contracts diffuse responsibility, or do they increase it, by providing another mechanism of control over prison managers? How accountable are correctional institutions and personnel under current arrangements?

9. Would the potential for corruption in running prisons be higher, lower, or merely different in form under contractual arrangements? Can close monitoring, along with competition and market processes keep the bidding for and the granting of contracts honest, or is collusion inevitable? How do the possible forms of corruption under public-private management differ from those under purely public systems? Which forms are easier to control?

10. How can government protect itself from becoming dependent on a private provider, merely substituting a private monopoly for a public monopoly? Should it retain some correctional capacity in its own hands? Should it contract only to multiple providers? Or does the possibility of future competition limit the potential for abuse of position by a solitary contractor?

Arguments For and Against Private Prison Contracting

In the chapters that follow, each of the issues defined above will be examined closely. Generally, the format of those chapters will be one in which an issue is raised as a negative or critical question posed by opponents of private prisons, followed by a response on the positive side. Here, that order is reversed, with arguments favorable to contracting for management of prisons followed by a separate set of arguments in opposition. The arguments have been abstracted and adapted from general literature on privatization as well as from discussions specific to prisons.[1]

Arguments For Contracting

1. Propriety

   a. Contracting enhances justice, by making prison supply more responsive to changes in demand, both upward and downward.

   b. Contractual wardens have an incentive to govern inmates fairly in order to enhance their legitimation, induce cooperation, lower costs, and ensure renewal of contracts.

   c. Contracting does not jeopardize due process; private and public wardens are equally subject to the rule of law and accountable to the same constitutional standards.

   d. Contracting can help clarify the purposes of imprisonment and the rules and procedures that define due process.

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[1]Sources used include the following: Judith Hackett, Harry P. Hatry, Robert B. Levinson, Joan Allen, Keon Chi, and Edward D. Feigenbaum, Contracting for the Operation of Prisons and Jails. A National Institute of Justice Research in Brief (Washington, DC: Department of Justice, June, 1987); Robert B. Levinson, "Okeechobee: An Evaluation of Privatization in Corrections," Prison Journal 65(1985): 75-94; Charles H. Logan and Sharla P. Rausch 1985 "Punish and Profit: The Emergence of Private Enterprise Prisons" Justice Quarterly 2 (1985): 303-318; Charles H. Logan, "The Propriety of Proprietary Prisons" Federal Probation 51(1987): 35-40; Joan Mullen, Corrections and The Private Sector. National Institute of Justice Research in Brief. (Washington, DC: Department of Justice, March 1985); Charles Ring, Contracting for the Operation of Private Prisons: Pros and Cons (College Park, MD: American Correctional Association, 1987); and E. S. Savas, Privatizing the Public Sector; How to Shrink Government (Chatham NJ: Chatham House Publishers, Inc., 1987).

e. Contracting for operating prisons is compatible with federal law and the laws of many states; specific enabling legislation has been passed in some states.

2. Cost

a. Contracting enables prisons to be financed, sited, and constructed more quickly and cheaply than government prisons; also, private firms are more apt to design for efficient operation.

b. Contracting across jurisdictions permits economies of scale.

c. Contracting may reduce overly generous public employee pensions and benefits.

d. Contracting typically indexes fee increases to the Consumer Price Index, while government costs have been shown to rise faster than the general level of inflation.

e. Contracting discourages waste, which cuts into profits.

f. Contracting avoids the motivation of budget-based government agencies to maximize size and budget.

g. Contracting makes true costs highly visible, allowing them to be analyzed, compared, and minimized.

h. Contracting avoids cumbersome and rigid government procurement procedures; vendors can purchase more quickly, maintain lower inventories, and negotiate better prices and values.

i. Contracting, through more effective personnel management, better working conditions, and less overcrowding, may increase employee morale and productivity while lowering absenteeism and turnover.

3. Quality

a. Contracting provides an alternative yardstick against which to measure government service; it allows for comparisons.

b. Contracting motivates both governmental and private prisons to compete on quality as well as cost.

c. Contracting, by creating an alternative, raises standards for the government as well as for private contractors; the public will be less tolerant of prisons that are crowded, dirty, unsafe, inhumane, ineffective, and prone to riots and lawsuits.

d. Contracting adds new expertise and specialized skills.

e. Contracting promotes creativity and enthusiasm by bringing in "new blood" and new ideas more often than is possible under civil service.

f. Contracting promotes quality and high standards by forcing officials and the public to understand their true price, rather than masking costs through overcrowding and substandard conditions.

g. Contracting will expand the political constituency concerned about correctional legislative reforms.

h. Contracting could hardly do worse than at least some current (public) prisons, in terms of quality.

4. Quantity

a. Contracting allows quicker response to meet new needs or to correct mistakes resulting from inaccurate predictions or faulty policies.

b. Contracting facilitates the distribution of inmates across agencies or jurisdictions, to maintain occupancy rates at an efficient level (i.e., near capacity, but not overcrowded).

c. Contracting helps limit the size of government.

5. Flexibility

a. Contracting allows greater flexibility, which promotes innovation, experimentation, and other changes in programs, including expansion, contraction, and termination.

b. Contracting can avoid capital budget limits through leasing, or spread capital costs over time through lease-purchasing.

c. Contracting reduces the levels of bureaucracy (red tape) involved in management decisions.

d. Contracting reduces some of the political pressures that interfere with good management.

e. Contracting avoids civil service and other government (and sometimes union) restrictions that interfere with efficient personnel management (hiring, firing, promotion, and salary setting; assignment of duties, work schedules, vacations, and leaves; adequate staffing to avoid excessive overtime; etc.).

f. Contracting reduces the tendency toward bureaucratic self-perpetuation.

g. Contracting promotes specialization, to deal with special needs prisoners (protective custody, AIDS patients, etc.).

h. Contracting relieves public administrators of daily hassles, allowing them to plan, set policy, and supervise.

6. Security

a. Contracting may enhance public and inmate safety through increased staff training and professionalism.

7. Liability

a. Contracting may decrease the government's liability exposure through higher quality performance and through indemnification and insurance.

8. Accountability

a. Contracting increases accountability because market mechanisms of control are added to those of the political process.

b. Contracting increases accountability because it is easier for the government to monitor and control a contractor than to monitor and control itself.

c. Contracting promotes the development and use of objective performance measures.

d. Contracting can help to enforce adherence to procedures and to limit or control discretion in the discipline of inmates.

e. Contracting will make prisons highly visible and accountable, in contrast to state prisons which, at least historically, have been ignored by the public and given (until recently) "hands-off" treatment by the courts.

f. Contractors are forced to be more responsive to the attitudes and needs of local communities when siting a prison.

g. Contracting can require prisons to be certified as meeting the standards of the American Correctional Association.

h. Contracting motivates vendors to serve as watchdogs over their competitors.

i. Contracting will encourage much broader interest, involvement, and participation in corrections by others outside of government.

j. Contracting provides a surgical solution when bad management has become entrenched and resistant to reform.

9. Corruption

a. Contracting gives managers more of a vested interest in the reputation of their institution.

b. Contracting pits the profit motive against other, less benign, motives (e.g., love of power, anger, zealotry, hatred, spitefulness, etc.) that can operate among those whose job it is to punish criminals.

10. Dependence

a. Contracting can increase the number of suppliers, thus reducing dependence and vulnerability to strikes, slowdowns, or bad management.

Arguments Against Contracting

1. Propriety

a. Contracting for imprisonment involves an improper delegation to private hands of coercive power and authority.

b. Contracting may put profit motives ahead of the public interest, inmate interests, or the purposes of imprisonment.

c. Contracting prisons raises legal questions about the potential use of deadly force.

d. Contracting creates conflicts of interest that can interfere with due process for inmates.

e. Contracting may face legal obstacles in some jurisdictions.

f. Contracting threatens the jobs and benefits of public employees; it is antilabor.

g. Contracting may threaten guards' sense of authority and status, both inside and outside the prison.

2. Cost

a. Contracting is more expensive because it adds a profit margin to all other costs.

b. Contracting creates the special costs of contracting: initiating, negotiating, and managing contracts, and monitoring contractor performance.

c. Contracting may cost more in the long run as a result of "lowballing" -- initial low bids followed by unjustifiable price raises in subsequent contracts.

d. Contracting may cost more in the long run if high capital costs inhibit market entry and restrict competition.

e. Contracting lacks effective competition in "follow-on" contracts, which are commonplace.

f. Contracting costs the government extra for the termination, unemployment, and retraining of displaced government workers.

g. Contracts with cost-plus-fixed-fee provisions provide no incentive for efficiency.

h. Contracting may have a higher initial marginal cost than would expanding government service.

3. Quality

a. Contracting may reduce quality through the pressure to cut corners economically.

b. Contracting may "skim the cream" by removing the "best" prisoners and leaving the government prisons with the "worst," which will spuriously make the private prisons look better by comparison.

c. Contracting will decrease the professionalism of rank and file prison employees because they will be underpaid and insecure and thus not able to develop a career orientation.

4. Quantity

   a. Contracting creates incentives to lobby for laws and public policies that serve special interests rather than the public interest; in particular, private prison companies may lobby for more imprisonment.

   b. Contracting, simply by expanding capacity and making imprisonment more feasible and efficient, may unduly expand the use of imprisonment, and weaken the search for alternatives.

   c. Contracting on a per prisoner, per diem basis, gives private wardens an incentive to hold prisoners as long as possible.

   d. Contracting creates a kind of underground government, thus adding to total government size.

5. Flexibility

   a. Contracting may limit flexibility by refusal to go beyond the terms of contract without renegotiation.

   b. Contracting may be stopped in advance, or suddenly reversed in midstream, by adverse public reaction, legal challenges, partisan politics, or organized opposition by interest groups, including public employee unions.

   c. Contracting reduces ability to coordinate with other public agencies (police, sheriff, probation, parole, transportation, maintenance, etc.).

6. Security

   a. Contracting may jeopardize public and inmate safety through inadequate staff levels or training.

   b. Contracting may limit the ability of government to respond to emergencies, such as strikes, riots, fires, escapes, etc.

   c. Contracting increases the risk of strikes, which may not be illegal for contractor personnel.

   d. Contracting may cause high employee turnover at transition.

7. Liability

   a. Contracting will not allow government to escape liability.

b. Contracting may cost the government more by increasing its liability exposure.

c. Contracting shifts risk away from government, which is the party best able to bear it.

8. Accountability

a. Contracting reduces accountability because private actors are insulated from the public and not subject to the same political controls as are government actors.

b. Contracting diffuses responsibility; government and private actors can each blame the other.

c. Contracting may encourage the government to neglect or avoid its ultimate responsibility for prisons; supervision may slacken.

d. Contracting reduces accountability because contracts are difficult to write and enforce.

9. Corruption

a. Contracting brings new opportunities for corruption (political spoils, conflict of interest, bribes, kick-backs, etc.).

10. Dependence

a. Contracting lowers the government's own capacity to provide services, which makes it dependent on contractors.

b. Contracting carries the risk of bankruptcy by the vendor.

c. Contracting may involve exclusive franchises that simply replace public monopolies with private monopolies.

4. THE PROPRIETY OF PROPRIETARY PRISONS

The most strongly expressed, and least critically examined, objections to private prisons are those that are presented as statements of "principle." Some of the government's strongest critics, especially when it comes to running prisons, have suddenly become champions of the government as being the only entity that has a right to manage these institutions. The ACLU, for example, regards imprisonment as among the "functions which rightfully belong to government."[1] The officially recorded policy of the ACLU states:

> The delegation of control and custody of prisoners to private entities, in and of itself, raises serious constitutional concerns. Because the deprivation of physical freedom is one of the most severe interferences with liberty that the State can impose, and because of civil liberties concern created by private management . . . the power to deprive another of his/her freedom cannot be delegated to private entities.[2]

Sandy Rabinowitz, director of the Houston office of the ACLU declares that "the whole concept [of private prisons] is really frightening."[3]

Mark Cuniff, executive director of the National Association of Criminal Justice Planners, says: "We're talking about taking away people's liberty, and I have questions about the propriety of anyone but the state doing that."[4] This is perhaps the most common form of the objection: to raise a "troublesome" question, but take no trouble to explore possible answers. It is simply taken for granted that, if the power in question is strong enough, only the state may legitimately apply it.

John DiIulio, Jr., a political scientist at Princeton, is one critic who has carried the propriety objection beyond the level of intuitive reaction to the realm of more serious thought. In doing so, he carries the negative argument from principle nearly

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[1]Jan Elvin, "A Civil Liberties View of Private Prisons," The Prison Journal 65(1985): p. 51 (emphasis added).

[2]American Civil Liberties Union, Policy Guide, Policy #243, Board Minutes, April 12-13, 1986.

[3]Cited in Newsweek, May 7, 1984.

[4]Cited in Kevin Krajick, "Punishment for Profit," Across the Board 21(March, 1984), p. 27.

to its logical extreme.[5] Accepting for the sake of argument that private prisons could do everything that prisons are supposed to do, and do so better and cheaper than government prisons, DiIulio insists that even then they would be undesirable, as a matter of principle. With admirable clarity and consistency, DiIulio points out that the issue of motive (whether profit or other) is irrelevant, as is the issue of scope. The private administration of even one halfway house, he says, would raise the matter of principle just as sharply as the private ownership and operation of every prison in the country. It is not clear why DiIulio stops there. The final extension of this argument would seem to be that even specific aspects of the care and custody of prisoners--such as food service, health care, and treatment programs--must also be provided directly by government.

DiIulio argues that, all other things held equal, something which he calls "the public interest" or "the common good" requires that prisons be run directly by government employees.[6] He does not identify any independently definable public interest that can be shown to be ill-served by contracting. Rather, it is apparently an analytic truth--a tautology. As a matter of incantation, only government employees, not contractors, can be public servants--i.e., can serve "the public interest."

DiIulio asks, rhetorically, whether the government's responsibility to govern "ends at the prison gate," as if a contract could cause it to do so. He asserts, quite reasonably, that prisons are "a public trust to be administered in the name of civility and justice" and points out that "no self-respecting constitutional government would abdicate so central a responsibility."[7] But this is a false dilemma. Contracting does not constitute abdication of responsibility, and it is not necessary to choose between contracting, on the one hand, and civility, justice, and fulfillment of the public trust, on the other.

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[5]John DiIulio, Jr., "Prisons, Profits and the Public Good: The Privatization of Corrections," Research Bulletin No. 1. (Sam Houston State University Criminal Justice Center, 1986), pp. 4-5.

[6]DiIulio does not use the phrase "government employees." He simply refers to "government." It must be made clear, however, that contractually managed prisons are still government prisons. They do not exist on their own authority. A case might be made for truly private prisons independent of government authority, but no one arguing for prison contracting is attempting to make that case. The issue, rather, is one of (a) direct governmental provision through salaried employees versus (b) governmental procurement through contract.

[7]Ibid., p. 5.

The Derivation and Delegation of Authority to Imprison[8]

How can it be proper for anyone other than the state to imprison criminals? Perhaps the place to start is by asking what makes it proper for the state itself. By what right does the state imprison?

In the classical liberal (or in modern terms, libertarian) tradition on which the American system of government is founded, all rights are individual, not collective. The state is artificial and has no authority, legitimate power, or rights of its own other than those transferred to it by individuals.

Why does this transfer take place? John Locke argued that individuals in the state of nature have the right to punish those who aggress against them. However, there will always be disagreement over interpretations and applications of natural law; people cannot be unbiased in judging their own cases; and those in the right may lack the power to punish. For these reasons, said Locke, people contract to form a state and completely give over to it their power to punish. Thus, the power and authority to imprison does not originate with the state, but is granted to it. Moreover, this grant is a conditional one. Citizens reserve the right to revoke any of the powers of the state, or indeed, the entire charter of the state, if necessary.

Robert Nozick, like Locke, sees the right to punish as one held by individuals in a state of nature. He also insists that no collective rights or entitlements emerge beyond those held by individuals. Thus, the right to punish is not exclusive or unique to the state. Is it, however, <u>special</u> to the state in some way? Is there an argument for individuals turning over their punishment power to a <u>state</u> rather than directly to some private agency?

In <u>Anarchy, State and Utopia</u>, Nozick answers as follows. Punishment, to be just, can be administered only once (or up to the amount deserved). Thus, anyone who punishes will preempt others in their exercise of this right. When persons authorize an agent to act for them, they confer their own entitlements on that agent. The more clients on whose behalf a protection agency acts, the fewer others whose exercise of the right to punish has been preempted or displaced. Therefore, a dominant protection agency (a state) has a higher degree of entitlement to punish, in the sense that it preempts the fewest others.

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[8]This and portions of three other sections of this chapter were originally published in Charles H. Logan, "The Propriety of Proprietary Prisons" <u>Federal Probation</u> 51(September 1987): 35-40.

Whatever the reasons for placing the power to punish in the hands of the state, however, the major point is that it must be transferred; it does not originate with the state. The power and authority of the state to imprison, like all its powers and authority, are derived from the consent of the governed and may therefore, with similar consent, be delegated further. Since all legitimate powers of government are originally, and continuously, delegated to it by citizens, those same citizens if they wish can specify that certain powers be further delegated by the state, in turn, to private agencies. Because the authority does not originate with the state, it does not attach inherently or uniquely to it, and can be passed along.[9]

The state does not <u>own</u> the right to punish. It merely <u>administers</u> it in trust, on behalf of the people and under the rule of law. There is no reason why subsidiary trustees cannot be designated, as long as they, too, are ultimately accountable to the people and subject to the same provisions of law that direct the state.

Legitimation of Authority

In any prison, someone will need authority to use force, including potentially deadly force in emergencies. Questions of legitimacy in the use of that force, however, cannot be resolved simply by declaring that for state employees some use of force is legitimate, while for contracted agents none is.

In a system characterized by rule of law, state agencies and private agencies alike are bound by the law. For actors within either type of agency, it is the law, not the civil status of the actor, that determines whether any particular exercise of force is legitimate. The law may specify that those authorized to use force in particular situations should be licensed or deputized and adequately trained for this purpose, but they need not be state employees.

The distinction between a contractual relation and salaried state employment, in terms of the derivation of authority, may be more apparent than real. In both cases, the authority of the actor, say a guard, derives from the fact that he is acting, not

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[9]Anarchists go further. They argue that people may delegate their rights, including the right to punish violation of their rights, directly to private agents acting on their behalf. Here, I defend only the weaker (libertarian but not anarchist) claim: that any legitimate governmental authority may be further delegated, through the government, to private agents. This assumes the existence of a legitimate and representative government, so that the chain of authority is unbroken from its original source: the people.

just on behalf of the state, but within the scope of the law. Consider the case of a state-employed prison guard who engages in clear-cut and extreme brutality. We do not say that his act is authorized or legitimate, or even that he is acting at that moment as an agent of the state. In fact, we deny it, in spite of his uniform and all the other trappings of his position. We say that he has overstepped his authority and behaved in an unauthorized and unlawful fashion. The state may or may not accept some accountability or liability for his act, but that is a separate issue. The point here is that the authority or legitimacy of a position does not automatically transfer to the actions of the incumbent.

There is, in effect, an implicit contract between a state and its agents that makes the authority of the latter conditional on the proper performance of their roles. This conditional authority can be bestowed on contractual agents of the state just as it is on those who are salaried. Where contractually employed agents, such as guards, have identifiable counterparts among state-salaried agents, there is no reason why their authority should not be regarded as equivalent. Thus, the boundaries of authority for contracted state agents should be no less clear than those for state employees; they could be even clearer, if they are spelled out in the conditions of the contract.

What about authority inside the prison itself? Would private prisons lack authority and legitimacy in the eyes of inmates? Legitimation is especially important to a proprietary prison. The exercise of naked power is extremely costly; cooperation is much more cost-effective (and therefore profitable) than is coercion. Commercial prisons, unlike the state, cannot indefinitely absorb or pass along to taxpayers the cost of riots, high insurance rates, extensive litigation by maltreated prisoners, cancellations of poorly performed or controversial contracts, or even just too much adverse publicity. These are some of the potential costs of the unfair treatment of inmates.

Legitimation constitutes one of the most effective methods of cutting the cost of power in all forms of social organization;[10] prisons are no exception. Since legitimation is generally granted in exchange for the fair exercise of power, a profit-seeking prison has a vested interest in being perceived by inmates as just and impartial in the application of rules. Thus, the self-interest of a for-profit prison company is more likely to increase, than to decrease, its concern with fairness. Moreover, the state is more likely to renew a contract with an organization that has a good record of governance than with a contractor who generates numerous complaints and appeals from

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[10]Peter M. Blau, Exchange and Power in Social Life (New York: John Wiley & Sons, 1967).

inmates. In short, economic self-interest can motivate good governance as well as good management.

Symbols vs. Substance

Many critics of private prisons are extremely concerned about matters of symbolism. For example, Ira Robbins, Professor of Law at American University, asks:

> When it enters a judgment of conviction and imposes a sentence, a court exercises its authority, both actually and symbolically. Does it weaken that authority, however--as well as the integrity of a system of justice--when an inmate looks at his keeper's uniform and, instead of encountering an emblem that reads, "Federal Bureau of Prisons" or "State Department of Corrections," he faces one that says "Acme Corrections Company"?[11]

I suspect that prisoners care more about practical than philosophical distinctions. They care more about how guards treat them, than about what insignia grace their uniforms. To the extent that they are treated with fairness and justice, inmates will be more inclined to legitimate their keepers' authority and to cooperate with them.

DiIulio, too, shares this concern with the symbols of authority: "The badge of the arresting police officer, the robes of the judge, and the state patch of the correctional officer are symbols of the inherently public nature of crime and punishment."[12]

If it were symbols, rather than substance, that we were worried about, we could find plenty of them in a contractual situation. The contract itself is a powerful symbol of legally enforceable obligations and responsibilities in both directions. A license could be required, and hung on the gate if that would make people feel better. The vendor's employees could be ceremoniously deputized and sworn. They could be given official-looking uniforms and badges, for that matter.

Michael Walzer is another who argues that administering criminal justice is an enterprise that is largely symbolic and therefore requires, not just technical expertise, but the application of social values. For this reason, says Walzer, it should always be in the hands of "representatives of the people":

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[11]Ira Robbins, "Privatization of Corrections: Defining the Issues," Judicature 69 (April-May 1986), p. 331.

[12]DiIulio, p. 5.

> Police and prison guards are our representatives, whose activities we have authorized. The policeman's uniform symbolizes his representative character.[13]

However, most public employees, including police and guards, are neither politically appointed nor democratically elected. They are hired, and cannot be said to "represent" the public by virtue of their selection. Rather, they represent by virtue of their function; that's their job. Moreover, the values that criminal justice workers are supposed to administer are codified in law. They are not the value preferences of either public officials or employees, whether elected, appointed, or hired through civil service procedures. The important question is whether the relevant legal values will be served more faithfully by public employees or by contractual agents. This is not a question of principle; it is an empirical question.

The great concern with symbolism on the part of those who question the propriety of private prisons indicates that their argument is not substantive. Essentially, it is theological.[14] Substantively, however, just what is it that we are ultimately trying to symbolize? What it ought to be is legal authority, not government employment. Employment is merely one method of conveying or delegating legal authority; contract is another.

Contracting and Sovereignty

Are there any theoretical limits as to which functions and powers (or as to how much of any one of them) government can delegate? Operating prisons, which is an exercise of executive, and perhaps quasi-judicial, power, is widely recognized as one of the basic functions of government. However, it is only one among many that have been carried out through the use of private agents. David M. Lawrence, Professor of Public Law and Government at the University of North Carolina, notes that many delegations of executive and judicial powers are well established:

> Important judicial and executive powers have been delegated, in some cases for decades or even centuries, without the validity of the delegation being questioned. The power of arrest has been delegated to railway police, to humane society agents, and to bail bondsmen. The power to seize and sell property has been delegated to certain lienholders. The power to destroy buildings, without personal liability, in order to stop the spread

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[13]Michael Walzer, "At McPrison and Burglar King It's...Hold the Justice," New Republic April 8, 1985, p. 11.

[14]I am indebted to Douglas McDonald for suggesting this term.

> of fire has been delegated to anyone at the scene of a fire. The power to adjudicate grievances between employees and employers has been delegated to private arbitrators. And the authority to determine which law schools' graduates may sit for the bar examination has been delegated to the American Bar Association. Only the last of these has been challenged on delegation grounds, and the challenges consistently have been refuted.[15]

Laurin Wollan points out that the perception that "criminal justice" is inherently and exclusively a function of the state is strongest when it is least closely examined. Moreover, it makes a big difference whether the question is asked broadly ("who should be responsible for the welfare of prisoners?") or narrowly ("can a private company provide prisoners with better food at lower cost?").[16]

When criminal justice is broken down into specific and discrete activities, or into functions and subfunctions, it is no longer so clear that any of these must be the exclusive province of the state. Wollan presents a typology in which "criminal justice" is broken down into 22 functions across 6 categories, and he gives examples of privatization for each of these functions. In many cases, private performance of specific functions has been going on for some time with little or no controversy. Specific aspects of criminal justice that already have experienced varying degrees of privatization include:

Community security and prevention
Initial detection and accusation
Investigation and evaluation of evidence
Victim services
Bail services
Bounty hunting
Legal aid and representation
Prosecution
Presentence investigation and sentencing recommendations
Transport of prisoners
Incarceration
Prison services (food, medical, education, etc.)
Reintegration (halfway houses, etc.)
Community corrections programs
Alternative sentencing supervision

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[15]David M. Lawrence, "Private Exercise of Governmental Power" Indiana Law Journal 61(1986): 647-695, at pp. 666-667.

[16]Laurin A. Wollan, "Privatization of Criminal Justice." Pp. 111-124 in Proceedings of the 29th Annual Southern Conference on Corrections. (Tallahassee: School of Criminology, Florida State University, 1984).

Probation services

National defense is clearly an essential governmental function. Yet not only does private enterprise produce the full range of materiel for the armed services, it participates even more directly in our defense. The Distant Early Warning System, which warns of attack by missiles or aircraft over the Arctic, is manned and operated by a private contractor.[17] Police protection, fire protection, even the entire management and administration of some cities, have been provided under contract. Private courts adjudicate many civil cases. Private prosecutors have operated to some extent in California and to a considerable extent in England. Even capital punishment is sometimes administered by private contractors in the U.S. today.

It is hard to find any specific governmental function or power, the administration of which has not been delegated at least in some part at some time to private agents. If there is no qualitative limit to delegation -- no type of function or power that can never be delegated in any degree -- is there perhaps some quantitative limit? The question here is not what function can be delegated, but how much of it.

The concept of sovereignty places a theoretical limit on the delegation of state power. The state may delegate to a private party the power to perform any particular function. However, while there is no limit to the number or type of functions that the state may delegate to private parties, there is a limit to the amount of power that it can delegate. The power to coerce is what defines the state. It can give up any amount of that power, but if it gives up too much, it ceases to be sovereign; if it gives up all of it, it ceases to be a state. The "far end" of that limit is the point at which the state loses actual sovereignty, at least over that function. The "near end" of the limit is the point at which it begins to lose effective control.

Correctional law expert William Collins, drawing from a leading treatise on municipal corporation law, concludes that delegation becomes "excessive" when it gives away so much power over a particular function as to compromise the government's ability to act in the public interest in that area.[18] In operational terms, this would mean loss of control over basic

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[17]E. S. Savas, Privatizing the Public Sector; How to Shrink Government (Chatham NJ: Chatham House Publishers, Inc., 1987), p. 60.

[18]William C. Collins, "Privatization: Some Legal Considerations from a Neutral Perspective." Pp 81-93 in Collins: Correctional Law, 1986 (Olympia, WA: William C. Collins, 1986), at p. 85.

policy or ultimate supervisory authority, rather than over ministerial matters. "The more the contract makes the private provider simply the administrative extension of the . . . government, and leaves ultimate authority in the hands of government officials, the more likely the contract will satisfy judicial scrutiny."[19]

With respect to the operation of prisons and jails, Collins believes that it would be excessive delegation to relinquish control over admission or release (including granting or denial of good time). He is less certain about questions of classification (e.g., custody level), which affect the conditions, but not the fact, of confinement. To pass the sovereignty test, it is not necessary that private prison officials be excluded entirely from decisions and actions relating to discipline or to release dates; only that they not be given final control in those areas. So long as the government retains final authority and the power of review over disciplinary actions or good time decisions that affect the liberty of prisoners, delegation of initial responsibility for these functions would not be "excessive," because sovereignty will not have been lost.

In addition to preventing erosion of its sovereignty, there is another, and much more important, reason for the state to retain final (not exclusive or total) authority over decisions affecting prisoners' liberty interests. In the political philosophy of liberal, or libertarian, constitutional government, the rights of individuals are more important even than the sovereignty of the state. Therefore, the strongest argument for placing in private hands something less than final authority over prisoners is not that this will preserve state sovereignty, but that such a restriction will help to preserve due process.

Issues of Due Process

One approach to the question of delegation is to view it as just one aspect of the broader issue of due process. The central issue in due process is not <u>who</u> exercises power or <u>how much</u> of it, but <u>how</u> it is exercised.

A Due Process Theory of Constitutional Delegation

In his comprehensive review of delegation issues, David Lawrence has noted that the ability of the federal government to delegate power is both broad and clear. "Since <u>Carter v. Carter Coal Co.</u>, decided a half-century ago, the federal courts have consistently allowed delegations of federal power to private actors. . . . Private exercise of federally delegated power is no longer a federal constitutional issue. Nor is the private

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[19]Ibid., p. 87.

exercise of governmental power delegated by state or local governments a federal constitutional issue . . . ."[20]

Among court decisions at the state level, Professor Lawrence finds no clear or consistent doctrine to distinguish constitutional from unconstitutional delegation. As a step toward producing such a doctrine, Professor Lawrence suggests that the closest approach to a coherent principle or standard against which to judge a potential delegation of governmental power is the test of due process:

> In summary, a due process basis for reviewing private delegations permits a court to approach and resolve the problem in terms of the essential danger that such delegations present: that governmental power may be used to further private rather than public interests. A court can address the danger directly to determine whether it exists in a particular instance and then test the mechanisms available to protect against the danger. This approach, well within the traditions of due process, not only permits handling the basic dangers raised by private delegations, it has the further advantage of being more likely to force a court to address those concerns directly and to articulate the considerations behind its decision.[21]

The due process approach goes straight to the heart of the problem of delegation of power by recognizing that it is simply a variation of the general problem of power. The central issue is not how much power, or what kind of power, or to whose hands it is delegated, but how the power will be exercised and what safeguards exist to prevent it from being abused.

Due Process Within Prisons

Certain aspects of prison administration have a quasi-judicial character. Examples would include imposing solitary confinement or other disciplinary actions, making or contributing to parole decisions, allocating "good time" sanctions that affect the date of release, and classification procedures that significantly affect the conditions of confinement. Discretionary decision-making in these quasi-judicial areas, whether done by public or by private prison staff, clearly requires some elements of due process. Moreover, even where prison decision-making is purely administrative, and not judicial, the coercive environment in which it occurs can still make the question of due process relevant.

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[20]Lawrence, pp 648-649.

[21]Ibid., p. 662.

Contracting Contributes to Due Process

Contracting can make positive contributions to due process. It is one of the strengths of contracting that it forces us to make visible and to treat as problematic some important issues of authority and due process that we might otherwise ignore or take for granted. Due process requires preset rules and rigorous adherence to them. It is universalistic, not individualistic: discretion, individualization, and "creativity" in punishment are detrimental to due process. Contractual arrangements offer an excellent means of limiting and controlling discretion, of clarifying rules, and of enforcing adherence to procedures.

In a recent Note in the Yale Law Journal,[22] David Wecht argues that private prisons may increase prisoners' due process protections by forcing courts to move away from their historical pattern of deference to prison administrators. While courts actually began to abandon their "hands-off" approach to prison administration long before the recent emergence of contracted prisons, the Yale Note argues that court supervision will now be accelerated as a result of the longstanding suspicion of courts toward delegation of power to private, for-profit entities. In order to ensure that conflicting private interests do not interfere with either prisoners' rights or the public interest, courts will insist on strong procedural safeguards. These might include strict legislative and contractual standards; training and certification requirements for prison staff; independent, state review of policies and of discretionary or adjudicatory decision-making; and greater liability to lawsuits.

Unfortunately, Wecht dismisses too lightly the warning that courts, on equal protection grounds, must apply the same standards of due process to government as to private prisons.[23] Instead, Wecht argues that equal protection requires greater vigilance and higher standards for private prisons. Public actors presumably require lesser vigilance and lower standards because, in Wecht's view, they are not so greatly influenced by private incentives that could conflict with public interests. But government employees no less than others have self-interests that can conflict with the rights of prisoners. It will not do to say that public prisons are run by civil servants who are pure at heart because they have to profit motives and therefore they do not require the same degree of due process protection as private prisons.

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[22]David N. Wecht, "Breaking the Code of Deference: Judicial Review of Private Prisons" The Yale Law Journal 96(1987): 815-837.

[23]Wecht, p. 834, note 102 and accompanying text.

Equal Protection of Due Process

Being suspicious of authority in the hands of commercial prison managers is an example of having the right attitude for the wrong reasons. It is not because they pursue profit that we should be vigilant, but because they wield power. A constructive response to this suspicion would be to require as part of a contract that commercial prisons codify the rules that they will enforce, specify the criteria and procedures by which they will make disciplinary decisions, and submit to review by a supervisory state agency. In short, the requirements of due process should be built into the conditions of the contract. But this is no different from the attitude we should have toward the state itself, and its employees. Since due process is an important problem for all prisons, we should not design solutions that apply only to private prisons. To do so distracts attention from the problem in public institutions.

Our focus should be on the procedures that will best protect the due process rights of inmates regardless of whether they are applied by government employees or by contracted agents. The procedures that will do this best will probably be the same or similar in either case. It should not be assumed a priori that one system or the other requires more stringent procedures.

It is also no solution to propose, as some have, that all decisions having implications for due process should simply be left in government hands.[24] The whole point of having procedures is to reduce our reliance on being in "the right hands." And the whole point of constitutional guarantees of due process is that decisions affecting life, liberty, or property cannot simply be entrusted to government hands. Whether prisons are run directly by the "iron fist" of the state or respond also to the "invisible hand" of the market is less important than that, in either case, those hands should be tethered by the same requirements of due process.

Evaluating, sanctioning, and controlling inmate behavior are integral parts of every aspect of a prison program; they cannot be handled by a separate and distant staff. Moreover, while protection of due process is ultimately guaranteed by the state, it should be made a responsibility of contractors as well. Trying to contract for the overall management of a prison by a private company, while exclusively restricting to government all decisions and actions that require due process protections, would

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[24]Peter Greenwood, "Private Prisons: Are They Worth a Try?" California Lawyer, July/August 1982, pp. 41-42. Greenwood points out that these functions account for less than five percent of current prison administration budgets, so it would not burden the state to retain full responsibility for their administration.

be futile. Worse yet, formally defining "administration" as the business of the private company and "rights protection" as the business of the state would discourage contractors from maintaining an attitude of full responsibility. Instead, a contract should establish a system of supervision whereby the state can monitor the discretionary decisions of the contractor, and whereby inmates can appeal what they view as unfair treatment in these regards or others.[25]

Courts probably will accept arrangements in which classification decisions, disciplinary sanctions, good time determination, and other quasi-judicial decisions are first made by private prison officials and then reviewed by or made subject to appeal before government authorities. They probably would not welcome being drawn directly into the primary decision process themselves. According to a news report, Corrections Corporation of America "drew the ire of Hamilton County's Sessions Court judges when the company took inmates downtown to be charged for what Judge Richard Holcomb said were instances the company should have handled internally."[26] The court objected to being asked by CCA to settle internal disputes that state prisons handled by withdrawal of privileges and denial of good time and other credits after internal administrative hearings.

One essential element of due process is the provision of mechanisms for independent review and appeal. It is important that the reviewing agent be disinterested, or at least not influenced by the same interests as the agent whose initial decisions are being reviewed. When a warden reviews the judgments and decisions of his officers, some independence has been introduced, but not a great deal. A Disciplinary Hearing Officer from a central office adds some more independence, but still remains part of a common administrative structure at a higher level.

Recognizing the importance of independent review to the protection of due process, some corrections systems provide for an ombudsman to hear and act on inmate grievances. Ideal characteristics for an ombudsman are: independence, impartiality, expertise in government, universal accessibility, and power only to recommend and to publicize.[27] In Connecticut, a private research institute provides the ombudsman for the state's

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[25]The expense of this system should be calculated into the cost of the contract.

[26]The Chattanooga Times, August 12, 1986.

[27]Timothy L. Fitzharris, The Desirability of a Correctional Ombudsman (Berkeley, CA: Institute of Governmental Studies, 1973).

correctional system. The ombudsman's function is to serve as an informal check against the power of the state.

If it is acceptable for Connecticut to have initial decisions made by state employees, subject to informal but influential review by a private agency, it should be at least as acceptable for a contracted prison to have initial decisions made by private actors, subject to formal review by the state and in accordance with rules and procedures that are also subject to review by the state. It should not be necessary to require that the whole process, including initial decisions, be left in the hands of state employees. Indeed, it would seem that impartiality is increased when a government agency reviews decisions that have been made by a private agent, rather than by another government agency or, worse, by a subdivision of itself.

If due process is satisfied in a government prison by the existence of channels of independent and external review of decisions initially made internally, then due process will also be satisfied if initial decisions by the staff of a private prison are subject to independent and external review. In neither case does due process require that the internal staff be excluded from the decision-making process.

Inmate Discipline and Good Time Decisions

Critics of private prisons fear that due process, particularly as it affects discipline and allocation of good time, will be trampled in the pursuit of profit. Most of all, they fear that private wardens will try to hold onto their charges as long as possible, to maximize their per diem revenues. The Legal Director of the Indiana Civil Liberties Union predicts:

> Private prison operators would not only want to reduce costs, but to enhance revenues by maintaining their facilities at capacity and by creating new demands for their services. Inevitably, private prison officials would have a role, even the key role,in making classification decisions, parole recommendations, awarding good time credits and meting out disciplinary sanctions. It will be only too easy for them to abuse these powers in order to increase the length of incarceration and their own income.[28]

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[28]Richard A. Waples, "The Privatization of Prisons: The Wrong Solution for a Real Problem" presented at "A Critical Look at Privatization in Corrections," a conference sponsored by the Indiana Department of Corrections, Indianapolis, Indiana, January 29, 1988.

Two observations are needed to put this fear in proper perspective. First, a company has a financial incentive to hang on to current prisoners only if you assume nonreplacement. Under conditions existing today and projected well into the future, that is not a realistic assumption. Moreover, the argument that there will be an incentive toward unfair and improper denial of good time assumes that such decisions will confer only benefits, and carry no costs; no commercial company with a competent legal staff would make so unrealistic an assumption. Second, it should be noted that only a small proportion of disciplinary cases (often less than ten percent)[29] result in revocation of a prisoner's good time credits; most involve other sanctions. In cases where significant prisoners' rights are at issue, due process can be protected by provisions for appeal to higher authority.

Inmate Classification

Classification of inmates according to the degree of security or supervision they require can have a major effect on the conditions of their confinement, by determining where and with whom they will be housed within a facility. Classification decisions must be made not only on entry, but continuously, as behavior or circumstances change. Moreover, the closer the decision makers are to the actual operations of the institution, the more information they will have on which to base their classifications. This suggests that classification decisions are best made by those who actually run an institution.

Critics worry that private prisons will make classification decisions not according to the best interests of prisoners or of the public, but in accordance with their own interests. It is not at all clear, however, that the interests of those who own and run private prisons are inconsistent with these other interests.

From any standpoint, classification decisions will be better if they are based on accurate predictions. Accuracy is not something that serves one set of interests better than another. This is because the interests of justice, order, economy, and inmate welfare are all served best when prisoners are subjected to the minimum degree of control sufficient to ensure security. There are reasons to believe, however, that private prisons will have especially strong incentives to make accurate predictions, while government bureaucracies will have a bias toward more conservative (i.e., higher security) predictions and classifications.

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[29]John W. Palmer, Constitutional Rights of Prisoners, 2nd ed. (Cincinnati: Anderson Publishing Co., 1977), p. 24.

In the public system, the highest status, largest budgets, and biggest staffs attach to the maximum security institutions. There is thus an incentive to overclassify inmates (i.e., a bias toward higher security designations). In addition, most states overclassify inmates because higher security space is often all that is available.[30] The economic cost of overclassification is not borne directly by those who do the classifying, but passed along to taxpayers. While oversecurity increases economic costs, however, it decreases political costs by minimizing the risk of escapes or loss of control. Public officials are more vulnerable and sensitive to political costs than to economic costs and thus tend to overclassify.

In a private prison, on the other hand, there is a financial incentive to treat cases at the lowest possible level of security, so that more prisoners can be held under lighter supervision or in facilities less costly to construct. There are restraints against carrying the downward classification too far, however. Escapes, violence, lawsuits and other consequences of inadequate security carry both direct financial costs and indirect public relations costs in the form of lost contracts due to a poor reputation. Thus, while private vendors have some incentives to engage in underclassification, they also have countervailing disincentives.

It is not really important to decide whether classification biases are more likely to occur in private or in governmental prisons. The major point is that they can occur in either type. The implication of this is the same as for discipline. Review procedures and other due process guarantees are neither more nor less needed in private prisons than they are in prisons run by government employees.

The Profit Motive vs. Other Motives

Before we look at motives, we should note one point of logic at the outset. Strictly speaking, the motivation of those who apply a punishment is not relevant either to the justice or to the effectiveness of the punishment. It is true that for punishment to be a moral enterprise, it is important that it be done for the right reasons. This, however, is a stricture that applies more to those who determine and decree the punishment than to those who carry it out--to legislative and judicial more than to executive agents. The immediate agents of punishment may be humans with motives virtuous or venal, or robots with no motives at all; that does not affect the requirements of justice.

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[30]Todd R. Clear and George F. Cole, American Corrections (Monterey, CA: Brooks/Cole, 1986), p. 319.

Still, the matter of motives--or rather, one particular motive--seems to be of such great importance to so many opponents of proprietary prisons that it must be dealt with. These critics believe that "criminal justice and profits don't mix." The ACLU in particular has complained repeatedly that "the profit motive is incompatible with doing justice."

If it is legitimate to examine the motives of interested parties, then to be consistent we ought to examine the motives of all parties, including state agencies, public employee unions, prison reform groups, and "public interest" groups.[31] All these parties, like private vendors, have motives that reflect self-interest as well as altruism, and agendas that are hidden as well as overt. For example, the ACLU's National Prison Project may really be as much opposed to prisons per se as to running them like a business. They are afraid that more efficient prisons will mean more imprisonment. They do not object to the profits that are made from the private administration of community correctional programs that serve as alternatives to prison.

A consistent objection to the existence of vested interests in punishment would have to focus as much on the public sector as on the private. Is it wrong for state employees to have a financial stake in the existence of a prison system? Is it wrong for their unions to "profit" by extracting compulsory dues from those employees? Is it wrong for a state prison bureaucracy to seek growth (more personnel, bigger budgets, new investment in human and physical capital) through seizing the profits of others (taxation) rather than through reinvestment of its own profits? Are the sanctions of the state diminished or tainted when they are administered by public employees organized to maximize their personal benefits? If not, why would it tarnish those sanctions to be administered by professionals who make an honest profit? I admit I have posed these questions in prejudicial language, but I have done so to make a point. The notion that any activity carried out for profit, as compared to salary and other benefits, is thereby tainted, is simply an expression of prejudice. Both are economic motivations.

Of various possible motivations for serving as an agent of punishment, the profit motive is among the most benign. Compare, for example, some alternative motives: self-righteousness, enjoyment of power, sadism, vengefulness, zealotry, adventurism, hatred, spitefulness, anger, bigotry, or displacement. No one has proposed that all criminal sanctions be administered by unpaid volunteers motivated by pure love of justice. If someone does propose it, watch out! Great injustices are often done in

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[31]Including the ACLU. See William A. Donohue, The Politics of the American Civil Liberties Union (New Brunswick, NJ: Transaction Books, 1985).

the name of noble-sounding values. The history of corrections, from the penitentiary to the juvenile court, is a road paved with many good intentions that produced bad results.[32] The clear lesson from this history, drawn by criminologists of all persuasions, is that criminal justice policies and practices must be judged by their consequences, not by their motives. In particular, declarations of "public service" should not be taken at face value.[33] Rather, public service should be judged as an outcome, regardless of whether the motivating force behind it is probity, power, or profit.

Replacing "public servants" with "profit seekers" in the management of prisons will not trade those whose motives are noble for those whose motives are base. Rather, it will replace actors whose motives we suspect too little with actors whose motives we are inclined to suspect perhaps too much. Still, whether we are right or wrong to suspect the motives of profit-seeking prison administrators, it is a step in the right direction, when we consider the high cost of relying on good intentions in the past.

Constraining (Everyone's) Self-Interest

But won't a commercial institution be "driven by profit" and, as a result, be tempted to put its own welfare ahead of the welfare of inmates, the needs of the state, or the interests of justice? This concern is legitimate, but it is at least partially misplaced if it is portrayed as a problem unique to commercial enterprises. Actually, the problem exists for public as well as private, for nonprofit as well as profit-making organizations. If it were really true that "justice and the profit motive are incompatible," then justice would be doomed, because in one form or another the profit motive is universal. Like the rest of society, politicians, government bureaucrats, and other state actors are motivated by self-interest. The field of public choice, a hybrid of economics and political science, is founded on this insight, and one of its founders, James Buchanan, recently received a Nobel Prize for his extensive research and theory in this area.

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[32]Francis A. Allen, The Borderland of Criminal Justice (Chicago: University of Chicago Press, 1964); David J. Rothman, The Discovery of the Asylum (Boston: Little, Brown, 1971); American Friends Service Committee, Struggle for Justice (New York: Hill & Wang, 1971).

[33]Willard Gaylin, Ira Glasser, Steven Marcus and David J. Rothman, Doing Good: The Limits of Benevolence (New York: Pantheon Books, 1981).

Consider the case of prosecutors. One does not have to be cynical to understand that prosecutors, like other people, are motivated by self-interest and not purely by love of justice. Job security,, prestige, and power are among the incentives of prosecutors. Many have political ambitions. They are rewarded along these lines according to their conviction rate.

Unlike justice, which is served best through case-by-case prosecution of the most deserved charge, conviction rate is maximized by generous plea bargaining and by pursuing the most numerous and easiest cases. It is this structure of incentives, rather than caseload, that explains the prevalence of plea bargaining.[34]

Suppose now that prosecution were privately contracted. The profit motive of a commercial prosecutor would be at least as defensible, morally, as the mix of motives of a public prosecutor. More importantly, however, the profit motive has the advantage of being more controllable. We cannot easily structure and manipulate the complex incentives of public prosecutors. In contrast, if we wish to encourage a commercial prosecutor to concentrate on the quality rather than the quantity or rate of convictions, we simply structure this incentive into the fee. The fee can be set by an agency authorized to reflect society's concerns (and accountable for doing so) and can vary according to charge of conviction. To discourage wrongful prosecution or improper charges, fines could be imposed on commercial prosecutors whose convictions are overturned on review or appeal.

This proposal is sketchy at best, but it illustrates the point that the profit motive is subject to creative public management in a simpler fashion and to a greater degree than are the motives and incentives operating in public bureaucracies.[35]

One of the most universal of motives is one that could be called the "convenience motive." All human beings, and the organizations they construct, are motivated to behave in ways

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[34]Bruce L. Benson "Guns for Protection, and Other Private Sector Responses to the Government's Failure to Control Crime" The Journal of Libertarian Studies 8(1986): 75-109, at pp. 85-86.

[35]A recent Note in the Yale Law Journal discusses at length the advantages of using financial incentives, like bonuses and fines, to monitor and control private prisons. The author argues that by properly structuring their incentives, profit-seeking prisons can be powerfully motivated to maximize, not just their profits, but also their effectiveness, as measured by recidivism. See James Theodore Gentry, "The Panopticon Revisited: The Problem of Monitoring Private Prisons," The Yale Law Journal 96(1986): 353-375.

that maximize their own convenience. Compared to the profit motive, the convenience motive has few positive external benefits; it is much more asocial and self-interested. Indeed, one of the strongest constraints on the convenience motive is the profit motive. Businesses, for example, must often put the desires of others ahead of their own convenience, if that will increase their profit. Businessmen understand that to sustain any competitive profit-making enterprise it is generally necessary to satisfy some needs other than one's own.

All institutions, from hospitals and universities to courts and prisons,[36] tend to operate according to their own convenience unless they are motivated to do otherwise. For public or nonprofit institutions, this motivation must take the form of political pressure. For private, profit-making institutions, the motivation can take economic as well as political forms, because market mechanisms of discipline and supervision are added to those of the state apparatus.

The effects of this addition are not simply economic. Competition does not just contain costs; it advances other goals as well. When it is possible for a commercial company to take business away from a competitor (including the state) by showing that it can do a better job, then that company becomes a self--motivated watchdog over other companies (and over the state). Such a company will have an interest in critically evaluating the quality of its competitors' services and an interest in improving its own.

In the case of prisons, the existence of competition, even potential competition, will make the public less tolerant of facilities that are crowded, dirty, unsafe, inhumane, ineffective, and prone to riots and lawsuits. Indeed, the fact that these conditions have existed for so long in monopolistic state prisons is a big part of what makes private prisons seem attractive. The possibility of an alternative will make the public, quite rightly, more demanding in its expectations.

Without competition, the state has had a monopoly over both service and supervision, over both doing justice and seeing that it is done properly. With competition, there will be a proliferation of agencies having a direct stake in both, without detracting at all from the state's role as the final arbiter of justice.

For these reasons, among others, the profit motive is not necessarily in conflict with the pursuit of justice; it can, in fact, be conducive to it.

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[36]David J. Rothman, Conscience and Convenience: The Asylum and Its Alternatives in Progressive America (Boston: Little, Brown, 1980).

5. ISSUES OF COST AND EFFICIENCY

The most frequent and most salient -- but not necessarily the strongest -- claim made for the superiority of proprietary prisons is that they will be less expensive, or at least more efficient. There is very little systematic empirical evidence either for or against this claim so far. As a result, both advocates and critics of proprietary prisons base their opposing predictions on theoretical (or often ideological) grounds and on analogies to privatization in other areas. The relative cost and efficiency merits of public and proprietary prisons can be examined within three areas: finance, construction, and operation. Greatest attention here will be given to the area of operation.

Private Financing and Lease-Purchasing

State and local governments are faced with the need to finance $5 to 10 billion in new prison construction. The traditional method of financing is through general obligation bonds. These bonds are secure, and government can generally borrow at slightly lower interest rates than private enterprise. This, however, is assuming that it can borrow at all. Some jurisdictions have borrowed to the point that they have very low credit ratings. Some have legal debt ceilings. Many have voters who are reluctant to authorize further borrowing.

Where government cannot borrow and cannot pay for new prison space out of capital budgets, private financing offers the opportunity to pay for expansion out of annually appropriated operating budgets. While lease-purchase arrangements are long-term in outlook, they include nonappropriation clauses allowing the government to terminate the lease. The main effect of these clauses is to avoid classifying the expenditures as debt. It is unlikely that governments will actually terminate their leases, especially as their equity in the property increases.

Private financing, even when it is through a nonprofit corporation or authority that can sell tax-exempt revenue bonds, generally carries a slightly higher interest rate. However, it avoids the cost of a referendum, has lower transaction costs, and is much faster than the issuance of general obligation bonds. This greater speed can save many months worth of inflation in the cost of the eventual construction. California, for example, has reported needing about $1.3 billion for new prison construction. Assuming a 5 percent inflation rate, an 8- to 10-month delay

associated with a general obligation bond would increase total construction costs in the range of $43 to $54 million.[1]

Private financing and lease-purchases are an option for government to consider, but they are not by any means a simple solution to the high cost of financing new jails and prisons. The issues involved are very complex and the relative advantages of different financing schemes will vary according to a jurisdiction's credit rating and can shift rapidly with changes in interest rates and tax laws.[2] Moreover, governments will want to consider other factors besides cost. For example, a straight lease might be the most expensive option, yet be preferred because it offers flexibility in meeting a temporary need.

Recent tax reforms have made private financing less attractive to investors by eliminating tax write-offs for accelerated depreciation. However, depreciation is still allowed if the facility is both owned and operated privately. Thus, there may be a trend toward this form and away from private financing by itself.[3]

The "Bypassing" of Voters

Avoiding debt limitations and capital budget restrictions are advertised as advantages of lease-purchasing, but they also raise political questions. Where voters have turned down bonds or passed propositions restricting debt, private financing may be seen as no more that a scheme to sneak spending past those voters through an arrangement that does not require their direct approval. By using the off-balance-sheet technique of lease-purchasing, a new jail or prison can be acquired without the appearance of long-term obligation or capital expenditures. Under this arrangement, some people claim that "it's the brokers, architects, builders and banks -- not the taxpayers -- who will make out like bandits."[4]

The public is often regarded as inconsistent because (in opinion polls) it regularly expresses a desire for more imprison-

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[1]Joan Mullen, Kent John Chabotar, and Deborah M. Carrow, The Privatization of Corrections (Washington, DC: National Institute of Justice, February 1985), p. 37.

[2]Ibid., pp. 40-41.

[3]National Institute of Justice, "Corrections and the Private Sector: A National Forum." (Washington, DC: National Institute of Justice, unpub. proceedings, February 20-22, 1985), p. 6.

[4]Susan Duffy, "Breaking into Jail: The Private Sector Starts to Build and Run Prisons," Barron's May 14, 1984, pp. 20-22.

ment yet frequently refuses (in bond referenda) to pay for it. Rather than inconsistency, however, this may reflect dissatisfaction with current government performance in constructing and operating prisons. The public may sense that it does not get full value for its correctional dollar. It wants more and better imprisonment but does not want to pay a lot more for it. This is not necessarily irrational. Indeed, it is a reasonable reaction to dissatisfaction under conditions of monopoly. Only where competition and comparison demonstrate the true price of a product does it become irrational to demand more without being willing to pay what it takes.

Even if a majority of the public did not want more prisons, as opposed to simply not wanting to pay for them, that would not settle the question. We live in a representative republic, not a direct democracy, and under constitutional rule of law, not direct majority rule. Where the crime rate is high and our laws call for imprisonment of serious offenders, we must provide space for them. Where courts declare overcrowding and other conditions to be unconstitutional, we must expand the space and make the conditions acceptable. Thus, a fiscally strained government whose prisons and jails are under physical and legal pressures, may be forced to "find ways around" a referendum. Such a government is not necessarily behaving in a high-handed fashion; it may simply be living up to its responsibilities.

In any case, while a referendum may be the last word on one particular type of financing, it does not preclude other forms, nor is it the last word on the issue of new construction, as opposed to financing. Indeed, it is not always clear just what it means when voters defeat referenda on the issuance of new bonds to finance prison construction. These referenda may simply reflect public apathy and confusion. The majority of the public does not vote on these issues and often these referenda face better organized and financed campaigns in opposition, than in support.

David Jacobs studied one prison bond referendum that was narrowly defeated in New York state.[5] He found strong and organized opposition among a small number of groups, combined with general public apathy that resulted in low voter participation. He found that voting in favor of the bond, when examined by area of the state, correlated positively with the crime rate. Also, the bond was supported strongly in liberal New York City and rejected strongly in conservative upstate New York. To some extent, that split might have reflected the general pattern of up-staters not wanting to pay for New York City's problems, but

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[5]James B. Jacobs, New Perspectives on Prisons and Imprisonment (Ithaca, NY: Cornell University Press, 1983), pp. 115-132.

Jacobs regarded that explanation as not wholly satisfactory.[6] He concluded that the vote was the result of confusion and apathy, not conscious rejection of prison expansion as a policy.

Opinion polls consistently show strong public support for more spending on criminal justice. The objection behind a failed referendum may be specific to the issuance of bonds and the expansion of public debt, not to the expansion of the prison system. In any case, voters still have the option of objecting to lease-purchasing, if they wish to, through their elected representatives.

Construction

Corrections Corporation of America reports its construction costs to be about 80 percent of what government pays for construction.[7] CCA notes that it can build not only faster, thereby saving inflation costs, but at a lower immediate cost, as well, since construction contractors charge the government more.[8]

Private companies have demonstrated repeatedly that they can locate, finance, design, and construct prisons more rapidly than government can.

In 1975, the Attorney General of Pennsylvania ruled that even hard-core delinquents could not be incarcerated in facilities with adult offenders. Faced with the need to relocate all affected juveniles immediately, and lacking suitable facilities, the state turned to RCA, with whom they already had a contract for educational programs for delinquents. In ten days, RCA set up the Weaversville Intensive Treatment Unit, a heavy security facility with 20 beds and 30 staff members. In this case, RCA was able to convert buildings already owned by the state; other contractors have built their own or remodeled existing private structures, such as motels, to make them secure.[9] While a spokesman for the Federal Bureau of Prisons states that it takes

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[6]Ibid., p. 126.

[7]Richard Crane, Vice President, Legal Affairs, Corrections Corporation of America, testimony, November 13, 1985, U.S. Congress. House. Committee on the Judiciary. Privatization of Corrections. Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 99th Cong., 1st and 2nd sessions, November 13, 1985 and March 18, 1986, Serial No. 40 (Washington, DC: U.S. Government Printing Office, 1986), p. 29.

[8]Kevin Krajick, "Punishment for Profit" Across the Board 21(March 1984): 20-27.

[9]Ibid.

two or three years to site and build their prisons[10] and other sources report that it takes five years or more to build secure facilities,[11] some private contractors have been able to design, finance, and build prisons in six months.[12]

In Houston, Texas, a privately-owned, 68,000 square-foot detention facility for 350 illegal aliens was financed and built in just seven months, to be operated under contract to the Immigration and Naturalization Service. Hutto and Vick describe the process:

> INS's request for proposal required a response within 30 days from the date of advertisement, complete with plans of the proposed facility. Work on programming and site acquisition began immediately. Site criteria were established and feasibility studies conducted in a matter of days. . . . Preliminary drawings and specs were completed in two weeks and ready for contractor review and pricing. . . . After the contract was awarded, the project was fast-tracked with construction drawings completed in the sequence required for each building system.[13]

The time savings achieved in the INS Facility would be almost impossible to duplicate in the public sector if normal bureaucratic procedures were followed. For this and other reasons, the privatization of corrections is an attractive alternative to continued massive capital outlays for facilities construction by the public sector.

In Laredo, a 150-bed detention facility for adult and juvenile males and females was built and opened by a private company within 8 months of signing a contract with the INS.[14]

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[10]Ibid.

[11]Newsweek, May 7, 1984.

[12]Hartford Courant, April 1, 1984.

[13]T. Don Hutto and G. E. Vick, "Designing the Private Correctional Facility," Corrections Today (April, 1984), p. 85.

[14]Crane, p. 33.

Operation

Salaries account for about 80% of most prisons' operating costs.[15] Starting salaries for corrections officers are generally low, however, so cutting salaries may not be the best method of reducing labor costs. Although there are occasional stories of lower wages[16], contractors generally pay salaries comparable to government, especially when they take over the operation of an existing facility.

According to CCA, more effective personnel management can cut costs without cutting salaries.[17] Adequate and appropriate staffing and better conditions improve productivity and morale, decrease absenteeism and turnover, and reduce expensive reliance on overtime. More efficient procedures ultimately translate into lower labor costs. For example, police chiefs around Bay County say that after CCA took over management of the jail there, booking time was cut in half as a result of streamlined procedures.[18]

CCA reports that it achieves savings in the key area of security personnel through efficient scheduling, facility design, and strategic use of electronic surveillance systems. As a result of these management and capital investments, labor costs are reduced to about 60% of operating costs.[19] A building design or work schedule which eliminates one post can save over $100,000 a year in salaries and fringe benefits, since it requires more than 5 staff positions to fill a post 24 hours a day.[20]

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[15]George Camp and Camille Camp "The Real Cost of Corrections: A Research Report," (South Salem, NY: Criminal Justice Institute, April, 1985), p. 3.

[16]At Hidden Valley Ranch, when run by Eclectic Communications Inc., the cook earned $4 less per hour than he did in the same job at a nearby San Francisco County boys' ranch. The warden earned one-third less than he did as warden at the federal prison in Terre Haute, Indiana. San Jose Mercury News, March 15, 1985.

[17]Charles Ring, Contracting for the Operation of Private Prisons: Pros and Cons (College Park, MD: American Correctional Association, 1987), pp. 28-29.

[18]Erik Larson, "Captive Company," Inc., June 1988, p. 90.

[19]Corrections Corporation of America, Company Report, April 3, 1987.

[20]Gail Funke, "The Economics of Prison Crowding," Annals, 478(1985): 88.

Civil service and other restrictions impede efficient personnel management in the public sector. Inefficient employment may even be legislated. Savas gives an extreme example from New York City: "Inefficient staffing was legitimized by a state law that called for an equal number of police officers on duty on each shift, despite the fact that crime statistics showed few criminals working in the small hours of the morning. Because of this legislated inefficiency, if more police were needed for assignment to evening duty, when most street crimes occur, more would also have to be hired and assigned when there was little work for them to do."[21]

When the Eckerd Foundation took over operation of the Okeechobee School for Boys, it eliminated what an independent study referred to as "a convoluted personnel bureaucracy."[22] State facilities "cannot add, delete, reclassify, exceed 10% above the minimum pay range, or carry out other personnel functions on a local level." State administrators found the personnel process time consuming and frustrating. In contrast, under Eckerd, the Superintendent at Okeechobee "has the latitude to hire, fire, and exceed the minimum salary, as long as he stays within the budget." Positions can be added or reclassified with a telephone call, to get concurrence from Foundation headquarters. Dismissals are formalized, with an appeal mechanism, but there is no union.[23]

There is a union of county employees at the Butler County Prison in Pennsylvania, but that has not prevented their private management company from instituting personnel reforms. All prior full-time employees retained their jobs and received pay hikes, but management was able to redefine job responsibilities and work schedules in order to reduce overtime and eliminate part-time,

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[21]E. S. Savas, Privatizing the Public Sector; How to Shrink Government (Chatham NJ: Chatham House Publishers, 1982), p. 24.

[22]All quotes in this paragraph are from American Correctional Association, Private Sector Operation of a Correctional Institution (Washington, D.C.: U.S. Dept. of Justice, National Institute of Corrections, April, 1985), p. 48.

[23]The next chapter, on "Issues of Quality," describes some severe problems of labor turnover resulting from a radical change in working hours, which Eckerd later changed back to a normal work week. Thus, the company may not have made the best use of its personnel flexibility at first, but at least the flexibility was there.

non-union positions.[24] At first the union insisted, like the police in New York City, that all shifts had to be staffed equally, regardless of need; in a later agreement, however, this was changed to differential staffing.[25] Many other personnel efficiencies, relating to work assignments, verification of worker presence, and more systematic provisions for sick and vacation relief, were instituted. Turnover fell from three or four employees a year under the county, to zero during Buckingham's first year.[26]

Skepticism Regarding Cost Savings

Critics of privatization challenge the assertion that prisons can be run more efficiently and less expensively by private companies. For example, John Hanrahan, a leading opponent of private contracting of public services, asserts: "One basic item that should make contracting-out more expensive, all other things being equal, is that contractors exist to make a profit, while governmental units have no such motivation."[27] By specifying "all other things being equal," Hanrahan makes his argument tautological. To escape the tautology, he would have to show that the profit motive adds more to expenses than it subtracts and also that it adds more than do the alternative motives found in organizations that do not pursue profits. In a competitive environment, profit margins must be kept as low as possible, as part of the process of keeping total costs down. Among current prison contractors, RCA makes a profit of 5% at Weaversville, while Behavioral Systems Southwest runs its detention centers with a profit margin of 8%.[28] Naturally, if "all other things" were equal, these two contractors would have costs that were excessive by 5% and 8%, respectively. By the same token, however, other costs need only be lower by 5% or 8% for these contractors to compensate for their profits.

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[24]Buckingham Security Ltd, Private Prison Management: First Year Report 1985-1986, Butler County Pennsylvania (Lewisburg, PA: Buckingham Security Ltd., 1986), p. 3.

[25]Ibid., p. 5, with update via personal communication from Charles Fenton, Warden.

[26]Ibid., pp. 4-5.

[27]John Hanrahan, "Why Public Services Should Stay Public," The Des Moines Register, March 31, 1983.

[28]Kevin Krajick, "Prisons for Profit: the Private Alternative," State Legislatures 10(1984): 9-14; Philadelphia Inquirer, April 16, 1984.

Another critic, John Donahue, argues that the scope for cost savings in running prisons is very limited. Imprisonment is such a simple, basic arrangement, he says, that there is little room for improvement in efficiency.

> Prisoners must be sheltered, fed, cared for when sick, protected from each other, and prevented from escaping. These do not appear to be the type of tasks that allow for major innovations in technique.[29]

John DiIulio also argues that so much of running a prison is either a fixed cost or judicially mandated that it is hard to imagine that there is any room for greater efficiency by the private sector.[30]

However, if this argument were correct, there would also be little room for variation in public prisons, either in performance or in cost. Yet, as DiIulio himself points out,[31] prisons vary greatly in both performance and cost, with no simple relation between the two. Since there is variation, it must be the case that there is room for variation.

Reasons to Expect Cost Savings

Peter Drucker[32] suggests that public service institutions tend to be both inefficient and ineffective, not simply because they are public rather than private, but because of the way they are financed. Profit-and-loss incentives differ fundamentally from budget-driven bureaucratic incentives. Entrepreneurs are competitively motivated to provide maximum satisfaction at minimum cost. In contrast, bureaucrats are rewarded not so much for efficiency, but in direct proportion to the size and total

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[29]John D. Donahue, Prisons for Profit: Public Justice, Private Interests (Washington, DC: Economic Policy Institute, 1988), p. 14.

[30]John DiIulio, Jr., "Prisons, Profits and the Public Good: The Privatization of Corrections." Research Bulletin No. 1. (Huntsville, TX: Sam Houston State University Criminal Justice Center, 1986), p. 3.

[31]Ibid. See also, John J. DiIulio, Jr., Governing Prisons: A Comparative Study of Correctional Management (NY: The Free Press, 1987).

[32]Peter F. Drucker, Management: Tasks, Responsibilities, Practices (New York, NY: Harper & Row,, 1973), pp. 141ff.

budget of their agencies.[33] Maximizing a unit's size and budget is not conducive to maximizing efficiency.

Budget-based organizations are motivated to increase in size and resources through expanding their budgets. Their money is based on promises, intentions, and efforts, not strictly on results. They depend for support on their ability to appeal to a broad constituency. They must be all things to all people and alienate no one.[34] This compromises their effectiveness because they cannot concentrate their efforts successfully.

Economies of Scale

Economies of scale vary greatly by the type of service and by the size and nature of the area being served. However, as Robert W. Poole, Jr. points out, "The one arrangement least likely to be most efficient is for all the services to be provided at the scale defined by the size of the [political jurisdiction]."[35] For example, nearly all cities need some jail services, but it may require a multi-city contract to meet the needs of small cities, while a large city can operate more efficiently by using multiple contractors to meet its varied needs (e.g., high and low security, male and female inmates, juveniles and adults, detoxification units, etc.).

Private contractors should be able to realize significant economies of scale by contracting across jurisdictions. When a private prison rents to a secondary contracting jurisdiction space that is unused by the primary contracting jurisdiction, this benefits all parties concerned. The company keeps its unit costs low by running closer to capacity. The secondary contracting jurisdiction benefits because it can rent space rather than build it. The primary contracting jurisdiction benefits because the company can charge the primary jurisdiction a lower fee and share with it a higher fee charged to the secondary jurisdiction.

Economies of scale could also be achieved by governmental units contracting directly with each other, rather than through private contractors. Interjurisdictional prisons and jails have been long and widely advocated, but cooperation between governments has been hard to achieve. Private contracting may help

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[33]Robert W. Poole, Jr., "Objections to Privatization," Policy Review 24(1983): 106.

[34]This also means that they can fully satisfy no one. For a discussion of this as it pertains to prisons, see Charles R. Tittle, "Prisons and Rehabilitation: The Inevitability of Disfavor," Social Problems 21(1974): 385-395.

[35]Poole, p. 107.

overcome some of the political, fiscal, and administrative obstacles to establishing regional, interjurisdictional facilities.[36] Such facilities offer a potentially more efficient means of accommodating low prevalence cases (e.g., women), exceptional needs cases (e.g., medical or protective custody), and other special categories.

Wastefulness in Public and Private Sectors

Waste and extravagance can be found in both the public and the private sector, though they tend to take different forms in each. Business is better known for padded expense accounts, expensive perquisites like company aircraft, and lavish offices (though these are found at the upper levels of government bureaucracies also). Private use of company or government vehicles is common in both sectors.

Shirking is a form of waste to be found wherever there are workers, but management controls are stronger in the private sector. Tardiness, absenteeism, and abuse of sick leave are probably more prevalent among government than private workers.

Employee theft is a source of waste found in both sectors, but only in very large corporations is it as common as it is in government.[37] While occasional embezzlement of large sums is generally associated more with private business, petty pilferage is certainly more epidemic in government. Personal use of telephones and postage are so common in government that they are hardly even perceived as theft, except for occasional abuses so flagrant as to be scandalous.

The form of waste that is most characteristically governmental (though it would be more accurate to identify it as "budget based" rather than "governmental") is the deliberate splurging that occurs toward the end of each fiscal year. It is universally understood among budgetary bureaucracies that to end the year with a surplus is to invite a reduction in the next year's budget. Most certainly, it weakens the case for an increase.

In sum, while various forms of waste can be found in either sector, their total influence is probably much greater in the public sector.

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[36]William L. Megathlin, Dennis D. Murphy, and Robert E. Magnus, Feasibility of the Establishment of Regional Prisons. (Washington, DC: U.S. Department of Justice, National Institute of Corrections, May, 1984), pp. 45-50.

[37]Erwin O. Smigel, "Public Attitudes toward Stealing as Related to the Size of the Victim Organization," American Sociological Review 21(1956): 320-327.

Public vs Private Retirement Benefits

In 1983, the President's Private Sector Survey of Cost Control (the Grace Commission) reported the results of its efforts to identify sources of waste and inefficiency in the federal government. They found that the largest single source was retirement programs. Historically, government employment had to compensate for lower salaries by offering greater security, both before and after retirement. When the Federal Salary Reform Act of 1962 mandated "comparability" of salaries, this trade-off was undermined, to the benefit of government workers, with added cost to taxpayers. Today's federal blue collar workers are better paid than their private counterparts and their civil service retirement arrangements are two to three times as generous as those for private employees.[38] Prior to retirement, federal employees take two-thirds more sick pay than do those in the private sector[39]. Assuming that the bulk of correctional workers are blue collar and that state and local (like federal) retirement systems and other benefits are also relatively generous, the findings of the Grace Commission suggest that there is probably room for savings in the overhead and indirect costs of prisons.

Inflation and Contracting

Another potential cost advantage of contracting is in controlling the effects of inflation. Prison contracts, if they are not renegotiated annually, typically include a provision constraining the vendor to limit fee increases according to inflation, as measured by the Consumer Price Index (CPI). In contrast, growth in government costs usually outpaces the general level of inflation, and government costs in the corrections area have been rising particularly fast.[40] Economist Harry W. Miley, Jr. found that from 1974 to 1984, the per inmate costs of the South Carolina Department of Correction increased by an annual average of 11.4% while the CPI increased an average of 7.7% a year.[41]

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[38]Peter Samuel, "Battling the Budget -- Gracefully." Reason 16(1984): 36.

[39]Ibid., p. 38.

[40]See Chapter 1.

[41]Harry W. Miley, Jr., "Cost Analysis of State vs. Private Correctional Facilities," (Columbia, SC: University of South Carolina), p. 3.

Purchasing

Government agencies require bureaucratic controls (red tape) to regulate their purchasing procedures because they lack the more automatic restraints of a profit-oriented firm. With their greater latitude, private prisons can shop more effectively and obtain better prices. Because they can purchase more quickly, they can maintain lower inventories.

An American Correctional Association report on the private operation of the Okeechobee School for Boys illustrates the difference between public and private purchasing arrangements:

> Purchasing practices constitute an additional bureaucracy at the State level. In addition to Department of Health and Rehabilitative Services policies and procedures, there is a Department of General Services--Division of Purchasing -- Bureau of Institutions which is responsible for training school purchasing. This Bureau has a schedule for purchasing [all] commodities needed in an institution. Consequently, the facility's Business Manager and Purchasing Agent have to plan ahead for at least six months and forecast the quantity needed for every item in those categories. Once a purchase order is issued by the Department of General Services it cannot be cancelled by an institution for any reason without going back to General Services with complete written justification.
>
> The Foundation, in contrast and with minimum interference, gave complete latitude to Okeechobee to purchase needed commodities. There is little delay in receiving goods, and no six-month lead time.[42]

In Hamilton County, Tennessee, the county had to go through a formal bidding process every week for prison kitchen supplies. After CCA took over all prison purchasing, the county was able to eliminate two buyer positions.[43]

Property Management

The Grace Commission's comparison of public versus private property management is also instructive and relevant to the issue of prisons. The Government Services Administration employs 5,000 people to manage 8,600 buildings worth $9 billion, at a cost of $125 million. In contrast, a large life insurance company

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[42]American Correctional Association, p. 47.

[43]Information supplied by Bill McGriff, Hamilton County Auditor, October 27, 1987.

requires only 300 managers for 10,000 buildings worth $8 billion, at a cost of only $9 million.[44] In other words, the private company manages more buildings (of nearly comparable value), with far fewer managers, at a small fraction of the cost of government management. It therefore seems reasonable to suppose that the management of prison property would also be more efficient in private hands.

Experience with Contracting for Specific Prison Services

Virtually every aspect of operating a prison -- such as food service, medical service and counseling, educational and vocational training, recreation, maintenance, security, industrial programs, and so on -- is already subject to contracting as a separate program component. In addition, many states now contract out the majority of their community corrections programs. If correctional administrators state that it is cheaper for them to farm out these various aspects of corrections separately, that may not prove, but it certainly does suggest, that it could also be cheaper to administer an entire subsystem, such as a prison, under private contract.

A comprehensive national survey of correctional agencies[45] identified 52 agencies that had contracts with the private sector in 38 states plus the District of Columbia. Those contracts encompassed 32 varieties of service, covering "literally every aspect of institutional operations".[46] Fifty agencies reported a total of about $200 million in contracts[47]. Looking only at their largest contracts, 22 agencies reported saving $9.5 million in all, or 26 percent less than would have been the case if they had provided those services themselves. On the other hand, six agencies reported a total loss of $800,000 on their largest contracts, or 17 percent more than they would have spent if they had provided the services themselves.[48]

Since the abovementioned figures pertain only to the largest contracts (excluding construction or architect fees), the total value of savings due to private contracts was unreported. However, we do know that altogether three-quarters of the

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[44]Samuel, p. 38.

[45]Camille G. Camp and George M. Camp, Private Sector Involvement in Prison Services and Operations (Washington, D.C.: U. S. Dept. of Justice, National Institute of Corrections, February, 1984).

[46]Ibid., p. 5.

[47]Ibid., p. 7.

[48]Ibid., p. 10.

agencies reported some -- at times considerable -- savings. Moreover, at least some of the money-losing contracts were a response to court orders or some other motivation to upgrade services[49] and thus not primarily designed to save money.[50]

Reviewing the cost implications of their survey in a later article, the Camps concluded: "Contracting with the private sector has proven to be cost-effective most of the time."[51]

Cost Inferences from Privatization of Other Public Services

All public services -- not just corrections -- either have direct counterparts in the private sector, or can be broken down into components, each of which has a counterpart in the private sector. Therefore, the literature on privatization of other public services is relevant to the question of whether we should anticipate cost savings in the privatization of corrections.

Excluding the postal service, one quarter of federal employees are engaged in activities having identical commercial counterparts. The Office of Management and Budget estimated that $1.7 billion a year could be saved by contracting this work to the private sector[52].

The contracting process has been shown to save the government money even when the government, after study, decides not to contract out. In Circular A-76, the Office of Management and Budget has specified the procedures for federal agencies to follow in determining whether some of the goods and services they produce could be more efficiently procured under contract. The first step is to write a clear Performance Work Statement defining the activity in question. The agency then analyzes its current method of carrying out that activity in-house and determines what changes would be necessary to make it as efficient as possible. The estimated cost of this newly organized in-house operation is then compared with the estimated cost if the activity were contracted to a commercial firm. About 45% of these comparisons favor the in-house operation, but the government wins this competition either way. Whether as a result of contracting or as a result of the internal managerial review, the

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[49]Ibid., p. 12.

[50]Moreover, the Camps noted that even those agencies not reporting cost savings "concluded that the operational benefits more than outweighed the cost factor." Ibid., p. 10.

[51]Camille Camp and George Camp, "Correctional Privatization in Perspective," The Prison Journal 65(1985): 24.

[52]Samuel, p. 39.

government agency achieves greater efficiency. In 1984, OMB reported that almost 1,700 cost studies conducted since 1979 showed an average savings of 20% over previous costs, "regardless of whether Federal employees or contractors won the competition."[53]

Other empirical research has shown economic benefits in the privatization of such diverse services as solid-waste collection, electric power, fire protection, transportation, postal service, health care, education, social services, protective services, and a number of others.[54]

Obviously, imprisonment differs from other public services in important respects, but not necessarily in ways that relate to efficiency and cost. Evidence of successful private delivery of other services is cause enough to anticipate that it also would be feasible for corrections.

Okeechobee -- An Early Cost Comparison

In a report sponsored by the National Institute of Corrections, the American Correctional Association compared Florida's privately-run Okeechobee School for Boys with the state-run Arthur G. Dozier School for Boys. Table 1 is adapted from that report.[55]

In the ACA report, these figures are interpreted as showing that Okeechobee did not become more efficient under private management. While Okeechobee continued to operate at a lower per capita cost under the Eckerd Foundation, just as it did under state management, it did not show any decrease.

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[53]U.S. Office of Management and Budget, Enhancing Governmental Productivity through Competition: Targeting for Annual Savings of One Billion Dollars by 1988 (Washington, DC: Office of Federal Procurement Policy, March, 1984).

[54]Savas, Chapter 6, "Public Versus Private."

[55]American Correctional Association, p. 69.

TABLE 1

OPERATING COSTS, PER CAPITA, AT
OKEECHOBEE AND DOZIER SCHOOLS FOR BOYS

	1981-82 (Before)	1982-83 (Transition)	1983-84 (After)
Dozier	$12,155	$13,604 (+10.7%)	$17,215 (+41.6%)
Okeechobee	$10,853	$11,310 (+ 4.2%)	$14,617 (+34.7%)
Differential		6.5%	6.9%

SOURCE: American Correctional Association, Private Sector Operation of a Correctional Institution (Washington, D.C.: U.S. Dept. of Justice, National Institute of Corrections, April, 1985), p. 69.

A very different interpretation, however, is actually more consistent with Table 1. The three fiscal years shown are the years before, during, and after the takeover of Okeechobee by Eckerd. The "promise" of Jack Eckerd (which was more like a boast or a bet) was not that his foundation could decrease costs over time, but that it could run the school for less than the state could.[56] An early claim of 10% savings was reduced to 5% before the RFP was put out, so the lower figure of 5% seems fair to use as Eckerd's test.

Costs are ordinarily expected to increase through time as a result of inflation, so the proper design for a before-and-after study is to compare the rates of increase under the two different types of management. A lower rate of increase, then, is most correctly interpreted as a cost saving. To interpret such a saving as resulting from private management would rest on the assumption that Okeechobee in state hands would have increased in costs at the same rate that Dozier did in state hands.

[56]Ibid., p. 67.

This is a logical assumption, and there is some empirical support for it. Dozier's major cost increase was for additional staff, hired in response to the recommendations of a 1981 legislative study of the state's training schools.[57] Okeechobee's staff/client ratio in 1981 was at least as bad as Dozier's -- 1:1.7 vs. 1:1.6.[58] It is thus reasonable to assume that the state would have upgraded Okeechobee at least as much as it did Dozier, at a comparable percentage increase in cost.

As shown in Table 1, costs at Okeechobee during Eckerd's first year increased 4.2%. This is 6.5 percentage points below Dozier's increase of 10.7%. This difference, 6.5, is an estimate of the percentage increase in Okeechobee costs that would have occurred under state management but was avoided by the change to private management. This compares quite favorably to Eckerd's claim to be able to run the school for "5% less" (than it would cost the state to run it during the same year). In other words, Jack Eckerd's boast was fulfilled, at least in the short run.

On the other hand, Okeechobee's cost control advantage across two years (6.9 percentage points) was not very much greater than its advantage across one year (6.5 percentage points). Additional data would be needed to determine whether Eckerd's efficiencies were temporary or continuing. Both Okeechobee and Dozier changed in important ways across these three years.[59] Such changes add to the problems of incomparability that make cost comparisons so difficult.

Simple Cost Comparisons Favorable to Private Management

In a recent census of juvenile facilities, the average cost in 1982 to house one resident for one year in a private facility was $21,256; in a public facility it was $22,009. However, there was great variation by state in costs and in the relative cost advantages of private versus public facilities. Public facility costs were higher in 30 states and private facility costs were higher in 17 states. Much of the cost advantage of private facilities was probably due to their open environments. While 90% of the private facilities had open environments, this was true for only 61% of the public facilities. The average daily

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[57]Ibid., p. 52

[58]Ibid., p. 49.

[59]Dozier added 17.5 staff positions in 1982-83 and 32 positions the year after that. During the transition year, Eckerd reduced the staff at Okeechobee and concentrated on upgrading the physical facilities. The next year, the Foundation contributed $236,000 of its own money and returned the staff to above its previous level. Ibid., pp. 15, 48.

cost per inmate for all public facilities was $60, a little higher than the cost of $58 for private facilities. However, the cost for "open" public facilities was $53 and for those with an "institutional" environment it was $62. Thus, cost was associated more with type of environment than with type of management.

One institutional juvenile facility that is privately run is RCA's Intensive Treatment Unit at Weaversville, Pennsylvania. While expensive, this program is comparable to or a little lower in cost than equivalent state programs. Its per diem of $130 is about 11% less than the $141 and $152 costs at two comparison state facilities.[60] RCA's staff salaries at Weaversville are often lower than equivalent state positions and their medical and pension benefits are more modest.[61] In 1983, Pennsylvania allocated $912,819 for Weaversville. RCA came in under-budget, with expenses for that year of $868,449, of which $59,761 was their proprietary fee.[62]

At the Marion Adjustment Center, the Kentucky Corrections Cabinet reports that U. S. Corrections Corporation's cost is about 25% higher than the cost of state-operated minimum security facilities, but comparable to the cost of contracts for community corrections, which is how the Cabinet defines the facility.[63] Another source compares the USCC fee of $25 per day with a state cost of $21. This would be 19% higher, but it includes $1 million for remodelling.[64] The state cost probably does not include financing, construction, and other capitalization. A third source, however, compares the USCC per diem fee of $25 in 1986 with 1983-84 costs of $22.74 and $26.83 at two similar state-operated institutions.[65] Allowing for inflation from 1983-84 to 1986, the USCC fee would be lower than state costs.

Facilities of the Immigration and Naturalization Service (INS) are generally cited as less expensive when in the hands of

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[60]Judith C. Hackett, Harry P. Hatry, Robert B. Levinson, Joan Allen, Keon Chi, and Edward D. Feigenbaum, Issues in Contracting for the Private Operation of Prisons and Jails. Final Report. (Washington, DC: Department of Justice, October, 1987), p. 53.

[61]Mullen, et al., p. 65.

[62]Philadelphia Inquirer, August 12, 1984.

[63]Bruce Cory, "From Rhetoric to Reality: Privatization Put to the Test," Corrections Compendium, May 1986, p. 12.

[64]Courier-Journal, February 16, 1986.

[65]Hackett et al., pp. 52-53.

private operators. In 1984, Behavioral Systems Southwest (BSS) charged the INS, for its Pasadena facility, about half of what the Los Angeles County Jail was charging the INS two years before.[66] Another source[67] compared a BSS per diem of $14 to INS costs of $40 - $50 (a 65% - 72% savings). CCA's per diem charge of $23.84 in 1984 compared to an INS cost of $34.85 (32% savings).[68] While these positive comparisons can be countered with others in the opposite direction (see below), the INS has reported an overall savings, across contracts, of about six percent.[69]

In addition to its INS contracts, Behavioral Systems Southwest also operates six minimum security re-entry facilities. As reported in Money magazine: "The firm charges $14 to $33.50 a day per detainee, or 15% less than it costs California to run similar programs. The difference is mostly labor costs. While starting correctional officers at a state-run prison usually earn slightly more than $2,000 a month. Behavioral Systems' monitors -- they don't carry firearms or wear uniforms -- make about half that."[70] The comparison between prison guards and halfway house monitors, however, may not be appropriate. Also, the implication that savings require salary cuts for similar work does not hold up when training and duties are held constant. For example, when CCA takes over a facility previously run by government, where comparison of function is more appropriate, it generally raises the salaries of employees who stay on.

Santa Fe County, New Mexico, spent $94 a day to run its jail before CCA took over in 1986. CCA costs in 1987 were $45 a day (52% lower). New Mexico attorney general Paul Bardacke attributed the lower cost to better use of the facility.[71] While Santa Fe County's budget for the jail under its own operation was $1.5 million a year, its payment to CCA would be $858,678 a year for the population size at the time of takeover. Assuming an arbitrary 12% increase in population, that would rise to $975,771. The contract with CCA sets a ceiling price of $1.3

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[66]Mullen, p. 68.

[67]Philadelphia Inquirer, April 16, 1984.

[68]Crane, p. 29.

[69]Samuel Greengard, "Making Crime Pay" Barrister Magazine 13(1986): 15.

[70]Money, May, 1986, p. 32.

[71]John W. Moore, "Paying for Punishment," National Journal No. 11 (March 14, 1987), p. 616.

million a year during the three-year life of the contract.[72] At the end of the first year, Dr. Patricio Larragoite, Chairman of the Santa Fe County Commission reported savings of $400,000 under the contract and projected a total of $1.5 million in savings over the three-year period of the contract.[73]

In Florida, CCA's final bid of $24.50 per diem to operate the Bay County Jail was 12% lower than the sheriff's final bid of $27.80 .[74] As an added benefit, CCA's figure (unlike the sheriff's) included $700,000 in renovations. When CCA and the sheriff each projected their total jail costs for the following year, CCA's estimate of $2.5 million was 22% lower than the sheriff's estimate of $3.2 million.[75] The sheriff's true costs were probably understated in his final bid. According to County Commissioner John Hutt,[76] the sheriff's proposed budget prior to county negotiations with CCA worked out to about $48 per inmate day. During county negotiations with CCA, however, Sheriff Pitts presented about 6 different revised budgets, in which he shifted costs from the corrections budget to the law enforcement budget. His final figure, however, was still higher than CCA's.

In addition, CCA initiated a work program that provided the county with $660,000 worth of labor in one year.[77]

Volunteers of America in 1985 charged Ramsey County, Minnesota $57 a day for fully confined inmates[78] in its women's detention center. This was 29% - 37% less than the $80 - $90 estimated cost if Hennepin County (Ramsey County's prior, public contractor) were to build new space for them.[79]

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[72]Santa Fe New Mexican, June 21, 1986.

[73]The New Mexican, August 16, 1987.

[74]Florida Times-Union, November 24, 1985.

[75]Florida Times-Union, 11-24-85. The news account does not explain the discrepancy between the 12% differential for the per diem figures and the 22% differential for total next year's costs. It may be that the per diem figures referred only to the current jail facility, while the total next year's costs included a Jail Annex, planned for construction.

[76]Interview with John Hutt, Bay County Commissioner, February 25, 1987.

[77]Larson, p. 90.

[78]$28 for work release inmates.

[79]Hackett et al., p. 53.

In Ohio, the Corinthian Corporation has proposed to build a jail for Summit County or Cuyahoga County. The 100-bed, $3.5 million facility would hold minimum security cases only: misdemeanants or nonviolent first offenders. The corporation's proposed charge of $50 a day would be lower than the $57 per diem cost of the current Cuyahoga County Jail or the $70 charged by Lake County to hold prisoners for other jurisdictions. Those current facilities, however, probably handle a broader range of offender than that proposed by the Corinthian Corporation. The $44 - $50 sliding scale at the Warrenville Workhouse might reflect the public cost for a more similar population.[80]

A three-county group in New Mexico negotiated with a private company, Southwest Detention Facilities, to build and operate a regional prison. The company offered to do this for $54 per inmate day, 31% less than the counties' current costs of $78 a day.[81]

During its first year of operating the Butler County Prison, Buckingham Security saved the county $100,000 in overhead by eliminating 15 part-time, nonunion jobs, while retaining 21 full-time, unionized county workers and reorganizing work schedules. The cost of running the jail was reduced from $700,000 to $600,000. Of that, $270,000 was for costs the county pays directly -- capital improvements, medical expenses, and jail (county) employee salaries. The remaining $330,000 was Buckingham's management fee, which covers food service, utilities, maintenance, management salaries, and a profit of 5% to 10%.[82]

Simple Cost Comparisons Favorable to Government Management

While INS facilities were cited above as examples of cost comparisons favorable to private management, they can also be used to cite comparisons unfavorable to contracting. In 1985, the per diem cost at privately operated INS facilities was $37.26 as an unweighted average across 5 sites; the cost at publicly operated INS facilities was $31.89 as an unweighted average across 6 sites for which there were data.[83] However, as noted by

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[80]All figures are from the Cleveland Plain Dealer, October 1, 1984.

[81]Philadelphia Inquirer, April 16, 1984.

[82]Lee Kravitz, "Tough Times for Private Prisons," Venture (May, 1986): 56; Buckingham Security Ltd., p. 4.

[83]Pennsylvania Legislative Budget and Finance Committee, Report on a Study of Issues Related to the Potential Operation of Private Prisons in Pennsylvania (Harrisburg, PA: Pennsylvania

the Pennsylvania Legislative Budget and Finance Committee, which reported these figures, there is so much variation among these facilities by location, size, security, and services that the comparison of the averages is not very meaningful. The range among the government-run facilities was $17.65 - $68.14. Among the privates, the range was $17.76 - $88.69. A Massachusetts legislative report also cited these comparative figures from the Pennsylvania report to emphasize the point that such comparisons are practically meaningless.[84]

Federal Bureau of Prisons Director Norman Carlson (now retired) informed Congress that the private Hidden Valley Ranch charged $92 per diem to hold Youth Corrections Act offenders. At the Bureau's three other facilities holding YCA offenders, he said, the cost was $55 per inmate day (40% less). Even so, he regarded Hidden Valley as "cost-effective" because it provided flexibility during a period of transition as the Youth Corrections Act expired.[85] Data on Hidden Valley are conflicting, however. Another source reports that Bureau of Prisons records showed payments to the contractor of about $76 per inmate day. This was described by the contractor as "about what it would cost the government to do the job itself."[86]

California plans to contract for several minimum security facilities to hold parole violators. The estimated cost of $16,000 to $20,000 per year per inmate would be one-third to two-thirds higher than the $12,000 figure for low-security state prisons.[87] State officials caution, however, that these figures may not be properly comparable.[88]

Legislative Budget and Finance Committee, 1985), p. 63.

[84]Massachusetts Legislative Research Council, Report Relative to Prisons for Profit (July 31, 1986), pp. 80-81.

[85]Norman A. Carlson, Director, Bureau of Prisons, testimony, March 18, 1986, U.S. Congress. House. Committee on the Judiciary. Privatization of Corrections. Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 99th Cong., 1st and 2nd sessions, November 13, 1985 and March 18, 1986, Serial No. 40 (Washington, DC: U.S. Government Printing Office, 1986), p. 133).

[86]Los Angeles Times, March 29, 1985.

[87]Fresno Bee, May 8, 1987.

[88]For example, would the new facilities require financing, construction, and purchase or rental of land, which existing state prisons do not?

The State of Alabama in 1985 decided not to contract, when a comparison of its own Stanton Correctional Facility for juveniles with Florida's privately-managed Eckerd Youth Development Center at Okeechobee showed that "privatization of correctional facilities in Alabama would significantly raise costs, not reduce them."[89] The annual cost difference was $2,694 per inmate (or $7.38 per diem).

Problems with Simple Cost Comparisons

Simple comparisons like those presented above can be used to support opposite conclusions: that proprietary prisons are less expensive -- or more expensive -- than their governmental counterparts. The key word here, and a source of confusion, is "counterpart." Comparisons across institutions must face the fact that facilities vary widely on a great many factors that affect costs; so much so that most simple comparisons of per diem rates are not very meaningful.

Region or location of a facility affects wage rates, property values, construction costs, and the price of food, fuel, utilities and many other costs.

The age of a facility affects maintenance, depreciation, and costs related to efficiency of design. If buildings are still being financed, the speed at which the debt is being retired has a substantial impact on per diem costs, just as housing costs vary by length of mortgage.

Construction costs and the purchase or rental of land may be included in some budgets or per diem figures and not in others.

Population size, homogeneity of inmates, and security level and custody needs of inmates, all affect cost. So, too, does the match between the physical design of a facility and the nature of its population. For example, a facility that must be built, staffed, and programmed to accommodate a mixture of security levels may not be as efficient as one that is designed for a more narrow population and purpose.

Processing costs vary by sentence length and turnover. Treatment costs are a function of the range of services and programs offered.

The foregoing are a few of the many factors that make one correctional facility inherently more expensive than another. Unless they are explicitly taken into account, it is not very

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[89]Hackett et al., p. 6.

useful to compare the per diem cost of a private facility to its governmental "counterpart."[90]

In addition to problems of comparability, simple comparisons suffer from being insufficiently thorough. A thorough analysis of the cost of a prison should include construction, depreciation, debt servicing, rent or rent equivalence, taxes paid or foregone, overhead, indirect costs, and many other complexities. The official budgets of government-run prisons, however, generally do not include all of these components.

One of the inherent difficulties in comparing government to private services is that the usual mechanism for reporting government costs -- the budget -- is not as thorough or as accurate as the cost-accounting mechanisms that must be used by contractors, who want to be sure that they recover all of their costs. As a result, government is often unaware of the true costs of its own services.

In a 1971 study of refuse collection in New York City, E. S. Savas[91] showed that the full cost was 48% greater than what was shown in the city's budget. In a later analysis across cities nationwide, Savas found that the true cost of municipal refuse collection averaged 30% higher than what was shown in the city budget.[92] An independent study of 18 Connecticut cities[93] also

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[90]Before-and-after comparisons might seem, at first glance, to avoid some of the problems of cross-facility comparisons. Region and location remain the same, as does (usually) the inmate population. However, many other things relevant to cost may change -- indeed, it is frequently one of the goals of privatization to bring about these changes. The private company may renovate or build to increase capacity. It may introduce new programs. It is likely to be required to seek accreditation and thus to meet standards not previously met. Monitoring, which may be included in the cost of the contract, adds a dimension that makes the operation different from before. In short, even a before-and-after analysis does not compare the "same" facility under two different forms of management, although it comes closer to it than a cross-facility comparison does.

[91]E. S. Savas, "Municipal Monopolies Versus Competition in Delivering Urban Services," pp. 473-500 in W. D. Hawley and D. Rogers (eds.), Improving the Quality of Urban Management (Beverly Hills: Sage, 1974).

[92]E. S. Savas, "How Much Do Government Services Really Cost?" Urban Affairs Quarterly 15(1979): 23-42.

[93]Ibid., p. 31, citing P. Kemper and J. M. Quigley, The Economics of Refuse Collection (Cambridge: Ballinger, 1976).

found actual costs of collection to exceed the budget figures by the same average amount: 30% (with a range up to 256%).

In contrast, Savas found that cities with contracted refuse collection were able to set user fees fairly close to actual costs, while cities with municipal collection charged user fees that had no relation to actual costs. His conclusion: "Cities with contract collection know how much the service costs; cities with municipal collection do not."[94]

There is reason to believe that government is often just as ignorant of the true costs of corrections as it is of the costs of refuse collection.

Hidden Costs of Corrections

Generally, reports of government correctional costs are taken from a single budget, either of a facility or of the agency in charge of the facility. These budgets vary a great deal in terms of what components they include. It is probably fair to say, however, that no agency or facility budget shows all of the direct and indirect costs of corrections.

Costs that do not appear in an agency's budget can be referred to, for convenience, as "hidden costs." This does not imply that they are deliberately concealed; only that they are not readily apparent or easily discernable. Most will come from the budgets of other government agencies, where they will probably not be identified as expenditures on corrections.[95] For example, litigation and liability costs are generally taken from the budget of the state or county attorney, not the corrections department or the individual institution. Fringe benefits and pensions often come out of some general fund rather than the budgets of particular agencies or facilities. Services provided by other agencies should be (but rarely are) prorated into the budgets of correctional agencies, and services provided centrally by a correctional agency should be prorated into the budgets of individual facilities. Facility budgets commonly list only operating costs, omitting land purchase, construction, financing, depreciation, and other capital costs.

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[94]Ibid., p. 34.

[95]Hidden costs are not the same as overexpenditures or unauthorized expenditures. Such expenditures will not appear in a budget, which is a prospective authorization, but they will show up in account books at year's end (perhaps in a disguised form, if they are unauthorized). Hidden costs, however, appear in neither the budget nor the report of expenditures of the particular agency or institution in question.

The problem with hidden costs is not merely that they are underestimated in comparisons; they are also harder to control. When costs are out of sight, they are often out of the minds of those who incur them and of those who might want to curtail them. Legislative budget review committees will lack the information necessary to evaluate competently the reasonableness of requests for funds. Outsiders (and even insiders) will find it hard if not impossible to do realistic cost-effectiveness analyses. Program managers lose at least some incentive to hold down costs when they do not get direct and accurate feedback. For example, if fringe benefits come from a separate budget, correctional managers and workers are not encouraged to view those benefits as a trade-off against salary, or against other expenses (like equipment) that affect working conditions.

A list of cost components frequently missing from the budget of a correctional agency or facility would include at least the following:

1. Capital costs: land purchases, construction, major equipment, depreciation or amortization
2. Finance costs: service and interest on bonds
3. Employment benefits: longevity bonuses, pensions, insurance
4. External administrative overhead: prorated share of the expenses of centralized executive offices (governor, mayor, etc.) or administrative offices (e.g., personnel services, central purchasing, data processing, general services administration)
5. External oversight costs: inspections, program monitoring, administrative or judicial reviews and appeals of decisions, auditing and other comptroller services
6. Legal service costs: counsel, litigation, and other legal services occasioned by the activities of the correctional agency or facility in question but charged to other budgets (includes publicly funded litigation costs of inmate plaintiffs or defendants as well as defense of the institution or agency and its political jurisdiction)
7. General liability costs: successful legal claims, punitive damages, fines, court costs, general liability insurance premiums or costs of administering a self-insurance plan
8. Property insurance costs: premiums or self-insurance costs for fire, theft, and casualty protection (or risk-cost of uninsured losses)
9. Staff training costs: when provided at cost or subsidized by another agency
10. Transportation costs: transportation services, vehicles, vehicle maintenance, fuel, parts, and

related costs may be provided by other departments

11. Food costs: other government agencies may provide surplus food or subsidies
12. Interagency personnel costs: personnel may be borrowed from other agencies for either routine purposes or emergencies
13. Treatment or Program costs: other agencies may provide hospitalization, medical and mental health care, education services or programs (including vocational education or job training), recreation, counseling, or other treatment programs and services
14. Opportunity costs: taxes or rent foregone from alternative uses of land or buildings
15. Unemployment and workmen's compensation costs

When asked to provide a per prisoner figure for the cost of running their facilities, most corrections agencies simply divide the operating budget by the average daily population. This, as noted above, may leave out many hidden costs. In the absence of information that indicates a more thorough accounting, it would be reasonable to add 35% to most figures reported by public agencies as an estimate of their real costs.[96]

In 1985, George and Camille Camp[97] asked state correctional agencies to report their average daily costs per prisoner. The 42 states that responded reported an average cost of $38.87 (and a range of $20.27 - $84.72). They were then asked to give an estimate of the total cost of correctional confinement and care taking into account expenditures by other agencies. These estimates ranged from $22.02 to $100, with an average of $44.11. The average estimated total cost was 13.5% higher than the average reported agency cost. The estimates of other agencies' costs may have been anything from informed guesses to outright guesses. Six states did not answer the second part of the question, one reported a total cost six cents higher than the agency cost, implying an uncanny degree of accuracy, and eleven states indicated that there were no costs of corrections incurred outside their agencies, which seems very unlikely.

Even the estimated total costs, however, did not include construction and financing. The Camps suggest that a "more accurate, yet conservative estimate is a 20 percent addition in

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[96]This would parallel the 30% underestimate found in studies of governmental budget figures for refuse collection.

[97]George Camp and Camille Camp, "The Real Cost of Corrections: A Research Report" (South Salem, NY: Criminal Justice Institute, 1985).

expenditures above those in the correctional agency's budget. In some systems, other than correctional agency expenditures for corrections may account for up to 35 percent more in prisoner expenditures."[98] The Camps' data, however, show a 45% addition for Colorado, a 104% addition for Ohio, and a 128% addition for New Hampshire.

A study by the Correctional Association of New York found that the real cost of housing inmates in New York City jails was 54% higher than the figure used by the Correction Department for its operating costs.[99]

For agencies or facilities that do not pay pensions and fringe benefits out of their own budgets, such an omission alone may call for a 25-30% inflator. The Camps found that salary averages 80% of correctional budgets and that retirement and other fringe benefits "frequently amount to one third of salary expenses."[100] A broader study by the Chamber of Commerce reported that government spends an average or 31% of payrolls for pensions (compared to 13% for private enterprise).[101] Adding current retirement contributions to reported cost figures may not be sufficient, however. Government pension systems are often underfunded, because they are subject to less stringent (and less fiscally sound) funding requirements than private pension systems must meet.[102] If pension obligations eventually must be honored, then part of their cost has simply been delayed, and thus hidden in another way as well.

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[98]Ibid., p. 3.

[99]The Correction Department gave $26,000 per inmate as the direct operating expense for its 11 jails in Fiscal Year 1984. When the Correctional Association included such costs as fringe benefits, debt financing, and interagency costs, they estimated the cost to be $40,000. See William G. Blair, "Inmate Cost is Put at $40,000 a Year" The New York Times, December 27, 1984.

[100]Camp and Camp, p. 3.

[101]Cited in Morgan O. Reynolds, Power and Privilege; Labor Unions in America (New York, NY: Universe Books, 1984), p. 194.

[102]President Carter's Commission on Pension Policy concluded that "if the government pension system were subject to the same funding requirements as private plans, the cost in 1980 would be 79.8% of payroll." Cited in Reynolds, p. 194.

Hidden Costs of Contracting

A private contractor's charges will also underestimate the total costs of corrections, albeit to a lessor degree. While we can have some confidence that a contractor's per diem will reflect all of the costs to the private vendor, plus a margin for profit, we cannot be sure that it will contain all of the costs to the government purchaser.

Part of a contractor's fee will include factors that are visible in both public and private operations. A second part will include many of the costs that are not visible in a public agency budget but are explicitly factored into a contractor's costs. A third part will consist of costs that are special to contracting or to the private sector, but which can still be included in the fee to government.

Beyond those costs that can be explicitly incorporated in a contractor's fee, there will be some costs to government that cannot be passed to the contractor, to be charged back as part of the fee. An example would be the cost of preparing RFP's and evaluating the responding proposals. In addition, there may be some costs that remain with the government because it is more efficient for the government to perform the service itself than to purchase it from a contractor.

Those costs to government that are not included in the contract, are the "hidden costs" of contractual corrections. That is, they are hidden in the sense that they are not included in the per diem costs reported by the contractor. Thus, while contracting makes costs more visible, it does not by itself reveal all costs. Those costs that remain with government, however, will be more easily identified as a result of the contracting process.[103]

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[103]For example, when asked how much it costs to run their jail, most county officials, looking at their jail budget, will not think to include any part of the cost of the county hospital. Suppose, however, that they have just signed a jail contract that specifies that the county is responsible for the bills of hospitalized inmates. They will be more aware thereafter of the need to include this component explicitly in their cost comparisons. Examination of contractors' costs may draw attention to government costs that are generally ignored. For example, the ACA study of Okeechobee (see American Correctional Association, p. 91) notes that Eckerd must pay over $175,000 for insurance and spend $250,000 of allocated funds on overhead, which the report incorrectly refers to as "costs that Dozier does not have." But the state of Florida does have overhead and self-insurance costs in running Dozier, Okeechobee's sister school. These costs should (but do not) appear in the budget for that facility.

One paper critical of private prisons[104] contends that among the hidden costs of private prisons that we must anticipate are the cost of emergency situations, such as escapes, riots, fires, natural disasters, public health problems, employee strikes, or bankruptcy. However, these emergencies can occur also in public prisons.[105] We do not know yet whether catastrophic costs will be more likely or less likely in private prisons. However, their risk-cost will probably be more visible, not less so. Contracts generally specify the liability of contractors for costs like these and require that the private company insure itself and indemnify the government against them. Contractors thus take these costs into account explicitly when they bid for contracts or renewals.

The contracting process itself is said by critics of contracting to add to the total cost of services. This would include the cost of soliciting, evaluating, drawing up, monitoring, renegotiating, and terminating contracts. The federal government uses four percent of the total contract cost as the incurred expense for contract administration, though the American Federation of State County, and Municipal Employees feels this figure is "often too low."[106]

Monitoring costs may or may not be "hidden," depending on the provisions of the contract. They will in any case accrue to the government, since if they are charged by contract to the private provider they will then be calculated into its fee. This procedure, however, forces the government to identify and make explicit the cost of an activity that must exist in one form or another with or without a contract.

Most discussions of monitoring treat it as a new cost, attributable only to proprietary prisons. However, all public correctional facilities have, or should have, at least some provisions for monitoring, supervision, or inspection. Monitoring is no less important for public facilities than for private

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[104]Christine Bowditch and Ronald S. Everett, "Private Prisons: Problems within the Solution," Justice Quarterly 4(1987): 441-453, at p. 449.

[105]While "bankruptcy" may not be the right term, units of government do face the threat of financial collapse and preventing it does carry a cost.

[106]American Federation of State, County, and Municipal Employees, "Contracting Out in Local Government," (unpublished paper, March, 1984)

ones. The Council of State Governments and The Urban Institute, in their study of private prisons raised this same argument:[107]

> It can also be argued that states should monitor their own state-operated facilities as carefully as they do a contracted institution and, therefore, monitoring expenses should be about the same for both modes of operation.

Thus, not all of the cost of monitoring a private prison should be attributable to the contracting process; only differential costs. Assuming that it would cost money to monitor a correctional facility whether it were public or private, it then becomes an open question whether a given degree of monitoring is more expensive or less expensive with a private facility. For example, it would be more expensive if a private facility required the hiring of new or specially trained monitors, different from those that monitor or would monitor public facilities. It would be more expensive if monitoring a private facility required the keeping of duplicate records whereas a public facility maintained only one set of centralized records. On the other hand, monitoring a private contractor might be less expensive if the contractor kept better records, or had a more sophisticated and efficient information management system. It would be less expensive if private facilities passed their inspections more often the first time around, thereby eliminating repeat inspections. Monitoring contracted facilities might be more expensive, or less expensive, than monitoring public facilities, depending on whether private managers are more cooperative or less cooperative than are public managers with their monitors and the monitoring process.

Another kind of indirect or hidden cost of proprietary corrections may occur if contractors pay some of their workers wages that are below the level of subsistence. In this case, an apparent savings in lower per diem fees may have to be balanced by a "hidden" government cost in the form of added welfare payments. In a similar way, some of the apparent savings from lower fringe benefits may be spurious. Contractor contributions to social security and company retirement plans will be included in the fee charged to the government. However, if those contributions are not adequate, there may eventually be a delayed cost to the government in the form of post-retirement welfare costs.[108]

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[107]Hackett, et al., p. 52.

[108]Government may create these hidden costs also, by paying less than subsistence wages or by underfunding pension plans.

Hidden "Rebates" from Contracting

Some of the costs of running a private prison, although they are charged to the government as part of the company's fee, eventually return to government in some form of tax. These could be referred to as "hidden rebates." Hidden rebates are expenses paid through a private contractor that return to the government as revenue.

For example, business taxes, property taxes, sales taxes, FICA (social security) and workmen's compensation contributions, unemployment taxes, telephone and utility taxes, fees for water, sewage, and waste disposal, and license fees are all costs of business incorporated in a contractor's fee, but they also all return to government as revenue. So do part of the profits of a private prison.

If the government contracts for a prison, the hidden rebates described above would have to be subtracted from the contractor's fee to calculate the true net cost to the government.

Hamilton County: A Relatively Thorough Cost Analysis

Correctional officials will find it very difficult to identify and estimate interagency costs. A county auditor, however, is in a good position to do so. That fact forms the basis of the analysis that follows.[109]

On October 15, 1984, Corrections Corporation of America assumed management of the Hamilton County Penal Farm, a 350-bed minimum to medium security county prison holding convicted county misdemeanants (males), state felons (males), and some pretrial detainees (females) under the jurisdiction of Hamilton County, Tennessee, at Chattanooga. The cost of the contract is renegotiated by CCA and the county every year. For that purpose, Bill McGriff, the County Auditor, prepares each year an analysis estimating and comparing the total cost to the county of:

(a) reassuming direct county operation of the prison, versus
(b) continuing to contract with CCA for the operation of the facility.

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[109]All data in the following analysis were supplied by Bill McGriff, Hamilton County Auditor, in written and telephonic communications.

Costs under County Management

The question facing the county each year is whether they could run their prison for less than the fee that CCA is renegotiating for the upcoming fiscal year. Since FY 83-84 was the last year in which the county had managed the prison itself, and many things have changed, it is necessary to identify and annually re-estimate component costs, rather than relying on outdated budget figures.

McGriff based his analysis on several assumptions:

1. That staffing would remain the same as CCA's, with certain adjustments, if the county took back the facility.
2. That prison employee salaries would have increased since FY 83-84 by the same amount as the salaries of other county employees.
3. That nonsalary expenses would have increased at a rate equal to inflation as measured by the Consumer Price Index, plus, where appropriate, a rate equal to the increase in the prisoner population.
4. That the county would have incurred no extraordinary expenses, such as a lawsuit settlement beyond the level of insurance coverage.
5. That the county would issue $1.6 million in bonds at 7% for 15 years to pay CCA for the new facilities they built at the Penal Farm.

These assumptions were designed to be conservative, i.e., to underestimate costs to the county if it had retained, or if it took back, management of the prison.

The assumption that county staffing would be the same as CCA's is realistic for purposes of pricing a resumption of control. However, it could well underestimate what the staff size might have grown to under continued county management.

Assumption 2 had to be modified in FY86-87 because a county wage study indicated that prison employees, among others, had been especially underpaid by the county.[110] Further, the personnel department indicated that since prison guards must be certified the same as the Sheriff's jail officers, and receive the same training, they should be paid accordingly. Jail officer trainees with six months' experience were paid at grade 8, while the entry level for prison guards prior to the CCA contract was at grade 4. On the other hand, the county had a policy of not upgrading a position more than two grades in one year, which

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[110]If the county took back the prison, it would pay salaries responsive to the wage study, whether higher or lower than CCA's.

might or might not have applied to the prison guards, who had already been out of the county system for a year. To be conservative, McGriff upgraded their positions only two grades. This is a significant underestimate, since it is reasonable to suppose that guards returning to the county system (especially those with experience) would be paid no less than entry level jail officers. Note that underestimation of salaries also implies underestimation of fringe benefits. Together, these two categories constitute close to half of total costs.

Assumption 3, by using the CPI, probably underestimates inflation in other county costs. Since WWII, the cost of services provided by government has tended to rise substantially faster than the CPI,[111] and correctional costs have recently been rising even faster than other government costs.

The assumption of no extraordinary (i.e., unforeseeable or incalculable) expenses is a necessary assumption, almost by definition. However, since sooner or later such expenses are bound to occur, the assumption has the effect of underestimating the potential cost of a county resumption of management. Under contractual management, CCA serves as a buffer for many such potential costs.

In computing the total costs of the prison under county management, McGriff included the following components:

Hamilton County Penal Farm Component Costs

Salaries & Wages	Fringe Benefits
Consumable Maint. Supplies	Maintenance & Garbage
Utilities	Insurance
Medicine & Personal Care	County Hospital Care
Food & Kitchen Supplies	Depreciation
Uniforms	Interest Expense
Capital Outlay (Equip.)	Other Direct Costs
Other Operating Expenses	Other Indirect Costs

The costs listed in the column on the left are those that would ordinarily be found in any prison budget. The costs listed on the right, however, are often taken from other budgets and not accounted for in the budget of the particular facility being examined.[112] As Hamilton County Auditor, however, McGriff was in a position to be unusually thorough in identifying the indirect

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[111]William D. Berry and David Lowery, "The Growing Cost of Government: A Test of Two Explanations" Social Science Quarterly 65 (1984): 735-749.

[112]This is particularly common at the state level, but it happens at county and federal levels as well.

and interagency costs as well as the regular budget line item costs of operating the Penal Farm.

Several of the items in the righthand column need some elaboration.

For Maintenance and Garbage, McGriff at first used a figure provided by the public works administrator. However, when he had his own people check out actual costs, counting the number of pickups and identifying costs not billed back to the facility, he found that the real cost was about twice that amount.[113]

Insurance includes both property and liability insurance..[114] McGriff made a conservative estimate of the cost of insurance for the prison, based on county insurance covering both its jail and its sheriff's department. The cost of the (estimated) jail portion of that coverage was used to estimate the cost of covering the Penal Farm.

The Workhouse Records Clerk keeps records on time served by prisoners. Her salary is separate from the Penal Farm's budget.

County Hospital Care would not come from the Penal Farm's budget in any case. Since the county defines all prisoners as indigents, any hospitalization is paid for out of the $3 million annual contribution the county makes for indigent care to Erlanger Medical Center, the joint city/county hospital. McGriff pulled Erlanger hospital costs for Penal Farm prisoners from this total, separate from the costs for Jail inmates.

Depreciation and interest costs are calculated for all construction at the prison prior to the CCA contract. In addition, if the county terminates the contract, it must reimburse CCA for the $1.6 million in renovations and additions invested by CCA during its first year of operation. To estimate the cost of this reimbursement, McGriff assumed a bond rate of 7% and a depreciation period of 40 years.

The categories labelled "Other Direct Costs" and "Other Indirect Costs" are listed and explained below.

Other Direct Costs	Other Indirect Costs
Personnel	County Commission
Accounting	County Executive

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[113]This experience is consistent with the research by Savas, cited earlier, showing that public administrators generally underestimate the cost of noncontracted refuse collection.

[114]CCA carries heavy insurance and indemnifies the county against potential costs of litigation and legal damages.

Financial Management
Data Processing
Purchasing
County Physician
Human Services Administrator
County Auditor
County Attorney
Finance Administrator

"Other Direct Costs" include activities of those central offices that routinely perform services for all county agencies: Personnel, Accounting, Financial Management, Data Processing, and Purchasing. Some portion of the activities of these offices would be directed toward the Penal Farm. The County Physician was (at that time) a doctor who worked part-time for the county. All he did for the county was to attend prisoners at the jail and the prison.[115] The Human Services Administrator is the head of the county's Human Services division.[116] Since the Penal Farm falls under this division, the services of the Administrator and her secretary are "Direct" rather than "Indirect" costs.

"Other Indirect Costs" are those incurred by the activities of other county officials at the executive level. These officials, and their staffs, must spend some portion of their time dealing with matters pertaining to the Penal Farm. The matters requiring their attention may be occasional, periodic, regular, or seemingly constant, but they are distinct from the direct, routine services included in "Other Direct Services."

All these interagency costs come from budgets other than those of the Penal Farm. Thus, they each require some prorating technique to calculate what proportion of those other budgets to attribute to the existence and operation of the Penal Farm. The prorating proportions described below were calculated by the auditor based on county expenditures (obligations) and other data for the Fiscal Year 1985-86.

For Personnel, Mcgriff assumed that time and costs would distribute in a manner equal to the number of Penal Farm employees expressed as a percentage of total county employees. This is certainly conservative. If correctional workers have higher turnover than other county employees (which is often the case) or if their recruitment requires a more extensive background

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[115]After CCA took over, it subcontracted to a group of local doctors to visit the facility twice a week. In 1987,, after the time of the auditor's report, the county health department hired a full-time physician, who now sees patients at the jail and prison as well as at the health department. CCA pays for that physician's services to the Penal Farm inmates (their contract with the private doctors having expired).

[116]Hamilton County has four divisions and four administrators: Finance, Public Works, Health Services, and Human Services.

investigation (which is less often the case than it should be), then the assumption of equal effort per worker from the personnel department would be false. The prorated personnel costs would be underestimated.

The County Physician (at that time) attended only to prisoners, so his salary and fringes were split between the Jail and the Penal Farm. When total Penal Farm prisoner days for FY 85-86 were added to Jail prisoner days, the Penal Farm accounted for 54% of the total. Under the assumption that jail and prison inmates have equal daily needs for a doctor's services, the auditor prorated 54% of the physician's salary and fringes to the Penal Farm.

The attentions (and salary and fringes) of the Human Services Administrator and her secretary were prorated to the Penal Farm at 34%. This is equal to the county's total Penal Farm Obligations, expressed as a percentage of the county's total Human Services Obligations.

All other Direct and Indirect costs were prorated at a rate equal to total Penal Farm Obligations as a percentage of the county's total General Fund Obligations.[117] This technique assumes that the ratio of external costs to internal costs was no greater at the Penal Farm than in the average county operation.

Such an assumption is certainly conservative. For example, auditing and purchasing for the prison were more difficult than for other county operations, and thus are underestimated by the prorating technique. Also, it is a good bet that when it was under direct county administration, the Penal Farm caused, per dollar of internal spending, more headaches and time costs to at least some executive level county officers than did the average county operation. The County Attorney, for example, probably spent more time on prison matters than on many other county matters, prior to contracting. County Commissioners everywhere cite the county jail or prison as a disproportionate source of their problems, particularly when they are uninsured against personal liability in the case of lawsuits. Thus, McGriff's proportional attribution of part of the time and budgets of the county executives to prison matters was probably too low.

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[117]General Fund Obligations were split off by the auditor from the total county obligations. General Funds paid for the county's general government administration. Constitutional officers like the sheriff, registrar of deeds, tax collector, clerks of court, etc., are separate legal entities, although they are part of the county's overall budget. While in many counties the Sheriff handles both the jail and the prison out of his budget, in Hamilton County the Penal Farm was always under Human Services, and thus part of general administration.

Table 2

HAMILTON COUNTY PENAL FARM ESTIMATED
TOTAL COST IF OPERATED BY COUNTY, FY 86-87

1. Salaries & Wages	$1,239,380
2. Fringe Benefits	320,491
3. Food & Kitchen Supplies	404,966
4. Medicine & Personal Care	28,694
5. Utilities	198,587
6. Consumable Maintenance Supplies	56,532
7. Uniforms	61,237
8. Equipment	45,506
9. Other Operating Expenses	108,045
SUBTOTAL: OPERATING BUDGET ITEMS	$2,463,438
10. Maintenance & Garbage	70,195
11. Insurance	41,885
12. Clerk of Workhouse Records	16,238
13. County Hospital Care	238,886
14. Depreciation on Pre-CCA Construction	57,500
15. Interest on Pre-CCA Construction	74,878
16. Amortized Purchase of CCA Addition	152,000
17. Other Direct Costs[a]	204,888
18. Other Indirect Costs[b]	93,833
TOTAL COST FOR YEAR	$3,413,741
Prisoner Days (avg. pop. = 364)	132,788
Cost Per Prisoner Day	$25.71

[a]Other Direct Costs: Personnel, Accounting, Financial Management, Data Processing, Purchasing, County Physician, Human Services Administrator

[b]Other Indirect Costs: County Commission, County Executive, County Auditor, County Attorney, Finance Administrator

Based on the calculations and estimation procedures described above, Table 2 presents McGriff's estimated costs to the county if it were to resume management of the prison for Fiscal Year 1986-87.[118] Table 2 shows a conservatively estimated total cost of $3,413,741 for Fiscal Year 1986-87, if the prison were under direct county management.

Cost items 1-9 in Table 2 are those that appeared as line items in the Penal Farm budget when it was under county operation. Cost items 10-18 are expenses that would not appear in the Penal Farm budget under county administration; rather they would be charged to other budgets. Note that the total cost shown in Table 2 is 38.6% higher than the subtotal, which includes only prison budget line items. In my earlier discussion of hidden costs, based on other studies, I suggested adding 35% to most prison budgets as a conservative estimate of indirect costs. If Hamilton County, like many other jurisdictions, had charged Fringe Benefits to a general budget, the total would have been 74% higher than the subtotal.

At an estimated total cost per prisoner day of $25.71, Hamilton County would be fairly frugal. A 1986 survey showed a reported cost of $30.26 per prisoner day for 10 jails in the East South Central region (AL, KY, MS, TN).[119] In 1983-1984, the reported cost per prisoner day across all of Tennessee's state adult confinement facilities was $30.17.[120] Although this last figure includes capital as well as operating expenditures, it is probably not as inclusive of other costs as is the Hamilton County estimate, and it is three years earlier.

Clearly, then, Hamilton County's estimated costs were low relative to those of other government-run facilities in the region. Therefore, Hamilton County provides a fairly severe test of a private contractor's ability to lower government costs.

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[118]The figures in Tables 2 and 3 differ somewhat from those in an earlier report by Charles Logan in Lynne Goodstein and Doris L. MacKenzie (ed.), The American Prison (Plenum, 1988). The earlier figures were based on projected costs that are now known more precisely.

[119]Corrections Compendium, November 1986. This source did not indicate whether this includes capital costs.

[120]U.S. Department of Justice, 1984 Census of State Adult Correctional Facilities (Washington, DC: Bureau of Justice Statistics, August 1987), Tables 18 and 31 (combining data).

Costs under Contracting

After estimating costs under county management, total prison and related costs to the county under CCA management can be calculated rather clearly, simply, and thoroughly. The fee per prisoner day is fixed by contract and the number of prisoners, while not predictable in advance, is known precisely for any past or current period. Table 3 calculates what it cost the county to run the Penal Farm under CCA contract during FY 86-87.

Table 3

HAMILTON COUNTY PENAL FARM ESTIMATED COST OF OPERATION UNDER CCA CONTRACT, FY 86-87

Total Payments to CCA (= $21.82 avg. per diem)	$2,897,685
Superintendent's Budget (monitoring)	67,783
Continuing, Noncontracted County Costs (1)	387,502
"Hidden Costs" (2)	23,458
SUBTOTAL	$3,376,428
Less "Hidden Rebates" (3)	($64,000)
TOTAL	$3,312,428
Total Prisoner Days (avg. daily pop. = 364)	132,788
Per Diem Total	$24.95

(1) Clerk of Workhouse Records, County Hospital Care, Depreciation on Pre-CCA Construction, and Interest on Pre-CCA Construction (items 12 - 15 from Table 1)

(2) Other Indirect Costs of county management (item 18 from Table 1), reduced by 75% (auditor's estimate) under CCA management

(3) Local sales, property, and business taxes

Payments to CCA averaged $21.82 per diem, rather than the contracted $22, because of an agreement by which CCA charged a lower fee for offenders convicted of drunk driving. These offenders serve their time on weekends. Beyond its payments to CCA, the county incurs other costs, which are included in Table 3 and described below.

Tennessee law calls for a Director of Corrections (also referred to as Superintendent) in counties with correctional facilities. Prior to the CCA contract, the Warden of the Penal Farm doubled as Superintendent. The former Warden now serves only as Superintendent, while an officer of CCA serves as Warden. The Superintendent acts as contract monitor for the county. He has an office at the facility plus an office downtown. He spends about two-thirds of his day at the facility and the other third downtown. He has a secretary and some other expenses. The Superintendent has final say on disciplinary matters, "good time" allocation, and release decisions.

At least part of the Superintendent's budget represents new expense to the county under contracting, since a monitoring function has been added and a previously combined role has now been split into two paid positions. On the other hand, it is not just new cost; a new function (independent monitoring) has been added, which the county did not have before. In keeping with McGriff's conservative methodology (underestimating costs under county operation and overestimating costs under contracting), the Superintendent's entire budget is included in Table 3, even though some of his time is spent on correctional matters other than the prison, such as electronic monitoring, community corrections, and community service programs.

In addition to the Superintendent, some other correctional expenses continue to be paid by the county directly, rather than through the CCA contract. In Table 3, these also have been added to the cost of the contract, in the line labelled "Continuing, Noncontracted County Costs." They all relate to the prison and were discussed in connection with Table 2. Some of these costs would be the same under county operation (Table 2) or under contracting (Table 3); specifically: the salary of the Clerk of Workhouse Records, county hospital care for prisoners, and depreciation and interest on construction prior to CCA (items 12-15 in Table 2).

Some other costs, referred to in Table 3 as "hidden costs" of contracting, are basically the same as the "other indirect costs" (item 18) in Table 2, but at a lower level. The prison continues to demand some attention by county executives. However, McGriff estimated that they now spend at most one quarter of the time they used to on this, so the cost was reduced accordingly.

The "hidden costs" under contracting are offset by what are referred to in Table 3 as a "hidden rebate" from contracting: every year CCA pays about $64,000 back into the community in local sales, property, and business taxes that would not have existed without the contract.

Comparison of Costs

Table 4 compares, for three fiscal years, the total costs to Hamilton County that occurred when the prison was managed by CCA, with the total costs (as estimated by the methods described above) that would have occurred if the county had resumed management itself.

Table 4

HAMILTON COUNTY PENAL FARM COSTS, UNDER COUNTY OPERATION VS. CCA CONTRACT, FY 85-86, 86-87, 87-88

	1985-1986	1986-1987	1987-1988
County Operation (per diem)	$2,853,513 ($25.05)	$3,413,741 ($25.71)	$3,642,464 ($27.49)
CCA Contract (per diem)	$2,746,123 ($24.10)	$3,312,428 ($24.95)	$3,346,300 ($25.25)
Savings (as %)	$ 107,390 (3.8%)	$ 101,313 (3.0%)	$ 296,164 (8.1%)
Prisoner Days (avg. pop.)	113,928 (312)	132,788 (364)	132,514 (363)

Fiscal Year 1985-1986 was the first full fiscal year under the CCA contract. CCA's fee that year was $21 per diem. The higher per diem in the table is based on total county costs under the contract, not just the payments to CCA. In FY 86-87, the fee was raised to $22, where it remained the following year.

Table 4 shows savings to the county of at least: 3.8% the first year, 3.0% the second year, and 8.1% the third year. Recalling the conservative nature of the county cost estimates,

the savings should be described as certainly more than this.[121] The savings dipped a little when CCA first raised its fee; however, they increased considerably the following year, when CCA held (or was held) to the same fee while the county's own cost basis increased.

It must be reiterated that these figures are not exact and most certainly underestimate the true savings. In discussions before the County Commission, McGriff has repeatedly emphasized the very conservative nature of his estimates of the costs of county operation. Where he could not get figures in which he had confidence, he either left costs out or used assumptions that he thought would err on the low side.

In addition, the commission took into consideration some costs and benefits that McGriff was not able to quantify at all. For example, CCA carries $5 million in liability insurance. In the event of a successful lawsuit, the indemnification clause in CCA's contract could save the county (and perhaps the commissioners personally) a considerable, but unpredictable, amount of money. Also, the commission believed that CCA was providing better management and more professional training than previously existed and was sparing county officials many of the daily hassles involved in running a prison. The additional staff training, new inmate classification system, computer records management system, and other improvements provided by CCA would have cost the county money to have achieved on its own. Grand jury reports were all positive after CCA took over, thus eliminating the time and expense required of the county to correct the sorts of problems criticized by earlier grand juries.

Two benefits in particular make the facility and its operation under CCA not truly comparable to the alternative county version. These are: the physical improvements made by CCA, and the added service gained by splitting the superintendent function from the warden function.

The county has gained $1.6 million in new construction made by CCA. McGriff did factor in the cost of reimbursing CCA for this construction if the county took back the prison. That, however, was based on CCA's construction costs. If the county had bid the construction itself (i.e., had there been no contract), it would

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[121]The real savings may be more than double these amounts. Consider the effects of assumption 2 on the figures for FY 86-87, where savings were lowest. If McGriff had estimated the pay of prison guards as equal to that of novice jail guards, rather than two grades lower, it would have added $148,676 to estimated county costs and the estimate of savings for that year would be 7%, rather than 3%.

have cost more.[122] Put differently, for the same price, the county would not have been able to add as much. In addition to the new construction, CCA invested capital and labor in repair and preventive maintenance of the physical plant, which it inherited from the county in a state of deterioration and neglect.

The contract added human as well as physical capital. Under the contract, the county has two full-time managers (each with a secretary) performing three functions: warden, superintendent, and monitor. Without the contract, the county would have only one person (with one secretary) to perform as both warden and superintendent, and it would have no monitor. It should be emphasized that monitoring is not just an added cost; it is an added benefit as well.[123]

The county has also added quality as well as quantity to its human capital. The warden under CCA is a man with much more experience than the county would have been able to attract on its own. Moreover, each CCA facility has behind it the quite considerable experience and expertise of the top corporate officers in Nashville.

Thus, the prison operation that Hamilton county has under the CCA contract is not the same as what it would have if it took the operation back, or if it had never contracted. It gets more, for less money, by contracting.

Conclusion

Private prisons will not necessarily be less expensive than those owned and run directly by government. A very safe generalization from the general literature on contracting for public services is that sometimes it saves money and sometimes it does not. It is too soon to say much more than that for prisons, but there are many theoretical reasons, and the beginning of some empirical evidence, to support the proposition that private

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[122]Inmate housing constructed by the county in 1981 cost approximately $65 per square foot. CCA's cost to construct inmate housing in 1985 was $48.62 per square foot (figures supplied by CCA).

[123]Besides monitoring, the superintendent now has time for additional duties that he did not have before the contract. For example, he supervises a new county program of electronic monitoring as an alternative to imprisonment for misdemeanants. Some of the time he would previously have spent as warden is now available for this sort of expansion of the county's total correctional program.

prisons can offer to government at least the potential for gains in efficiency.

Whether or not proprietary prisons are less expensive than those run by the government, their greatest economic benefit may be the information they provide. They make more visible the true full cost of correctional facilities. As stated in a report to the National Institute of Justice:[124]

> Government accounting systems are generally incapable of isolating the full costs of a public activity or service. For a specific function such as prison security or standards compliance, the direct costs are usually buried in the expenditure records of several agencies, and the indirect costs are particularly elusive. One of the advantages typically ascribed to contracting in other fields is its ability to reveal the true cost of public service. Corrections is no exception. Under a contract system, the costs of confining particular numbers of clients under specified conditions will be clearly visible and more difficult to avoid through crowding and substandard conditions. While corrections authorities might welcome the opportunity to demonstrate clearly that more prisoners require more resources, it remains unclear whether legislators and voters will be prepared to accept the real costs of confinement practices that meet professional standards.

Correctional authorities should welcome the chance to reveal the true costs of uncrowded, properly run prisons and jails. Voters and legislators can then be required to make realistic choices. To get this information, however, as well as to provide the maximum range of choices, there must be competition and information from the private market.

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[124]Mullen, et al., p. 81.

6. ISSUES OF QUALITY

Critics' Predictions of Poor Quality

Even if private prisons are cheaper, say the critics, that can only come at the cost of quality. Indeed, responsiveness to economic incentives, which proponents see as essential to competition on both cost and quality, is regarded by many opponents as the enemy of value. Achieving economy at the expense of quality is commonly referred to as "corner cutting."

Corner Cutting

Critics contend that corner cutting is an almost inevitable consequence of the pursuit of profits. "It's impossible to make a profit and not cut those corners," declares Stefan Presser, a Houston ACLU attorney.[1] Corner cutting by private prisons, it is charged, will mean poorer food and less of it, fewer services, and cheaper labor with lower professionalism and less training. Critic John Donahue insists that "private firms will be unable to reduce labor costs without debasing the quality of the workforce and, with it, the conditions of confinement for prisoners."[2] Barry Steinhardt, executive director of the ACLU of Pennsylvania predicts: "Since the object of private prison operators will be to maximize profit, companies will inevitably look to reduced services and unacceptably low standards."

Those who would be most adversely affected by reduced labor costs -- unionized public employees -- predict the most dire consequences of cutting back on wages, benefits, or number of workers:

> [Private prisons will have] fewer correctional officers . . . more escapes, more inmate attacks, . . . more riots. [Staff will be forced to work] longer correctional careers [with] more heart attacks, more alcoholism, more nervous breakdowns--in short -- more death. Lower salaries [will] mean greater turnover; less qualified personnel; less job commitment; and in many cases, exploited workers. . . . [A]s the companies cut corners to

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[1]Fern Shen, "Investors Hope to Spring Profit from Private Prison," The Hartford Courant, April 1, 1984.

[2]John D. Donahue, Prisons for Profit: Public Justice, Private Interests (Washington, DC: Economic Policy Institute, 1988), p. 14.

> bolster the bottom line, law and morality will fall by the wayside. . . .[3]

That may be an extreme expression of the thesis, but it captures the essence of the argument: that private companies, by their very nature, must put cost before quality and therefore quality will suffer.

Concern with quality is certainly called for in the field of imprisonment, and it is true that excessive concern with costs can jeopardize quality. However, whether competition and profit-seeking lead to improved quality or to corner cutting will depend less on the intrinsic nature of private business than on the nature of government's oversight and regulation of the contracting process. If government becomes caught up in the lowest bidder syndrome, competition for business and the need for profit may indeed cause a reduction in quality. For this reason, concern with cost savings should not outweigh considerations of quality when evaluating programs or proposals.

Experience with contracting in other contexts has shown that market forces can be used to assure quality as well as cost containment in competitive contracts. However, to enhance this effect it is necessary to pay a premium in the form of a price higher than that which would be perfectly competitive. Thus, prison contract proposals should be compared on a cost-benefit basis, and not on cost alone. "You get what you pay for" is a message that both government planners and taxpayers need to hear. The message can be a promise as well as a threat, however. The real question is not whether private enterprise will be motivated to produce what is demanded (and paid for), but whether it is able to produce higher quality in response to a demand for precisely that.

A frequent objection to contracting for any public service, including prison management, is that contractors, instead of producing quality, will simply take it for themselves where it already exists, a process described as "skimming the cream."

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[3]Dave Kelly, President, Council of Prison Locals, American Federation of Government Employees, statement entered into the record, U.S. Congress. House. Committee on the Judiciary. Privatization of Corrections. Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 99th Cong., 1st and 2nd sessions, November 13, 1985 and March 18, 1986, Serial No. 40 (Washington, DC: U.S. Government Printing Office, p. 18.

Cream Skimming

"Skimming the cream" refers to the possibility that private prisons may be able to select what cases they will receive, or that the government will be selective in the cases they contract to send. In contrast, the government must deal with whatever cases make their way through the criminal justice system to the point of incarceration. A recent textbook describes skimming as characteristic of prison privatization:[4]

> Most privatization plans call for skimming off the best of the worst -- the nonserious offenders who can be efficiently processed. Thus, the correctional enterprise faces the possibility of having to manage only the most costly, most intractable offenders on a reduced budget, and with the worsened fiscal and personnel situations that would result from such a development.

There has indeed been selectivity in some, but not all, of the contracts for secure confinement facilities. The INS reserves its own facilities for more difficult cases and screens for escape risks those aliens placed in the privately contracted Pasadena and San Diego facilities.[5] For the Marion Adjustment Center in Kentucky, a contractual pre-release center, the state allegedly selects only its best prisoners out of a desire for the contract to succeed.[6] Tom Keohane, warden at Eclectic Communications' juvenile facility, reported that their contract to the U.S. Bureau of Prisons (now expired) effectively allowed them to reject inmates they considered likely to cause trouble.[7] In a proposal that never became reality, the Corinthian Corporation of Beria, Ohio, offered to build a 100-bed minimum security jail to receive only misdemeanants or nonviolent first offenders. A local county official complained that, while Corinthian's charges would be less than those of other jails in the area, they were still high for that type of prisoner. A Corinthian spokesman

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[4]Todd R. Clear and George F. Cole, American Corrections (Monterey, CA: Brooks/Cole, 1986), p. 532.

[5]Joan Mullen, Kent John Chabotar, and Deborah M. Carrow, The Privatization of Corrections (Washington, DC: National Institute of Justice, February 1985), p. 68.

[6]Judith C. Hackett, Harry P. Hatry, Robert B. Levinson, Joan Allen, Keon Chi, and Edward D. Feigenbaum, Issues in Contracting for the Private Operation of Prisons and Jails (Washington, DC: Department of Justice, October, 1987), p. 25.

[7]Los Angeles Times, March 29, 1985.

replied that the plan would cover 85% of a county's jail population.[8]

In contrast, most of the existing county jail contracts obligate the vendor to take whatever offenders the sheriff brings in for detention, from the mildest misdemeanants to the most dangerous felons. When CCA proposed to take on the entire Tennessee prison system, they were perfectly serious; they did not want just the cream. In Pennsylvania, the Weaversville Intensive Treatment Unit receives many of the state's most serious juvenile offenders and has little control over its referrals.[9] At Okeechobee, in Florida, the Eckerd Foundation incarcerates predominantly hard-core, serious felony delinquents, with a complicating mix of severely disturbed and first-time offenders.

Thus, if cream skimming does occur in private prisons, it will usually be because the contracting agency or jurisdiction wants it that way. It will not be because most companies are not willing to provide a full range of custody and security.

In the government's own prison system, "cream-skimming" goes on all the time, except that there it is called "offender classification." When it occurs entirely within a single system, it engenders little controversy. It is a legitimate management tool designed to enhance security, efficiency, effectiveness, or other ends. Ernest van den Haag has argued[10] that prisons could be built and run much less expensively if we acted more boldly on security classifications. Though they might balk at some of van den Haag's proposals for "no-security" prisons, most correctional officials would agree in principle that it is wasteful to confine inmates in prisons that have much higher security than they need.

In practice, however, offender classification operates with uncertain success. Predictions of offender behavior are unreliable, there are no established standards for classification, and the classification of particular inmates can change at any time. Despite extensive classification efforts in prisons today, facilities at all levels, from the most to the least secure, are not homogenous in their populations. They each have the full

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[8]Cleveland Plain Dealer, October 1, 1984.

[9]James O. Finckenauer, Juvenile Delinquency and Corrections: The Gap Between Theory and Practice (Orlando, Florida: Academic Press, 1984), p. 181.

[10]Ernest van den Haag, "Prisons Cost Too Much Because They Are Too Secure," Corrections Magazine, April, 1980, pp. 39-43.

range of offender "types"[11] Hence, "cream skimming" may not be as easy to demonstrate in practice as it is to discuss in principle.

The crucial flaw in the charge that privatization will "skim the profitable cream and leave the losses to the government" is that it ignores the fact that all imprisonment is paid for by the government. Assuming an informed governmental purchaser, the only way that a contracted prison can keep its contract, let alone make a profit, is by operating at a lower cost than the government could operate that same prison, with the same prisoners. This is true whether the facility and its inmates are "cream" or "skim." Even if a prison also generates revenue, through a prison industry, work crews, work-release programs, or business-like management of the commissary, this will bring a profit to the contractor only to the extent that the contractor can do these things more efficiently than could the government. Otherwise, the government has the option of running the prison itself and keeping the "profit" -- i.e., the excess payment that it would have made to the contractor. The only way that "cream skimming" could constitute a relative loss to the government would be if the government failed to maintain effective competition between contractors, and between itself and contractors. If the government does not maintain effective competition, it will waste money whether contractors take the cream, the skim, or a homogenized mixture. So long as profit is the result of a gain in efficiency, rather than the result of inattention, corruption, or other dereliction of duty on the part of government in the contracting process, it will be a gain to taxpayers as well as to the contractor.

To illustrate how different this positive view of "cream skimming" is from that of the critics of privatization, consider the following statement by DiIulio, to which I have added comments in brackets that offer the positive interpretation:[12]

> [I]f extensive privatization does occur, it is likely to create a two-tiered correctional system [that's a gain of one tier more than there is now] in which managers on the public tier have an unwelcome monopoly on [or rather, competitive superiority over] the worst facilities and the most hard-to-handle inmates. Public prison managers will then govern facilities where costs, staff turnover, and violence

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[11]Hackett et al., p. 22.

[12]John DiIulio, Jr., "Prisons, Profits and the Public Good: The Privatization of Corrections." Research Bulletin No. 1. (Huntsville, TX: Sam Houston State University Criminal Justice Center, 1986), p. 4.

> run high [but not as high as if they were contracted] while productive inmate activity and staff morale run low [but not as low as if they were contracted].

As this illustrates, the important question is not who gets to run the easy facilities or who has to run the tough ones; the question is who can run which ones better.

Why should it be supposed, however, that private enterprise will only be interested in the "cream" of corrections? This would, of course, be true in a tautological sense, if "cream" were defined as whatever part of corrections is profitable to a contractor. Suppose, however, that cream and skim are defined on other grounds, such as difficulty of management. Nothing in the profit motive calls for the avoidance of either hard work or risk-taking. It does call for attaching a premium to these, but that premium is there on both sides. Prisons and prisoners that are hard to manage (the "skim") will be expensive whether they are in contractors' hands or in the government's. What counts is the differential. If it is profitable for private companies to take on this part of the business, they will be motivated to do so. If it is not profitable (i.e., if it is more efficiently handled by the government), it will be in the interest of all parties for it to be left to the government. That is a rational solution and should not be referred to, pejoratively, as "cream skimming."

Regardless of what it is called, it might turn out that government is better at running the difficult and expensive facilities while the private sector is better at running the easy and less expensive ones. If that pattern does develop, the critics of privatization would still have a valid point that it is not fair to compare such apples and oranges directly, thus making the private sector look better and the government look worse. As DiIulio points out, it would not be fair to compare low-security private facilities to the average public facility:[13]

> Where facilities are modern, staff is abundant, populations are small, and offenders are not hard-core, both public and private agencies have run safe, clean, cost-effective institutions. Most inmates, however, are confined [by government managers] in places where facilities are huge, the physical plant is in disrepair, trained personnel are lacking or hard to retain, and populations are large, racially polarized, and dangerous.

This, however, is a basic methodological point about proper comparisons, not a valid argument against contracting.

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[13]Ibid., p. 2.

"Dumping," the opposite of skimming, may also occur if a state tries to use a contractual facility to selectively rid itself of only its most difficult cases.[14] Both skimming and dumping will cause problems only to the extent that they are noncontractual manipulations of one party by the other. That can be avoided by identifying as clearly as possible in the contract the nature of the intended population and the respective powers of selection on each side.

Related to the issue of skimming, but less controversial, is the prospect that contracting could be used to handle prisoners with special needs. Protective custody cases, medical cases, the aged or handicapped, and females, require separation from the bulk of the prison population and often have special treatment needs. Protective custody cases total about 7% of all prisoners, or around 35,000 cases nationally. Courts often rule that the conditions under which they are held, involving solitary confinement purely for purposes of segregation rather than punishment, constitute cruel and unusual punishment.[15] Since these cases are small as a proportion of any one public facility, greater economies of scale could be achieved if they were contracted to a private facility, particularly one that served multiple jurisdictions. Many prison officials view this particular form of prison privatization more favorably than other forms. With specialized populations, it is easier to see that a contract can be mutually advantageous to the government and the contractor. Hence, these proposals do not get labelled as either "skimming" or "dumping."

Mud Slinging

Speaking of "dumping," this seems as good a place as any to examine a couple of the more unsavory charges that critics of private prisons have directed at certain members of the industry. These accusations are important not so much because of the substantive issues they raise as because they reveal the ideological intensity to which the debate over private prisons sometimes rises (or sinks).

The ACLU and other critics frequently repeat a story about an entrepreneur who planned to "build a prison on a toxic dump purchased for $1."[16] Apparently the ACLU, if it cannot defeat

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[14]Hackett et al., p. 25.

[15]Los Angeles Times, March 29, 1985.

[16]This phrase, or one like it, is typical of the charge. See: Jan Elvin, "Private Prison Plans Dropped by Buckingham," Journal: The National Prison Project Winter 1985, p. 11; Jody Levine, "Private Prison Planned on Toxic Waste Site" Journal: the

them by other means, is prepared to smear private prisons with toxic waste -- or at least, with toxic waste stories that mislead through innuendo.

The truth is that for $1, Beaver County, Pennsylvania, transferred to Buckingham Securities Ltd. 60 acres of land as part of an agreement in which, at a cost to itself of $350,000, Buckingham would clean up, completely remove, and safely dispose of some toxic industrial chemicals contained in a shallow, monitored storage pit in the woods at the back of the land, and build a prison on the front of the land (not "on" or even significantly near the former dump site).[17]

The clearly intended point of the story, as presented by the ACLU, is that only a greedy private company could have such dirty hands. However, if the ACLU and others wanted to make the general point that penology and pollution don't mix, they could find a better target than a private company that wanted to clean up a toxic waste site in order to replace it with a prison.[18]

Another story uncritically repeated for its shock value, and to imply that private wardens will not run humane institutions, is the story of "axe-handle Charlie." Charles Fenton, co-founder of Buckingham Securities Limited, had a long career in the Federal Bureau of Prisons, including terms as warden at three major prisons. Several critical sources have referred to an incident in his career when Fenton was Warden of the penitentiary at Lewisburg, Pennsylvania.

The facts of the case (Picariello v. Fenton) are readily

National Prison Project, Fall 1985, pp. 10-11; Ira Robbins, "Privatization of Corrections: Defining the Issues" Judicature 69(1986): p. 327; John D. Donahue, Prisons for Profit: Public Justice, Private Interests (Washington, DC: Economic Policy Institute, 1988), p. 7.

[17]Some of these details are included in one of the ACLU reports, but not in a way that detracts from its overall "horror story" tone. See Levine, pp. 10-11.

[18] In the public sector, they could look at the state of Massachusetts, which located its Deer Island House of Correction on the same site as a sewage treatment plant. When plans were made to relocate the prison, those plans were made conditional on the ability to locate a garbage incinerator (a waste-to-energy facility) at the same site as the prison. See The Boston Globe, December 17, 1986, pp. 1, 13.

available.[19] Warned that he was about to receive two busloads of unusually dangerous offenders from the Atlanta penitentiary and that most of the prisoners had succeeded in removing their shackles during their trip in the enclosed rear of the bus, Warden Fenton had good reason to be prepared for the possibility of a serious disturbance. He and his men met the bus equipped with riot batons and pick handles, each being among the riot gear approved by the Federal Bureau of Prisons. The pick handles were used only as a show of force and to constrain, not hit, certain offenders. Some who refused to cooperate during processing were pointed at or touched lightly with the handles to designate them for removal to a separate room where they had to lie on the floor. If they attempted to rise, they were held down with a pick handle.

Private prison critics have repeated many times a special version of this story in which a jury is said to have found Fenton liable in a "brutality case" in which inmates were allegedly "beaten with axe handles while shackled and handcuffed."[20] In reality, the court and jury found that no inmates were beaten at all in this case, with axe handles or otherwise, let alone while shackled or handcuffed. In fact, the plaintiffs did not even claim that they had been "beaten" in the usual sense of the word; rather, that they were "terrorized" and subjected to "assault and battery" in the legal sense of "offensive touching." The U.S. District Court, in its review of the case, found that no one was beaten or terrorized or offensively touched, that escorting and restraining the prisoners had involved only "privileged contact," and that all of Warden Fenton's actions had been reasonable, except for one. The one action found by the court to be "not reasonable" (but also "not extreme and outrageous") was the decision to keep one plaintiff's handcuffs on while he was in his cell, for three days. The court awarded this plaintiff $200 as full and fair compensation for his discomfort.

These two stories represent extreme examples of attempts to discredit private prison companies and to imply that they cannot be trusted to run decent, humane institutions. I have discussed them at some length here because of the frequency with which they are repeated and because of the danger that dramatic stories like these might foreclose a fair test of whether private companies can, in fact, run high-quality prisons. These particular stories

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[19]491 F. Supp. 1026 (1980).

[20]See Donahue, p. 7; Levine, p. 10; Craig Becker and Amy Dru Stanley, "Incarceration Inc.: The Downside of Private Prisons," The Nation, June 15, 1985, p. 729; J. Michael Keating, Jr., Seeking Profit in Punishment: The Private Management of Correctional Institutions (American Federation of State, County and Municipal Employees, 1985), p. 15.

happen to be misleading. Sooner or later, however, there will probably be some scandalous or horrifying stories about some private prisons that will be true. This will happen not because they are private, but because they are in a dangerous and difficult business where it is easy to make mistakes. And when things go wrong in a prison the results are usually dramatic.

Much of the rest of this chapter will, of necessity, rely on anecdotal evidence regarding the quality of performance by private prisons. As illustrated above, this form of evidence needs to be taken with a grain of salt.

General Goals and Standards

Most people, including legislators, judges, and criminal justice administrators as well as the general public, are ambivalent and inconsistent in their views of criminal justice. They mix together utilitarian and nonutilitarian considerations. They want prisons to be places of rehabilitation, deterrence, incapacitation, and retribution all at once. They offer little consensus on priorities, to resolve the inevitable conflicts among their many goals and expectations. In such an environment, it will not be any easier to evaluate private prisons than it has been to evaluate their public counterparts, let alone to compare the two.

These observations about conflicting goals, however, indicate one of the most important contributions that private prisons can make to the enhancement of quality. Without a contracting process, an agency may never face up to the question of just what its purposes and goals are. It may even remain vague or ambiguous about its activities deliberately, in order to satisfy conflicting demands placed upon it. In contrast, jurisdictions concerned about their contractors' fulfillment of contractual obligations will need to clarify and specify their goals and performance measures to a greater extent than occurs without contracting. Every jurisdiction has laws, regulations, and policies that apply to the administration of prisons. These can be incorporated into contracts simply by reference (though the laws would probably apply even without reference in the contract). In addition, contracts can be used to spell out further standards, regulations, and performance measures beyond those that apply to all prisons in that jurisdiction.

ACA Standards

In a study for the National Institute of Justice, the Council of State Governments and the Urban Institute[21] report that private prison contracts often include a requirement to adhere to

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[21]Hackett et al., pp. 40-41.

standards developed by the American Correctional Association (ACA) and to seek accreditation by the Commission on Accreditation for Corrections (CAC), which uses the ACA standards. In some cases, these standards were proposed by the contractor, rather than requested by the government agency. Generally the ACA standards go beyond what is required locally; where they are incompatible, or less stringent, the local regulations take precedence.

As noted in the report to NIJ,[22] the ACA standards cover such areas as:

Security and control	Work programs
Food service	Educational programs
Sanitation and hygiene	Recreational activities
Medical and health care	Library services
Inmate rules and discipline	Records
Inmate rights	Personnel issues

Missing from this list, but very important to the ACA, are standards that relate to crowding, such as the size of cells and recreation areas or the total floor space per inmate.

The ACA standards all refer to internal conditions, such as standards of security and decency, rather than to external results, such as rehabilitation or crime control. They are concerned primarily with process rather than with outcome and they emphasize nonutilitarian, rather than utilitarian, criteria. In short, they relate to the "quality of confinement" and the "quality of life" in prisons, in terms of criteria important to prisoners, their keepers, and the public: security, order, safety, space, sanitation, food, recreation, work, discipline, and programming.

As of early 1987, CCA had secured CAC accreditation of two of its nine facilities and was preparing to apply for accreditation of their other seven. As CCA points out, this ratio compares favorably to the one-fifth of state and federal facilities and less than 1% of local jails that are accredited.[23] In fairness to the Federal Bureau of Prisons, it should be noted that 38 of their 47 institutions were accredited for three-year terms as of Fiscal Year 1986.[24] However, within the category of state and local facilities, accreditation is clearly an unusual event.

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[22]Ibid., p. 41.

[23]Corrections Corporation of America, Company Report, April 3, 1987, p. 10.

[24]Federal Bureau of Prisons, 1986 Annual Report (Washington, DC: Federal Bureau of Prisons), p 11.

The private sector already plays a major role in the supply and accreditation of health services in prisons. Doyle H. Moore, founder of Prison Health Services, which supplies the services of nurses, doctors, psychiatrists, and dentists, points out that "[o]f the nation's 3,900 jails, only 160 are accredited by the National Commission on Correctional Healthcare and we provide the health services at 31 of them."[25] The company guarantees to get its clients accredited within one year or pay a penalty. In 1985, Prison Health Services did not have to pay any of the $1 million it faced in potential penalty fees.[26]

Accreditation, while a useful measure of quality, is not always reliable. As DiIulio[27] and Gettinger[28] point out, even accredited public prisons are sometimes crowded, dirty, violent, or deficient in work or other programs, so there is no guarantee that private prisons will be free of these problems even when they are accredited. Still, it is likely that accredited institutions, as a group, will tend to be of higher quality than most others, so accreditation status is still useful as a single (albeit not definitive) indicator of quality.[29] Moreover, it must be renewed every three years, so the longer a facility's history of accreditation, the more reliable it is as an indicator.

American Correctional Association standards generally exceed constitutional minima, and many are more stringent than those specified in state statutes. In turn, the standards of private prison companies sometimes exceed those of the ACA. Staff training is an example.

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[25]Lee Kravitz, Lee, "Tough Times for Private Prisons," Venture, May 1986, p. 60.

[26]Ibid.

[27]DiIulio, "Prisons, Profits, and the Public Good," p. 3.

[28]Stephen Gettinger, "Accreditation on Trial" Corrections Magazine, February 1982, pp. 6-21, 51-55.

[29]Accreditation has to be pursued, however, and a high rate of accreditation in a particular jurisdiction may be as much a reflection of political support for the pursuit as it is a reflection of quality. When Florida pursued a successful campaign to win accreditation for all of its penal institutions, some experts objected to the impression created thereby that Florida's prisons were somehow exemplary (see Gettinger, Ibid.). Florida was not so much special in the quality of its prisons as in its system-wide commitment to apply for accreditation, an expensive and time-consuming process.

Training

The ACA calls for a minimum of 120 hours training for new staff. CCA requires "at least 160 hours of training for new correctional officers, a minimum of 40 hours of additional training each year, and at least 24 hours of training per year for management personnel".[30]

As a comparison, new federal Bureau of Prison staff also undergo four weeks (160 hours) of formal training and a minimum of 40 hours training each year.[31] The Immigration and Naturalization Service trains its officers for 6 weeks (240 hours) at the Federal Law Enforcement Training Center.[32]

The high training of federal correctional officers, however, is not typical of the larger number of state and local correctional workers. In The National Manpower Survey of the Criminal Justice System, the U.S. Department of Justice reported[33] that nearly half of all juvenile correctional agencies provided no formal entry training to line staff; where they did provide training, it averaged about 30 hours in length, with less than one-fourth in excess of 40 hours. For staff in adult corrections, over half of the training programs were less than 100 hours. Subsequent training on the job was also rare: the Manpower Survey found that less than 10% of state correctional officers had attended in-service courses. Moreover, supervisors were not much better trained than line staff: only one-tenth of surveyed correctional agencies required that supervisors receive training in supervision either before or after appointment.

Florida is unusual in the amount of training it requires of correctional officers: 360 hours. CCA testified in support of changing the law to apply to private as well as to public corrections officers.[34] On the other hand, perhaps reflecting

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[30]Corrections Corporation of America, p. 11.

[31]Federal Bureau of Prisons, p. 8.

[32]New York Times, February 19, 1985.

[33]U.S. Department of Justice, National Institute of Law Enforcement and Criminal Justice, The National Manpower Survey of The Criminal Justice System: Executive Summary (Washington, D.C.: Government Printing Office, circa 1976), pp. 11-13.

[34]Richard Crane, Vice President, Legal Affairs, Corrections Corporation of America, testimony, November 13, 1985, U.S. Congress. House. Committee on the Judiciary. Privatization of Corrections. Hearings before the Subcommittee on Courts, Civil

different standards for juvenile as opposed to adult corrections, Florida's contract for private operation of the Okeechobee School for Boys requires only a minimum of 40 hours pre-service training, and 40 hours per year in-service training for all direct child-care employees.[35]

Guards at the privately owned Marion Adjustment Center "receive the same training as their state-employed counterparts."[36] At Silverdale Detention Center, however, because CCA is seeking accreditation, the private guards "have received more training than did the county guards."[37]

The most important training, however, may not be the formal, classroom type. Nor do most prison jobs require higher education, and therefore a more expensive labor pool. What an effective guard needs is on-the-job training in the "simple, paramilitary routine of numbering, counting, checking, looking, monitoring inmate movement, frisking convicts, searching cells, and so on."[38] In short, guards must be trained in how to run things "by the book."

To support their warnings about lack of training in the private sector, some critics have pointed to the case of Danner, Inc., a one-time private provider of detention space to the INS. Danner did not train its employees in security and emergency procedures or in the use of firearms. During an escape attempt, one prisoner was accidentally killed with a shotgun by a Danner guard. While this case indicates the importance of training, it is not a fair representation of correctional contractors. Danner's primary function was to provide transportation for spare parts and shipping crews in the Port of Houston. As a secondary

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Liberties, and the Administration of Justice, 99th Cong., 1st and 2nd sessions, November 13, 1985 and March 18, 1986, Serial No. 40 (Washington, DC: U.S. Government Printing Office, 1986), p. 30.

[35]American Correctional Association, Private Sector Operation of a Correctional Institution (Washington, D.C.: U.S. Dept. of Justice, National Institute of Corrections, April, 1985), p. 12.

[36]National Criminal Justice Association, "Private Sector Involvement in Financing and Managing Correctional Facilities" (Washington, DC: National Criminal Justice Association, April 1987), p. 17.

[37]Ibid.

[38]John J. DiIulio, "Prison Discipline and Prison Reform," The Public Interest No. 89 (Fall, 1987), p. 73.

activity, they supplied security watchmen for ships.[39] Lacking training and proper facilities, they should not have been involved at all in providing detention, even on a one-time emergency basis. There is a lesson in that, but it does not necessarily generalize to companies whose primary business is incarceration. The company, not incidentally, is no longer in business. The same cannot be said for the many public institutions of confinement where even worse things have happened.

Training is important to the staff of any prison, public or private. Indeed, it is too important to be taken for granted in either type of facility. Contracts for private prisons certainly should require levels of training at least as high as those in their public counterparts. But if they call for higher levels, it merely invites the question, "Why don't we expect this of our public employees also?" Raising such expectations is, after all, a major purpose of competition, and either side may have something to learn from the other.[40]

Turnover

Even the best training program will be diminished in its contribution to quality if staff turnover is very high. Not only is training an ongoing process, but there is no substitute for experience, which takes time and stability to accumulate in a workforce.

Unfortunately, high turnover is endemic to corrections, from top to bottom. Among sheriffs and top administrators in departments of corrections, there is potential at every election for discontinuity. In 1987, the average length of service among directors of adult correctional agencies was 3.6 years.[41] John DiIulio, an insightful student of prison governance, believes that this problem of fluctuating executive leadership "is largely

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[39] (Medina v. O'Neill, 589 F. Supp. 1028, 1031 (1984)).

[40] Who will train whom? In a survey of correctional agencies, Camp and Camp found that 43% of them contracted with private agencies for staff training, placing that among the ten most frequently contracted services. See Camille G. Camp and George M. Camp, Private Sector Involvement in Prison Services and Operations. Report to National Institute of Corrections (Washington, D.C.: February, 1984), p. 6.

[41] George M. Camp and Camille Graham Camp, The Corrections Yearbook 1987 (South Salem, NY: Criminal Justice Institute, 1987), p. 42.

responsible for the fact that prisons have been ill-managed, under-managed, or not managed at all.[42]

At lower levels, staff turnover in corrections has historically been very high. The figure most commonly cited for turnover among correctional officers is a national average of about 30%. A recent textbook, for example, says: "Turnover is high, about 28% nationally, and absenteeism runs as much as 15 percent in some prisons."[43] In Fiscal Year 1974, a national correctional manpower survey found, for state institutions, that voluntary resignations had an average rate of 19% of corrections officers, while the hiring rate was 32%. The highest rates were among institutions with 25 to 74 employees, where the quit rate rose to an average of 28% and the hiring rate averaged 47%.[44] A more recent source cites a national average turnover rate of 18% among correctional officers in adult state systems, but does not indicate whether this is a quit or hiring rate.[45]

It is not clear yet whether private prisons will be able to reduce staff turnover very significantly or reliably. In an occupation with low pay and extreme stress, the turnover problem may be rather intractable. One of the early secure facility contracts showed at least a short-term negative impact on turnover. Severe problems of transition caused a turnover rate that was already almost unbelievably high among the state employees to almost double during the first year after the private takeover. This contract, at the Okeechobee School for Boys, will be discussed in some detail later in this chapter.

On the other hand, Corrections Corporation of America reports a facility staff turnover rate of about 15% overall, though it is sometimes higher during the first year of a contract.[46] They had their highest turnover at Silverdale, the prison in Hamilton County, Tennessee. Three years into that contract, less than

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[42]DiIulio, "Prison Discipline and Prison Reform," p. 89.

[43]Clear and Cole, p. 302.

[44]U.S. Department of Justice, Law Enforcement Assistance Administration, Corrections: National Manpower Survey of the Criminal Justice System vol. 3 (Washington, DC: Govt. Printing Office, 1978), p. 45.

[45] American Correctional Association, 1987 Directory of Juvenile and Adult Correctional Departments, Institutions, Agencies, and Paroling Authorities. (College Park, MD: American Correctional Association, 1987), pp. xxx-xxxi.

[46]Crane, p. 29.

half of the original staff remained.[47] However, turnover was previously very high under the county also (up to 50% annually).[48]

Staff turnover is likely to be a problem for private prisons, just as it is for others. It is too soon to predict whether it will be higher or lower, and in any case it will probably vary so much through time and across facilities as to make generalization difficult even when there are more data. Rates of turnover will be useful in future research to comparatively evaluate governmental and private prisons. Of course, the meaning of a turnover rate is not self-evident; it must be interpreted according to information about its cause. However, it is at least relatively easy to measure and generally can be taken as a performance factor, preferably in combination with many other factors.

Credentials

Private companies can bring to corrections, particularly at lower levels of government, experience and expertise that would not otherwise be available to them. Many of the officers of proprietary prison companies are veterans of state and federal corrections systems; others have expertise in management, business, finance, construction, and the law. As Richard Crane, then a Vice President at CCA, put it:[49]

> If anyone should be using the "no experience" argument it should be us. Our over 160 years of correctional experience among top management is surely better than any you will find in most state corrections systems.

Among the current or recent executive officers at CCA are two who were former state directors or commissioners of corrections, one of whom is a past president of the American Correctional Association and recipient of the E. R. Cass Correctional Achievement Award. Three are former state prison wardens. Three hold doctorates in law; one of these, a specialist in correctional law, is the former Chief Counsel for the Louisiana Department of Corrections and the legal issues trainer for the National Institute of Corrections. Several other officers hold degrees in criminal justice or business. One is an architect, another a

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[47]Samuel Jan Brakel, "Prison Management, Private Enterprise Style: The Inmates' Evaluation" (Chicago: American Bar Foundation, 1988), p. 29.

[48]Ibid., p. 32.

[49]Crane, p. 38.

Certified Public Accountant. The company's board includes a former Chairman of the U.S. Board of Parole.

CCA's competitors, large and small, also have personnel with training and experience. These would include: Wackenhut, the largest provider of private security in the country; Pricor, whose officers include one who worked 15 years as a state prison budget director[50] and another who is a former Commissioner of Finance and Administration and Commissioner of General Services for the State of Tennessee; Buckingham Security, Ltd, one of whose co-founders was once warden at the tough Lewisburg and Marion federal prisons during a 23-year federal corrections career, and is now warden of the privately-managed Butler County Prison; Behavioral Systems Southwest, whose two chief officers had long careers in the California Department of Corrections; Eclectic Communications, Inc., whose warden at Hidden Valley Ranch worked 27 years in the federal prison system, including stints as a warden at maximum security institutions.[51]

Private corrections companies will not necessarily have strong experience and training among their top executive officers. U.S. Corrections Corporation, for example, was founded by two men with no corrections experience (they hired that expertise when they got their first contract). However, the contracting process does give a jurisdiction a higher degree of control over selecting correctional authorities on the basis of experience than often occurs in the political processes of election and appointment. Sheriffs, for example, are often elected without prior experience even in law enforcement, let alone in running a jail. A small city or county has little chance of hiring directly the high level of competence, training, and experience it can obtain through contracting.

Ironically, the extensive prior experience of private corrections officials is sometimes used against them. Critics ask, rhetorically, what these former officials can do in the private sector that they couldn't do in the public sector. Or they search through the records to find some problem faced by these officials when they were in government service. In both cases, critics make the mistake of attributing to individuals something that is characteristic of a system. It is hard to serve for long at the level of warden or higher without being involved, directly or indirectly, in a lawsuit, and critics of private prisons have drawn some ammunition from this fact.

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[50]Samuel Greengard, "Making Crime Pay," Barrister Magazine 13(1986): 14.

[51]Ibid.

The case of "axe-handle Charlie" has already been cited. Another example is an article in The Nation,[52] which cites a Supreme Court ruling that the Arkansas prison system in 1978 was operating under conditions of cruel and unusual punishment. The Commissioner of Corrections in Arkansas at that time was T. Don Hutto, who later became Vice President of Corrections Corporation of America, then President of CCA International and a member of the Board of Directors of CCA. Since most states in recent years have had jails, prisons, and prison systems under court orders for conditions of confinement, it is very misleading to imply that this particular case gives either CCA or Hutto some sort of shadowy past. To the contrary, Hutto is widely regarded as having had a distinguished career in corrections. He has been elected President of the American Correctional Association and has received that Association's E. R. Cass Correctional Achievement Award. His prior experience, including his record of reform in an unconstitutional state prison system, brings strength, not weakness, to his current service in the private sector.

Inspections

In January, 1983, the Tennessee Corrections Institute inspected Hamilton County's prison and found violations of 62 out of 177 regulations. Earlier reports were similarly poor. In February, 1985, four months after the prison was taken over by CCA, the same inspector found 21 violations, most of which were corrected within a few months. Subsequent inspections found few faults.[53] A Hamilton County grand jury inspects the prison four times a year. According to County Auditor Bill McGriff,[54] the grand jury reports since CCA took over "have all been glowing." In contrast, many were critical of the facility under the county.

On January 30, 1987, a grand jury inspected the New Mexico State Penitentiary and the privately-run Santa Fe County Detention Facility. After comparing the two institutions, several grand jury members recommended that private management of the state prison be considered. They cited economy, efficiency, and cleanliness as potential benefits.

In Bay County, the State Correctional Internal Inspector found 76 violations of Florida codes or standards at the county jail prior to its takeover by CCA. Four and a half months into the contract, a subsequent inspection found only 9 violations, all of

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[52]Becker and Stanley, p. 729.

[53]The Chattanooga Times, August 12, ,1986.

[54]Telephone interview with Bill McGriff, Hamilton County Auditor, August 14, 1987.

which were rectified by the time of a follow-up one month later.[55]

Private Parts Reflect Public Wholes

Whatever independent effect contracting may have on quality, it cannot completely outweigh the effect of the purchasing agency's own commitment. Quality supplied is determined most strongly by quality demanded. Private prisons will thus largely reflect the public systems of which they are a part. This principle was noted by Kevin Krajick, one of the first observers of the private prison scene, in a brief comparison of two private juvenile facilities: RCA's Weaversville Intensive Treatment Unit, and the Eckerd Foundation's Okeechobee School for Boys.[56]

That comparison is worth elaborating here. It illustrates not so much a difference between RCA and the Eckerd Foundation--both had successful track records running small-scale programs for juveniles -- as a difference between the missions assigned to each by the respective states. Pennsylvania asked RCA to quickly create a small, intensive treatment facility for hard-core delinquents. The state was more concerned with speed and quality than with cost. Florida asked the Eckerd Foundation to take over a large, run-down, troublesome, and underfunded facility, and to run it for even less money.

The results are described in the two sections that follow.

Pennsylvania, RCA, and Weaversville

Weaversville, as Krajick noted "is part of a relatively progressive juvenile system; Pennsylvania has made a commitment to running small, well-funded institutions." Krajick quotes the manager of Weaversville as saying, "We're able to do what we do because somebody up there in the state really cares about these kids. They give us whatever we need." The state pays RCA $40,000 per year for each resident, 5% of which is RCA's profit.[57]

Though many of the residents are serious offenders, the atmosphere is relaxed. Staff outnumber residents and are well educated and trained; they include teachers, psychologists, and caseworkers. There are daily group therapy sessions. Krajick

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[55]League of Women Voters, "CCA -- First Year Report Card," (Bay County, Florida: video tape, October 1986).

[56]Kevin Krajick, "Punishment for Profit" Across the Board 21(March 1984), pp. 25-27.

[57]Ibid., p. 25.

quotes James Finkenauer, a Rutgers University expert on delinquency programs nationwide, as saying, "Weaversville is better staffed, organized, and equipped than any program of its size that I know."[58]

The employees at Weaversville are enthusiastic about their jobs in spite of lower pay than they might get in a comparable state job. Indeed, some of those employees gave up state positions to do the same work in the private sector. They cite as a major compensation the opportunity to do quality work. "There's far more creativity in working for a corporation," says Henry Gursky, project manager at Weaversville. "There is a direction towards excellence and innovation here that seems to be unique to private industry," adds Arthur Eisenbuch, Weaversville's clinical psychologist.[59]

Pennsylvania state officials, who might be seen as competitors as well as sponsors and monitors of the Weaversville program, are also positive. Robert H. Sobolevitch, director of the state Welfare Department's Bureau of Group Residential Services, says that Weaversville is "the best example of a private operation. This is going to be the national model. It's the hottest thing in corrections." While the program is expensive, Sobolevitch reports that costs at Weaversville run slightly under spending at Pennsylvania's comparable state-run juvenile institutions.[60]

At least at Weaversville, then, the fear of critics that companies "driven by profit" must necessarily sacrifice quality to cut costs, has not materialized.

Florida, Eckerd, and Okeechobee

The private takeover of the Okeechobee School for Boys occurred within a totally different context from that which produced the private Weaversville Intensive Treatment Unit. Both facilities were intended to hold hard-core, serious juvenile offenders, but there the similarity ends. Weaversville was produced as a new facility in response to a legal necessity, and it was supported by a jurisdiction already spending relatively high amounts on its own facilities. Okeechobee, in contrast, was perhaps the most neglected and deteriorated facility within a system of large state training schools that had been allowed to run down in anticipation of deinstitutionalization. Prior to contracting, Okeechobee and two other state training schools were facing lawsuits alleging cruel and abusive conditions of confinement.

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[58]Ibid.

[59]Philadelphia Inquirer, August 12, 1984.

[60]Ibid.

Krajick underscored the contrast between Okeechobee and Weaversville:[61]

> Florida gives Eckerd less than one-half the money per resident at Okeechobee that Pennsylvania gives to RCA for Weaversville. Juvenile-justice experts say that Florida imprisons too many delinquents in training schools to begin with, and that all the schools are too big for their own good. Okeechobee alone is more than twice the size of the Pennsylvania institutional system....

With funding from the National Institute of Corrections, a research team for the American Correctional Association undertook a study to evaluate the effects of privatization on Florida's Okeechobee School for Boys.[62] Because of late timing, they were unable to use a before-and-after design for most of their analyses. Instead, they compared Okeechobee (after the takeover by the Eckerd Foundation) with the Arthur G. Dozier School for Boys, another training school of about the same size that continued to be run by the state. They gathered and examined three general types of data: on clients, on staff, and on management and administration. In addition, because the school seemed to be suffering from transition problems at the time of their original study, they had a consultant return eight months later for a more subjective follow-up look.

Of the client measures gathered, only one -- number of detentions -- produced usable data. The ACA analysis of the data, however, was badly flawed. They failed to control for significant population differences on race and seriousness of offense, while controlling instead for nonsignificant differences on a widely used offender classification scale. Since they found little to report in their client data anyway, it need not be examined here.

When examining the staff data, the research team found that staff morale and satisfaction at Okeechobee were lower than at Dozier. There was a smaller questionnaire return rate at Okeechobee (62% vs. 82%), and the average length of employment was much longer at Dozier, so there could have been selection factors operating. However, most of the staff dissatisfaction at Okeechobee was clearly real.

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[61]Krajick, p. 26.

[62]American Correctional Association, Private Sector Operation of a Correctional Institution.

On about half the survey questions, there were significant differences between Okeechobee and Dozier staff. The difference was not in direction of response but in the degree of agreement, in a negative direction.

Okeechobee staff more often:

-- saw the environment as threatening to clients and staff;
-- saw their work as temporary employment and "just a job";
-- were dissatisfied with their jobs and work environment.

They less often:

-- saw their institution as well organized and well run;
-- felt that they were well trained or effective;
-- were optimistic about the future of their charges.

In terms of management, the researchers found significant improvements in efficiency of purchasing and greatly increased latitude in personnel procedures. However, Eckerd had serious problems in running Okeechobee that resulted from initial personnel policies that later had to be reversed.

When it first took over the facility, Eckerd reduced the staff from 224.5 to 183 positions. Cottage counsellors lived with their charges 24 hours a day, but their work week was redefined from (5x8=) 40 hours to (5x16=) 80 hours. This (along with other factors) caused great dissatisfaction and enormous turnover among the counsellors.

Staff turnover at Okeechobee was very high to begin with, about 87% the year before the contract began. During the year of transition, turnover shot up to 167% (on an annual basis), then fell back to 118% the year thereafter.[63] Meanwhile, turnover at Dozier was very low during all three years (about 10% to 12%).

In response to this unrest, Eckerd contributed an extra $236,000 above the contract to bring the staff size back to its pre-contract level and reduce the work week. The new work week ranged from 40 hours for detention unit counsellors to 56 hours for cottage counsellors (16 hours a day for seven out of fourteen days). At this point, new Okeechobee cottage counsellors, after 90 days, were earning $12,000 per year for a 56 hour week. This was the same hourly rate ($4.12) as new Dozier counsellors, who

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[63]These figures are derived from Tables 8.1 and 8.2 of the ACA Report (Ibid.). I had to extrapolate a weighted average turnover for all staff at Okeechobee from the ACA figures given separately for "Counsellors" and "Other staff" in Table 8.2. The approximate ratio of these two categories was estimated from the data in Table 8.1.

received $8,560 per year for a 40 hour week. In addition, Okeechobee counsellors received free room and board, which Dozier counsellors did not. Nonetheless, staff morale and turnover remained much worse at Okeechobee than at Dozier. Their total compensation advantage was apparently not worth the onerous work schedule. Later, cottage counsellors were reduced to 8 1/2 hours a day, 45 hours a week, and all staff were paid overtime beyond 40 hours a week (the initial policy after the takeover provided no overtime pay rate).

Thus, Eckerd's attempt to cut labor costs by reducing staff size and increasing work hours was clearly a failure, which soon had to be reversed. While the year of reduced budget for staff allowed Eckerd to shift funds into making substantial and permanent improvements in the facility's physical plant, those improvements came at a high cost in terms of staff morale. As the ACA study concluded:[64]

> The Eckerd Foundation's assumption that they could "site-adapt" their Wilderness Camp program to fit Okeechobee, was unrealistic. This idea, coupled with the loss of experienced state staff and an immediate reduction in total number of personnel, left the facility both understaffed and for the most part in the hands of inexperienced personnel. The concomitant increase in work-hours led to an even higher rate of personnel turnover and contributed to further lowered staff morale.

There must have been unrest among the residents as well as the staff, judging from Okeechobee's high escape rate. On the other hand, the rate was high before the changeover also. The escape rate was 25.6, 27.6, and 25.6 per 100 inmates in the years before, during, and after transfer from government to private hands. This is essentially no change, in spite of the extremely high turnover among the cottage counselors and the other problems of a difficult transition year.[65] At Dozier, the escape rates for those three years were 10.6, 8.0, and 6.3 per 100.

Management of the education program at Okeechobee was made more efficient by the contracting arrangement. Previously, the Florida Department of Education contracted the education programs at Okeechobee and Dozier to local education systems (a community college and the county school board, respectively). When Eckerd contracted to run Okeechobee, it also applied for, and won, the contract for its education program. This resulted in several

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[64]Ibid., p. 92.

[65]Ibid., p. 58.

efficiencies. Educational and institutional policies and disciplinary actions could be coordinated. Educational and other staff could overlap and supplement each other's activities. Finally, overhead costs authorized at 20% of the education contract could be largely reinvested in the School. At Dozier, all overhead costs were taken by the contracting county school board. At Okeechobee, however, Eckerd took only one sixth of the authorized overhead and used the remainder to pay other expenses at the School. Moreover, after the first year, Eckerd used some of its education contract funds to pay for telephone, utilities, and maintenance accounted for by the education program. At Dozier, the school board paid for none of these costs out of its contract.

The ACA researchers tallied up an inventory of 36 positive results and 22 negative results of the Eckerd contract. The list is too long and detailed to present fully, but a sample from each set is paraphrased here.

Positive Results included:

1. Greater flexibility in personnel procedures
2. Greater flexibility in purchasing and capitalization
3. Improved training program
4. New equipment and refurbishment of all occupied cottages
5. The education program (which must be contracted by the state) was brought under the same administration as the rest of the institution.
6. The Foundation lobbies the legislature for program and capital funds.
7. Improved security and fire safety
8. Improved food
9. Improved clothing for clients
10. Increased supply of maintenance materials
11. Quicker identification and resolution of problems
12. Faster renovation and construction

Negative Results included:

1. An initial work schedule for counsellors that was too demanding, resulting in lowered morale and greatly increased turnover
2. A requirement of one to five years employment with the Foundation before transfer of state pension credit to the Foundation retirement plan
3. Difficulty in changing staff attitudes and philosophy
4. Insufficient maintenance staff
5. Duplicative accounting requirements
6. Department of Health and Rehabilitative Services perceived a loss of information and control
7. Loss of coordination with rest of state juvenile system

Several positive results that are omitted above referred to employee benefits or perquisites. They are worth a summary mention for two reasons. First, they mitigate somewhat the major negative experience of the transfer period: employee dissatisfaction over hours and working conditions. Second, they differ from the experience of some other contracts, in which employee benefits constitute a sore point. At Okeechobee, under Eckerd, employees received: a pension plan at least as good as under the state; $10,000 free life insurance; free dental care; free housing, meals, and clothing; tuition for part-time college study; certain professional and business expenses for key staff; and Foundation-sponsored social events. It should also be noted that among the negative "results" mentioned in the report were: short client stay; inappropriate referrals to the facility; and no control over population size. Since these are determined by the state, it does not seem accurate to describe them as the "results" of contracting.

The ACA study noted in an afterword that a newly changed administration at Okeechobee made a large number of remarkably positive achievements following the first draft of the ACA report.[66] Staff turnover was cut by 75% following a return to normal working hours. Staff were added, while the population declined. Client control increased, while the atmosphere relaxed. The student council met regularly with the Superintendent, a grievance procedure was created, and the need for disciplinary segregation declined. Work release and aftercare programs were developed. Sanitation and maintenance improved. Staff training was strengthened. Improvements were noted in the classification system, in community relations, and in many other areas.

The ACA study team concluded with a hypothesis that the pattern of a difficult transition period, followed by a change in administration and subsequent improvements, might prove to be typical of private prisons in takeover situations. The experience of Butler County, Pennsylvania, however, does not support that hypothesis. When Buckingham Security first took over management of the county prison, its relationship to the unionized work force was precarious: Buckingham's original plan, halted at the last minute by a court order, was to fire them all. In spite of that shaky start, however, the pre-existing friction between the county and its workforce was greatly reduced, an era of arbitration awards was ended with the first contract ever

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[66]Ibid., pp. 99-101.

between the county and the union, and turnover fell from three or four a year to zero.[67]

The Silverdale Survey

Samuel Jan Brakel, while a researcher for the American Bar Foundation, studied the quality of CCA's program at Silverdale, largely from the perspective of the inmates.[68] By means of a questionnaire, Brakel asked a sample of 20 inmates at this county prison 16 questions covering the conditions of their confinement, programs and services, due process procedures (discipline, grievance, legal access, and release procedures), and relations with the outside world.

At the aggregate level, the total responses (20x16=320) broke down as follows: 157 positive, 67 ambivalent, and 96 negative.

Among the areas where CCA was most highly rated by inmates were: physical improvement, upkeep, and cleanliness; staff competence and character; work assignments; chaplain (also counsellor) services; requests and grievances; correspondence and telephone; and outside contacts.

Areas with a rough balance of positive and negative ratings were: safety and security; classification; medical care; food; education; discipline; and legal access.

Areas with a preponderance of negative ratings were: recreational facilities and programs; and release procedures. It should be noted that release decisions and allocation of good time credits are the responsibility of the county superintendent of corrections and out of the hands of CCA.

Six of the prisoners were able to compare CCA's management with prior conditions under county administration, at least on some of the questions. Among them, they produced 28 explicit before-and-after comparisons: 24 favored CCA and 4 favored the county prior to CCA.

From prisoners' comments and information gathered independently by Brakel, it is evident that much of the before-and-after comparison favoring CCA stems from the fact that conditions under the county had become particularly bad. This may be a common problem in evaluating private prisons. The early ones in

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[67]Buckingham Security Ltd, Private Prison Management: First Year Report 1985-1986, Butler County Pennsylvania (Lewisburg, PA: Buckingham Security Ltd., 1986), pp. 3-5.

[68]All figures in this section are from Brakel, "Prison Management, Private Enterprise Style: The Inmates' Evaluation."

particular may often be responses to desperate situations, where a "regression to the mean" effect is possible. On the other hand, while inheriting a "mess" may make it hard to do worse, it does not guarantee that one will do better. Indeed, it makes it harder to do well in absolute terms, to the extent that one inherits at least some of the causes of the prior problems, in terms of budget, physical plant, staff, and inmates.

Many inmates were able to make external comparisons of their experience under CCA to conditions at the county jail in downtown Chattanooga or to conditions at the state penitentiary in Nashville. These comparisons totaled 102, with 66 favoring Silverdale, 10 favoring the Chattanooga County Jail, and 26 favoring the state penitentiary. The external comparisons suggest that CCA's improvements are real achievements and not just regression-to-the-mean effects.

Brakel also cites the contract monitor and former warden as having identified "in unequivocal terms" five major areas of improvements: physical plant, classification, staff treatment of inmates, the disciplinary system, and medical services.

A Survey of Contracted Services

It is reasonable to expect that the quality of private sector operation of entire institutions will correlate with the quality of private sector delivery of the various separate services and programs that make up the whole. Here there is a longer track record, so we have better information.

In a recent survey of corrections agencies by Camille and George Camp,[69] 52 agencies, representing 38 states plus the District of Columbia, reported having at least one service contract with a private vendor. The Camps found 32 varieties of services that were contracted privately, covering "literally every aspect of institutional operations."[70] When asked to identify benefits, 62% of 50 responding agencies mentioned better quality of service.[71] In response to an open-ended question about advantages, half of the reported advantages related to

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[69]Camp and Camp, Private Sector Involvement in Prison Services and Operations.

[70]Ibid., p. 5.

[71]Ibid., pp. 9-10. The range of benefits mentioned included: Improved Administrative Operations (more efficient operation, reduced training requirements, better accountability, better use of space); Cost Savings (fewer staff, lower costs); and Improved Services and Conditions (better quality, unique service provided, decreased liability through better conditions).

quality of service and 45% related to cost.[72] When asked to identify liabilities, using a checklist of 12 possible problems, the 50 agencies produced a total of 161 complaints. About a third of these (34%) were in the category of service quality or delivery.[73]

It is too soon to do a formal survey, like the Camps', of corrections agencies that have contracted for the operation of entire facilities; the number is too small. The closest thing we have to that sort of review is a report prepared for the National Institute of Justice by the Council of State Governments and the Urban Institute. From 22 states, they obtained documents such as contracts, requests for proposals (RFPs), inspection reports, and legislative studies. They visited privately contracted facilities and interviewed corporate and government officials. While emphasizing that information on service quality is very limited, they concluded that these facilities "are perceived by government agency oversight officials as being quite satisfactory. We have seen no indication to date that a government agency has been dissatisfied to any significant extent with the quality of the service provided."[74]

Comparison Yes, Double Standard No

Perhaps the major contribution of private prisons is that they will provide an alternative standard against which to measure public prisons. This is one potential benefit of private prisons that reform groups should examine closely. Privatization may force improvements in government operations by defining higher standards. When they perceive an alternative, the public, the courts, and the government will be less tolerant of prisons that are crowded, dirty, unsafe, inhumane, ineffective, and prone to riots and lawsuits.

However, the existence of an alternative, or comparative, standard should not lead to the creation of a double standard, in which the legal requirements for private prisons are higher than for their public counterparts. It is one thing to anticipate higher quality from private corrections, or to encourage it with incentives in the form of renewed contracts, longer renewal periods, or higher fees. It would be another matter, however, to formally require contracted facilities to meet higher standards

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[72]The rest were miscellaneous.

[73]The rest distributed as follows: 39% Process (supervision, bidding, red tape); 22% Contracting Relationships (quality control, payment, union or other labor problems); 5% Cost-Effectiveness. Ibid., pp. 11-13.

[74]Hackett, et al., p. 51.

than are required of government operations. Charles Ring, in what is probably the best-balanced monograph on private prisons, points out perceptively what could happen then: "Plaintiffs' attorneys could argue that state prisons which fail to meet the minimum requirements imposed on private providers are in violation of the state's own standards of what constitutes acceptable conditions and humane care."[75] Just as the requirements and procedures of due process should be defined the same in both government and contractor prisons (see Chapter 4), so too should the legally required minimum standards of care be the same in both.

Conclusion

There has been almost no systematic empirical research evaluating the quality of private prisons in comparison to those run by the government. Until there is, initial evidence will tend to be anecdotal, and some of that sort of evidence has been considered in this chapter. Such evidence should be evaluated with caution. Government-run prisons have been studied extensively for decades. About all that can be said about them as a class is that they vary enormously on just about all dimensions that would relate to the concept of quality. We know, in the case of public prisons, that we should not generalize too broadly from short-term experience at individual institutions.

Private prisons, however, because they are still unusual, are particularly susceptible to the effects of publicity in both a positive and a negative direction. Much of the journalistic literature in the first few years was rather complimentary and optimistic. As is often the case, as the novelty wears off, critical stories are becoming more common. While neither puff pieces nor hatchet jobs will provide a basis for valid conclusions, the relative influence of each type of story will be lopsided for some time to come. The governmental prison system has survived countless scathing exposes, basically because it is the only system we've got. Private prisons do not have that advantage. There is little danger that jurisdictions will commit themselves completely to private prisons on the basis of early positive reports. It is more likely that they might rule them out completely on the basis of early scandals. No matter how convincing such stories of "success" or "failure" may appear, however, they should not form the basis of any but the most narrow and tentative of conclusions.

My own conclusion so far is simply that private prisons will fall variously within the same range of quality as do those run

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[75]Charles Ring, Contracting for the Operation of Private Prisons: Pros and Cons (College Park, MD: American Correctional Association, 1987), p. 17.

by government employees. Some private prisons will be better than some public prisons, and conversely. As long as there are at least some jurisdictions that might be improved upon by competition from the private sector, that option ought not to be categorically ruled out. Moreover, even jurisdictions with relatively high quality prisons ought to remain open to the competition.

7. ISSUES OF QUANTITY

Many critics are opposed to private prisons largely because they are opposed to prisons generally. They are afraid that cheaper and more efficient prisons will mean more imprisonment. Few of these critics object to the profits that are made from the private administration of community correctional programs that serve as alternatives to prison.[1] Rather they fear that private prisons will distract attention from these and other alternatives.[2] It is ACLU policy "that new prison or jail capacity should be increased only after existing unconstitutional conditions have been remedied, if ever."[3] Moreover, capacity should not be expanded until all alternatives to imprisonment have been exhausted.[4]

Jerome Miller, Director of the National Center on Institutions and Alternatives, lobbies hard for alternatives to imprisonment. Miller has voiced strong doubts about for-profit jails for adults[5] and his organization's newsletter has attacked and ridiculed the idea of proprietary prisons.[6] However, Miller had no objections to privately contracting out virtually all of the Massachusetts juvenile corrections system, a revolutionary change for which he was personally responsible. Apparently his objection is not to a private contractor performing a justice system function. Rather, he fears that, in the area of adult corrections, it will increase the total amount of imprisonment. The

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[1]Michael A. Kroll, Michael A., "Prisons for Profit," Progressive, September 1984, pp. 18-22.

[2]Jess Maghan and Edward Sagarin, "The Privatization of Corrections: Seeking to Anticipate the Unanticipated Consequences," paper presented to American Society of Criminology (San Diego, CA: November, 1985), pp. 44-46; Russ Immarigeon, "Private Prisons, Private Programs, and their Implications for Reducing Reliance on Imprisonment in the United States" The Prison Journal 65(1985): 60-74; Christine Bowditch and Ronald S. Everett, "Private Prisons: Problems within the Solution," Justice Quarterly 4(1987): 451.

[3]Jan Elvin, "Private Prison Plans Dropped by Buckingham," Journal: The National Prison Project Winter 1985, p. 50

[4]Ibid.

[5]Newsday, July 30, 1984.

[6]Institutions Etc., "If You Think This Sounds Good, Wait'll You Hear About Discount Gas Chambers," Investigative Newsletter on Institutions/Alternatives 6 (November, 1983): 6-8.

private exercise of state authority to carry out correctional practices is acceptable to Miller, but only where the aim is to substitute treatment for punishment.

"Capacity Drives Use"

If, through greater efficiency, more prisons are built, argue the critics, then they will be filled simply because they are there. "As long as you build prisons," declares Steve Kelban, a program associate at the Edna McConnell Clark Foundation, "you'll fill them. It's a self-fulfilling prophecy."[7]

For this argument to have weight as an objection to privatization, it would have to be shown that capacity produced, owned, and operated by private agents on a contingent basis under contract to a government is as likely to be used by the government "because it is there" as is capacity produced, owned, and operated by the government itself. On the contrary, however, it seems more likely that the government would use up "excess" capacity that it already owned than that it would purchase "unneeded" capacity from a contractor. Owners may feel compelled to find uses for their idle properties; renters, however, do not expand just because there are vacancies on the market. Thus, the argument that capacity drives use would be a better argument against government ownership of prisons than against privatization.

Opponents of new prison construction have long believed that an increase in prison capacity will, by itself, cause an increase in the use of that capacity. Private prison opponents now speak of "the solid evidence which supports the position that the criminal justice system inexorably operates to fill every available cell regardless of the need [or] wisdom of their use."[8] The evidence, however, is not solid, but shaky.

The most widely cited piece of this evidence is found in part of a study by Abt Associates.[9] A time-series analysis relating state prison populations to changes in capacity concluded that all net increases in capacity will be entirely absorbed within two years. This analysis was examined closely at Carnegie-Mellon University, by a team of experts headed by Alfred Blumstein, an

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[7]Florida Times-Union, September 23, 1984.

[8]J. Michael Keating, Jr., Seeking Profit in Punishment: The Private Management of Correctional Institutions (American Federation of State, County and Municipal Employees, 1985), p. 29.

[9]Abt Associates, Inc., American Prisons and Jails (Washington, DC: Government Printing Office, 1980).

eminent authority on prison population research.[10] They found that the Abt analysis contained a crucially incorrect calculation and was extremely sensitive to the inclusion of two extreme data points. In addition, they criticized the statistical model as overly simplistic because it omitted important variables and ignored simultaneous (two-way) causal effects. Blumstein and his associates concluded that existing evidence does not support the hypothesis that prison capacity directly determines the degree of prison use. While they emphasize that the evidence does not disprove that hypothesis either, they point out that during the late 1950's and 1960's, there was considerable spare capacity, yet during the 1960's, prison populations declined even though crime was increasing.[11]

Obviously, capacity is not unrelated to the degree of prison use, but expansion of capacity does not automatically produce a rise in imprisonment. Likewise, nonexpansion does not automatically prevent an increase in imprisonment; if it did, there would be no overcrowding. For over two decades, prison reform groups have advocated a moratorium on all new prison construction, believing that capacity drives use, and hoping that lack of capacity would curtail use. That strategy has backfired, and increasing numbers of prisoners are paying the price in terms of overcrowding and deteriorating physical conditions.

Given current levels of crowding, oversupply seems like a fanciful concern. Though it could become a reality in the future, that prospect should be viewed as a hope, not a danger. Overconstruction now would allow us later to tear down many ancient and run-down monstrosities that have been tolerated as long as they have only because there were no alternatives to them.

Still, supporters of privatization, who tend also to support supply-side theories of economics, ought not to dismiss completely the warning that private production of public services can increase the demand for those services (Starr, 1987). Indeed, both liberals and conservatives sometimes support particular forms of privatization precisely because they want to see more rather than less activity in those specific areas. In the area of criminal justice, however, demand should drive supply, rather than vice versa. Whether we opt for more imprisonment or for less, our decision ought to be based on a sound philosophy of punishment, not merely on the availability or absence of beds.

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[10]Alfred Blumstein, Jacqueline Cohen, and William Gooding, "The Influence of Capacity on Prison Population: A Critical Review of Some Recent Evidence," Crime and Delinquency 29 (January 1983): 1-51.

[11]Ibid., p. 50.

We, the consumers of justice, must see to it that our demand for punishment is relatively inelastic with respect to supply, so that oversupply, if it does occur, will simply drive down the price. To imprison someone merely because there is a bed available would obviously be unjust; equally unjust would be the failure to imprison a felon because no bed is available. However, distortions of supply do not relate symmetrically to distortions of justice. While undersupply leads inevitably to either overcrowding or underimprisonment, oversupply does not necessitate overimprisonment. Nonetheless, oversupply is also undesirable, if only because it is wasteful. What is needed, for both justice and efficiency, is flexibility of supply, which the private sector is best equipped to provide.

Vested Interests and Lobbying

Advocates of privatization generally want to see total government spending go down. Contracting, even if it reduces unit costs, does not necessarily reduce total spending. One thing that can prevent it from doing so is effective lobbying on the part of contractors, who have a vested interest in seeing that the government buys more of that which they supply. Critics of private prisons are right to worry about potential distortions in the justice market as a result of political influence by parties with vested interests.

Some of these critics go overboard, however, when they imply that contracting will create special interests where none existed before, and when they exaggerate the power, the influence, and the supposedly purely self-serving character of private businesses. Some critics portray private prison companies as prepared to hang on to each prisoner as long as possible, by denying inmates good time credits and undermining their bids for parole, in order to wring out an extra margin of per diem payments. Some fear this vested interest may spread like a virus: they ask whether prospective jurors who own any stock in a prison company could be disqualified from felony cases.[12] In addition, they credit private prison companies with enormous power to manipulate legislatures and public opinion in the direction of greater punitivity, to ensure longer prison sentences and more of them. They speak of the ability of these firms to "buy unlimited television and newspaper time and space, reach the highest political levels and unleash upon America a program to convince the public to lock up more and more people for longer and longer periods, carefully concealing that their motive is

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[12]Maghan and Sagarin, pp. 60-61.

profit."[13] Harmon Wray[14] warns that "the most critical flaw in the privatization movement is that it is inherently expansionist." Wray cites the Vera Institute's Michael Smith as noting that "the private sector has an enormous investment in stimulating demand" and he cites Ken Schoen, Director of the Justice Program at the Edna McConnell Clark Foundation, who predicts: "Private operators whose growth depends upon an expanding prison population may push for ever harsher sentences. . . . And the taxpayers will finance the profit-makers while double-locking their doors at night."

Special vs. Public Interests

Lobbying is an intrinsic and (within certain limits) positive aspect of representative government. Whatever government does, and however it does it--whether directly or through contracted agents--the policy-making process will be subject to lobbying by all sorts of groups representing any number of different interests.

Special interests can take other than economic forms. Personal, moral, philosophical, ideological, or reputational investments can be at stake, with the same biasing effect and the same potential conflict with the general public interest as may be the case with a financial vested interest. For example, the National Center on Institutions and Alternatives has a strong philosophical and moral commitment against incarceration and in favor of alternative sanctions. It also tends to identify with offenders. Yet the NCIA is the largest private provider of presentence reports in the country,[15] and in that role it is not completely free to promote its own values exclusively. Surely it would lose business as well as credibility if all of its presentence reports argued against imprisonment. Here, then, is a case where an economic interest[16] acts to restrain an ideological interest and to force greater attention to the concerns of the general public. In short, its economic interest keeps NCIA honest and objective, in the sense that it is forced to consider

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[13]Edward Sagarin and Jess Maghan, "Should States Opt for Private Prisons?" a debate with Charles Logan in The Hartford Courant, January 12, 1986.

[14]Harmon L. Wray, Jr., "Cells for Sale" Southern Changes 8(September, 1986): 6.

[15]Herbert J. Hoelter, "Private Presentence Reports: Boon or Boondoggle?" Federal Probation 48(1984): 53.

[16]Note that private, for-profit companies are not the only ones with economic interests; such interests also influence nonprofit organizations and government agencies.

values and interests and definitions of justice other than just its own. This same dynamic can operate on a profit-making, incarcerative organization just as it does on this nonprofit, nonincarcerative organization.

While "special interest" groups are usually decried, they also deserve some appreciation.[17] Whether they intend to or not, they often serve shared interests and they can be a creative force for change. Corrections experts have long bemoaned the relative lack of organized constituencies for corrections, other than correctional employee unions. One noted expert, John P. Conrad, has concluded glumly: "A strong and durable constituency for corrections cannot be built. . . . The reason is simple. Corrections is unrelated to citizens' personal interests."[18] Adding new parties with an incentive to shape and direct the general thrust of social policy as well as to innovate and experiment in the details of its execution offers at least an opportunity to shake up a generally stagnant enterprise.

Whether these changes will be good or bad will depend on whom you ask. Predictably, they will please some and displease others. As noted, critics who expect that private prisons will lobby for more imprisonment generally do not like that prospect and define it as a special interest in conflict with the public interest. In the eyes of most of the public, however, "special interest" lobbies of that sort would also be promoting the general interest. The percentage of the American public who feel that the courts have not been harsh enough rose steadily from 48.9 percent in 1965 to 84.9 percent in 1978.[19] From 1980 to 1986, it held steady in the range of 82% to 86%.[20] In a recent national poll, 71% of the public said that a jail or prison term is the most appropriate sanction for a broad range of offenses,

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[17]David M. Lawrence, "Private Exercise of Governmental Power," Indiana Law Journal 61(1986): 653.

[18]John P. Conrad, Corrections and its Constituencies," The Prison Journal 64 (Fall/Winter 1984): 47-48.

[19]Bruce L. Benson, "Guns for Protection, and Other Private Sector Responses to the Government's Failure to Control Crime" The Journal of Libertarian Studies 8(1986): 77.

[20]U.S. Department of Justice, Sourcebook of Criminal Justice Statistics--1986 (Washington, D.C.: Bureau of Justice Statistics, 1987), Table 2.11, pp. 86-87.

including rape, robbery, assault, burglary, theft, property damage, drunk driving, and drug offenses.[21]

Thus, if private companies do lobby for more imprisonment, it is not at all clear that doing so would conflict with the public interest, at least as the public defines its own interest.

It should not be supposed, however, that private corrections corporations would lobby only for longer sentences. It would also be in their interest to lobby for higher correctional budgets for rehabilitation, education, job training, work programs, medical services, conjugal visiting facilities, better food, and any number of other improvements in prison environments and programs. The more these are mandated by the state, the more they can be offered by private prisons as well. Contractors may lobby for capital outlays to renovate deteriorating facilities, then bid for the work if it is authorized. As noted above, one major obstacle to significant change of any sort in corrections has been the fact that the interested and active constituency has always been so narrow and weak. Thus, reform-oriented corrections professionals may find in the private sector an ally as well as a competitor, and should welcome this expansion of the constituency.

Private vs. Public Lobbies

The private sector will not introduce lobbies to a field where now there is none. It will not turn a nonpolitical into a political arena. Corrections is already a political arena. Wherever governments appropriate and redistribute resources there exist interest groups of all sorts attempting to influence the allocation of these resources. Among the interest groups now actively involved in correctional issues are: corrections officials and their associations, correctional employee unions and associations, police and their organizations, attorneys and their associations, crime commissions, funding agencies, ex-offender organizations, the American Civil Liberties Union and its state chapters, and a number of other prison reform groups.

Criminal law and criminal juscice generally, not just corrections, are political, and strongly influenced in their development by special-interest groups. This fact is recognized by analysts all across the political spectrum, from right wing libertarians, through liberals and Ralph Nader style muckrakers, to the radical left.[22] Bruce Benson, an economist at Florida

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[21]Joseph E. Jacoby and Christopher S. Dunn, "National Survey on Punishment for Criminal Offenses" (Bowling Green, OH: Bowling Green State University, 1987).

[22]Benson, p. 79, footnote 22.

State University, has summarized the special interest theory of law in six propositions:[23]

1. Legislators and other public officials supply and enforce laws demanded by politically powerful special interest groups.
2. Effective interest groups tend to be small relative to the population that might be affected by the government activity in question, because of the difficulty of organizing and making decisions when many individuals are involved.
3. Political power may take the form of votes, money, or the ability to disrupt a politically stable situation with such things as strikes, violence, and disorder.
4. Interest group members may be very self-interested but they also may be very well intentioned individuals seeking what they feel is "good" for the society as a whole (although their definition of "good" is typically affected to some extent by their personal circumstances).
5. Bureaucrats (i.e., police, prosecuting judges, prison officials) constitute interest groups that benefit when laws requiring enforcement are passed.
6. Government responds to interest group pressure by favoring the most powerful group (or groups) . . . [however,] conflicting demands tend to lead to compromise, with no group completely satisfied or dissatisfied.

In support of the special interest theory of the development of law and operation of the justice system, Benson[24] cites empirical research by Berk, Brackman and Lesser[25] on changes in the California Penal Code from 1955 to 1971. They found that just a few criminal justice lobbies dominated, and during the early period practically dictated, criminal justice legislation. Prominent among these lobbies were the California Peace Officers Association, the American Civil Liberties Union, the state Bar Association, and the Friends Committee on Legislation. Benson notes[26] that:

> [An] important finding of the Berk-Brackman-Lesser study was that "public opinion" played no identifiable

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[23]Ibid., p. 79.

[24]Ibid., pp. 81-83

[25]Richard Berk, Harold Brackman, and Selma Lesser, A Measure of Justice: An Empirical Study of Changes in the California Penal Code, 1955-1971 (New York: Academic Press, 1977).

[26]Benson, p. 82.

> role in Penal Code revision. The study deemed "inescapable" the conclusion that criminal law was enacted for the benefit of interest groups rather than for the public good.

The aim and result of this lobbying by public bureaucrats and nonprofit organizations has been to expand the size, scope, power, and resources of the criminal justice bureaucratic empire.

Public employee organizations and unions that promote the campaigns of those who promise them larger budgets, more jobs, and higher salaries are engaging in the same activity that they warn against on the part of private contractors. Thus it is ironic to hear the President of the American Federation of Government Employees Council of Prison Locals (which represents Federal Bureau of Prison workers) declare that: "For the first time, it is in someone's self-interest to foster and encourage incarceration. It does not take an accountant to figure out that they will act in their self-interest."[27]

Of the one million members of the AFSCME, 50,000 are corrections employees.[28] Organized union labor accounts for some of the strongest lobbies and most lavishly funded Political Action Committees in the country. As Morgan Reynolds notes: "Unions can supply formidable organization, campaign money, workers, and direct influence over some members' votes. Public employees participate in elections at substantially higher rates than the general citizenry does, thereby forming a more potent voting bloc than their share of the work force might suggest."[29]

Correctional workers' unions have used collective bargaining to restrict the ability of administrators to contract for

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[27]Dave Kelly, President, Council of Prison Locals, American Federation of Government Employees, statement entered into the record, U.S. Congress. House. Committee on the Judiciary. Privatization of Corrections. Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 99th Cong., 1st and 2nd sessions, November 13, 1985 and March 18, 1986, Serial No. 40 (Washington, DC: U.S. Government Printing Office, p. 7. Emphasis shifted.

[28]Warren I. Cikins, "Privatization of the American Prison System: An Idea Whose Time Has Come?" Notre Dame Journal of Law, Ethics and Public Policy 2(1986): 455.

[29]Morgan O. Reynolds, Power and Privilege: Labor Unions in America (New York: Universe Books, 1984), p. 183.

community-based programs.[30] These bargains preserve the jobs of institutional employees and, as a side effect, keep the populations of the institutions higher than administrators may desire. Those who complain that private prison businesses, in pursuit of profits, will discourage the use of alternatives to prison, have been silent when organized labor, in pursuit of its own interests, has done the same. Among the policies that correctional unions have sometimes perceived as conflicting with their own interests, and which they have therefore opposed, are: deinstitutionalization, contracting out for services, the use of volunteers, establishment or enhancement of due process rights for inmates, increased community and family involvement in institutional programs, prisoner furloughs, work or educational release programs, and a shift of emphasis from custody to treatment.[31]

A study of correctional unions in 17 states found that "employee organization lobbying, publicity, lawsuits, and job actions . . . have often been attempts to counteract progressive correctional programs such as community-based facilities and to reestablish an emphasis on custody. Another feature of this campaign is that correctional unions have advocated longer prison terms and more stringent parole policies -- for example, an increase in the minimum term an inmate must serve before he can become eligible for parole."[32]

One final example of a public sector lobby is particularly relevant to the charge that privatization is inherently expansionistic (in contrast, by implication, to government monopoly). In most referenda on bond issues for prison construction, the general public is disorganized and confused. It wants more prisons but doesn't want higher taxes to pay for new long-term debt. Such referenda are often defeated by a well-funded advertising campaign mounted by organized and powerful opponents of new prison construction. Supporters were better organized than usual, however, in a 1981 referendum for a bond issue to build new prisons and expand the system in New York. There, the biggest spender, shelling out $158,000 to lobby <u>for</u> the bond issue, was the New York Department of Correctional Services.[33] The referendum was defeated, but it "had no impact on the

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[30]John M. Wynne, Jr. <u>Prison Employee Unionism: The Impact on Correctional Administration and Programs</u> (Washington, DC: U.S. Dept. of Justice, NILECJ, January, 1978), pp. 184-185.

[31]Ibid., pp. 227-228.

[32]Ibid., p. 217. I am grateful to Bruce Benson for drawing my attention to this reference.

[33]James B. Jacobs, <u>New Perspectives on Prisons and Imprisonment</u> (Ithaca, NY: Cornell University Press, 1983), p. 118.

construction plans and timetable of the Department of Correctional Services," whose Commissioner exhorted his employees to work instead on the regular appropriations process, and "support the continued expansion of our state prisons with the appropriations in [the next] budget."[34]

Against this background, to argue that privatization will introduce an element of self-interest not otherwise found in the criminal justice system is absurd. This is not to deny that private firms will have special interests that may sometimes conflict with the public interest (or with other conflicting interests competing to be defined as "the public interest"). The point is that these conflicts of interest are not unique to the private or profit-making sector and therefore do not provide legitimate grounds for excluding that sector from participation in the criminal justice policy process.

Private prison companies may very well become important actors with influence on the formation of criminal justice policy, just as the public actors in the field are today. Indeed, merely to open up the field already has taken some political muscle. As Harold Wray reports, one CCA lobbyist managed the campaigns of Tennessee governor Lamar Alexander and served as his chief of staff. Alexander has been strongly supportive of prison privatization. "Others in the CCA-Alexander circle include CCA stockholders who are current and former Alexander cabinet officers, CCA administrators who are former state GOP chairpersons, a CCA lobbyist who was a Democratic state senator, and two prominent public figures [the governor's wife and the state's House Speaker] who in 1985 sold their CCA stock to avoid the appearance of conflict of interest."[35]

Competition within the industry, however, can serve to dilute, rather than concentrate, this political power. For example, one of CCA's competitors, Corrections Associates, Inc. (now called Pricor), hired Tennessee's Finance Commissioner Hubert McCullough away from his state office, to become its new chairman and CEO.[36]

With or without the participation of profit-making enterprises, it is important to maintain democratic political controls to prevent any one set of narrowly defined interests from squeezing out all others and from asserting an imprimatur over designation of "the public interest." We cannot prevent "lobbying" (though it may not always be called that) by nonprofit organizations, government agencies, public-employee unions, or

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[34]Ibid., pp. 130-131.

[35]Wray, p. 4

[36]The Tennessean, September 11, 1985.

commercial companies, any of whose interests may or may not coincide with the public interest. However, allowing them to compete, both in the provision of a service and in the public formulation of policy for the provision of that service, is a better method of protecting the public interest than is granting a monopoly to one particular type of service provider and thus concentrating the vested interests.

Just as competition in supply is the best protection against domination in the provision of a service, so competition in the political marketplace protects against domination there. "Pluralism" is what we call the condition in which the "public interest" must be sorted out from among competing definitions, claims, and interests. We regulate the competition, to preserve the integrity of the processes by which we determine (a) what services are most in the public interest and (b) who best can supply them. But it is competition as well as regulation that prevents concentration of power in either area.

Expansion vs. Flexibility and Diversification

The charge that private corrections companies, to remain profitable, will require an ever-expanding prison population, is based on a simplistic caricature of capitalism that reflects a misconception of the nature of business under conditions of competition. To be sure, most profit-makers do attempt to drum up business. On the whole, however, businesses succeed not by stimulating spurious demand, but by accurately anticipating both the nature and level of real demand. This is true whether demand is rising or falling, and particularly if it is shifting. The ability to predict and respond is far more important to a business than any supposed power to artificially stimulate demand.

The supposed need for full, if not increasing, occupancy is often referred to by commentators on private prisons as the "Hilton Inn mentality."[37] The phrase is an unfortunate one when used by critics, and not just because of the high quality associated with the Hilton.[38] Many hotels make profits without continuous states of full occupancy. It is far more important that they be able to predict demand and have the flexibility to shift resources and to adjust prices accordingly.

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[37]Joan Mullen, Kent John Chabotar, and Deborah M. Carrow, The Privatization of Corrections (Washington, DC: National Institute of Justice, February 1985), p. 73.

[38]It is the government, not the Hilton Inn, that for decades has chosen to cram more "guests" into each "room," rather than to expand its facilities.

Still, it is clear that private facilities will have an interest at least in stable, if not in maximum, occupancy levels. Rather than assuming they will respond insidiously, by violating the rights of their inmates or by stampeding the legislature and judiciary into greater use of prisons, it should be recognized that efficient use of contracted facilities is also in the public's interest.

One response based on that recognition would be to write contracts that allow a vendor to accept inmates from another agency or jurisdiction, to temporarily fill space not needed by the contracting agency. A higher price could be charged for these "extra" inmates, with the excess shared between the vendor and the contractor. This arrangement is part of the contract between CCA and Bay County, Florida. In Santa Fe, New Mexico, CCA runs the county jail under contract to Santa Fe county but has supplemental contracts to hold prisoners for the city of Santa Fe, the Federal Bureau of Prisons, the U.S. Marshall's Service, and some other counties and cities in New Mexico.[39] In Houston, CCA has a supplemental contract with the Texas Board of Pardons and Paroles to hold pre-parole inmates in the facility that it runs as a detention center under a primary contract to the INS.[40]

These supplemental contracts benefit all parties by increasing efficiency. Jail space is a scarce resource, but the problem is more one of distribution than of aggregate supply. While some jails are desperately overcrowded, many others, especially small to medium sized local facilities, have plenty of empty cells. Every year, some jails close for lack of need. The flexibility of private contracts can do much to allocate resources to where they are needed.

Another lesson to be learned from the Hilton Inn is one that is far more feasible for a private enterprise than for a government agency. That lesson is: diversification. Commercial enterprises survive and prosper in the long run not by artificially stimulating a spurious demand for just one product, but by accurately anticipating and responding to shifts in real demand. We should not assume that correctional corporations will always be motivated to lobby for expansion of high security facilities. Such corporations can be expected to diversify both within and outside of corrections. If they anticipate or sense a shift in public demand toward community treatment, electronic monitoring, or other alternatives to incarceration--or, indeed, a decline in

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[39]Corrections Corporation of America, press release, June 26, 1987.

[40]Corrections Corporation of America, press release, July 7, 1987.

total demand for correctional services of any type, through falling crime rates or decriminalization--they will prosper more by shifting resources to other activities than by attempting to buck the trend. Right now, there is a big overhang of genuine, unmet demand for imprisonment. However, if the demand for alternatives to prison increases, commercial companies should be able to respond rapidly to such a shift. One INS detention contractor, for example, also provides (and aggressively markets) electronic monitoring services as an alternative to jail.

To sum up briefly, political and economic pressures to expand the use of imprisonment are neither inherent in nor unique to the involvement of private enterprise in corrections. Vested interests in promoting either imprisonment or alternatives to imprisonment can be found in both public and private sector organizations. The general public interest, whether that may be in greater or in lesser use of imprisonment, is therefore no more naturally allied with the special interests of government agencies, government managers, and government employees, than it is with those of government contractors.

8. ISSUES OF FLEXIBILITY

A major promise of proprietary prisons is that they will bring with them the flexibility and innovation typical of entrepreneurial activity and commonly found among small businesses. They will have less of the bureaucracy that tends to preserve the status quo in government and very large businesses. As enterprises subject to competition and market discipline, they will be more free to engage in purchasing and subcontracting without the bureaucratic regulations that are needed to control the process of government spending. They will be able to respond more rapidly to the changing conditions and needs of corrections, or act more quickly to correct mistakes resulting from inaccurate predictions or faulty policies. They will add new expertise and specialized skills, and promote creativity and enthusiasm by bringing in "new blood" and new ideas more often than is possible under civil service.

Joan Mullen, an expert on privatization of corrections at Abt Associates, sees enhanced flexibility as a greater potential contribution of the private sector than the prospect of cost containment:[1]

> The notion that private organizations can provide more for less is undeniably attractive, but probably unrealistic. The greatest promise of the private sector may instead lie in its capacity to satisfy objectives that might be difficult if not impossible to achieve in the public sector -- introducing public sector managers to the principles of competitive business; quickly mobilizing facilities and manpower to meet immediate needs; rapidly adapting services to changing market circumstances; experimenting with new practices; or satisfying special needs with an economy of scale not possible in a single public sector jurisdiction.

In short, one of the major strengths claimed for private prisons is that their greater management flexibility and more rapid speed of response will promote both minor innovations and major program changes, whether through initiation, expansion, contraction, or termination.

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[1]Joan Mullen, "Corrections and the Private Sector" The Prison Journal 65(1985): 1.

Rigidity vs. Clarity

In reply to these claims, critics of contracting argue that it is impossible to write a contract that is as broad and flexible as the mission of a public agency needs to be. Contractors will be unwilling to go beyond the provisions of their contracts. Renegotiating and changing contracts is time-consuming and terminating a contract is often very difficult. Thus, contracts produce their own form of rigidity, and it will be harder for the government, under contracting, to order and control marginal changes. As two critical sociologists put it:[2]

> How can innovation be expected from a contractor who will not offer one iota more than the contract calls for and who does not have even the limited flexibility of the state and national correctional programs?

A political scientist argues:

> Writing and enforcing highly detailed contracts may help to guarantee accountability, but it does so only at the expense of administrative flexibility. . . . As a public corrections official with years of experience in these matters stated, "Either the contractors will be allowed to run wild as they did in the old days, or we'll make the specifications,, regulations, and monitoring so rigid that the firms will become as bureaucratized and inefficient as we are. . . ."[3]

This all-or-nothing reasoning, however, is clearly a false dilemma. Private prisons can have latitude in some respects without being given free rein in all respects.

A government prison that is run by unionized public employees may suffer from its own kind of contractual rigidity. The contract in question here would be a management-labor contract, rather than a government-management contract. For example, one study of correctional unionism reported that: "Correctional administrators interviewed during our research charge that the provisions requiring that assignments and promotions be based on

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[2]Edward Sagarin and Jess Maghan, "Should States Opt for Private Prisons?" a debate with Charles Logan in The Hartford Courant, January 12, 1986.

[3]John J. DiIulio, Jr., "What's Wrong with Private Prisons" The Public Interest 92(Summer, 1988): 73.

seniority have done more to disrupt the operation of correctional institutions than any other kind of provision."[4]

It is fair to predict that private prison companies will use their contracts to limit what is demanded of them. Within reason, that is one of the intended functions of a contract. But what critics see as rigidity, proponents see as specificity and clarity.

Government agencies can issue grandiose mission statements without fear of penalty if they fail to live up to all their promises. A contract, on the other hand, is meant to cut both ways -- to specify as well as to limit what is required. The purpose of a contract is to facilitate, not to restrict, the accomplishment of certain goals. Contracts force the government to confront the question of what are its goals, standards, and criteria of performance. All parties -- contractor, government, and taxpayers -- benefit from that process. Contracts protect the government by specifying in advance the nature and quality of the service it is to receive. Contracts also protect the contractor from unanticipated and unreasonable demands.

Contracts do not, however, necessarily protect a vendor from previously unspecified but reasonable demands. A more flexible contractor will have a competitive edge, when it comes time for contract renewal, over one who uses the contract as a shield in a rigid and truly unreasonable fashion. The government's control over contract renewal and rebidding will tend to prevent abusively rigid interpretations of contract provisions by the vendor. To exercise this control, however, the government will have to be prepared to deal with the problem of terminations and transitions.

Contract Terminations and Transitions

In exchange for the flexibility of contracting, government must be prepared to minimize the risk of interruptions in service when contracts change. When a contractor takes over a government operation or when the government takes one back or shifts it to another contractor through competitive rebidding, there are many details that must be planned for in advance. Capital investments must be protected. Property and equipment must be transferred. Continuity of records must be maintained. The interests of current employees must be considered. In short, terminations and transfers of contracts, even on a nonemergency basis, entail complications not found under normal governmental continuity.

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[4]John M. Wynne, Jr. Prison Employee Unionism: The Impact on Correctional Administration and Programs (Washington, DC: U.S. Dept. of Justice, NILECJ, January, 1978), pp. 170-171.

The AFSCME maintains a file of instances where it has been necessary to terminate contracts for various public services because they proved to be too costly or unsatisfactory.[5] These examples illustrate the problems of transition referred to above, but they also show something else. They indicate that it is feasible to terminate a public-private contract. In contrast, how feasible would it be to replace or halt the activities of a government agency, staffed by tenured and unionized civil servants, whose services were found to be unsatisfactory? It may not always be easy to terminate a contract, but experience has shown that it is nearly impossible to terminate a government agency, even one supposedly made mortal by a sunset law.[6] Thus, the fact that bad management may suddenly fail or have to be terminated can be seen as an advantage of the contract situation. Where contracting, and thus competition, is possible, the entrenchment of bad management (either public or private) is less likely; where it does occur, a surgical solution is at hand.

The INS has successfully terminated, and replaced, several of its contracts for detention facilities. Robert Schmidt, formerly Supervisor of Detention Services for the Immigration and Naturalization Service, supervised ten private contracts for six different facilities before he retired. Of those ten contracts, he describes three as "total successes," four as "OK," and three as "total failures." He reports that the INS had little difficulty in terminating the contracts that were failures and replacing them with new contractors.[7] It should be noted, however, that the INS is a national agency with multiple facilities, which should help to facilitate such transitions.

Contractors with multiple contracts can deal with rough transitions by temporarily reassigning personnel. CCA uses experienced facility administrators from its central offices to serve as interim administrators when setting up a new contract or changing the administration of an ongoing contract. The Eckerd Foundation used counsellors from its other programs to deal with a rough transition period at Okeechobee, during which there were strong fears of violence. According to an American Correctional Association study, the Superintendent and these personnel "were

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[5]American Federation of State, County, and Municipal Employees, "Contracting out in Local Government" (unpublished paper, March, 1984).

[6]Robert Behn, "The False Dawn of the Sunset Laws," The Public Interest 49 (Fall 1977): 103-118.

[7]Robert J. Schmidt, panel presentation on "Assessments of Private Corrections" at The National Conference on Alternatives to Jail and Prison Overcrowding, sponsored by the University of Florida, Orlando, Florida, March 10, 1988.

able to maintain the safety of the institution through heroic effort and countless hours of overtime."[8]

CCA's contract for New Mexico's women's prison provides for a procedure to ensure the government a smooth transition in case of contract termination. For a period of 60 days, CCA would work under supervision of the New Mexico Corrections Department during transfer of operations back to the NMCD or to another contractor. All records would transfer to the NMCD.

As a final note here, since one purpose of contracting is to allow for competition in the provision of correctional services, it would be a mistake to regard potential terminations and management transitions as necessarily negative. Certainly, they can be disruptive, but in individual instances they may be either good or bad, depending on what went before and what comes after.

Innovation and Risk-Taking

A study of contracting for community correctional services[9] found that flexibility was a major attraction to public agencies. Contracts allow agencies to experiment with new programs without long-term commitment of funds or of tenured civil service staff. Vested interest in these programs does not accumulate inside the agencies. This avoids the tendency toward bureaucratic self-perpetuation that ordinarily makes public programs difficult even to alter, let alone to eliminate.

Of course, flexibility advantages to the public agency translate into insecurity for the private contractor. If the vulnerability of a contract is an advantage to one side, it is a disadvantage to the other. However, this problem is intrinsic to all private contracting. To survive and succeed, a contractor must solve this problem in a variety of ways: by providing service that is too good to give up; by accurately anticipating and being ready to meet the shifting needs of different clients; by holding down the administrative costs of hustling from one contract to another; by cultivating multiple clients; or by other techniques that must be the stock-in-trade of any competitive contractor.

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[8]American Correctional Association, Private Sector Operation of a Correctional Institution (Washington, D.C.: U.S. Dept. of Justice, National Institute of Corrections, April, 1985), p. 16.

[9]Gene Kassebaum, Billy Wayson, Joseph Seldin, Gail Monkman, Peter Nelligan, Peter Meyer, and David Takeuchi, Contracting for Correctional Services in the Community: Vol. 1, Summary (Washington, DC: U.S. Dept. of Justice, May 1978).

Flexibility and willingness to take risks are often seen as virtues when associated with small businesses. They can, however, be seen as mixed blessings when it comes to the incarceration business.

On the one hand, the structure of incentives seems to favor originality and innovation in the private sector. While failure in corrections can be dramatic and costly for either the public or the private sector, there are fewer countervailing rewards for success in the public sector. Private actors can be motivated economically to take innovative risks, but public actors' concern with political survival induces caution and reinforces the status quo. Under civil service, the careers of line staff and middle managers are more or less predetermined, while the positions of top officials depend largely on avoiding embarrassing mistakes. Avoiding bad publicity becomes more important that outshining the competition, especially if there is no competition.

On the other hand, in the coercive environment of prisons, flexibility and innovation are not necessarily desirable. Cumbersome governmental procedures for review and approval of changes in policies and programs are not merely obstructionist. They are necessary to preserve due process constraints on the power of the state. It is important not to lose these constraints when state power is extended through contractual agents.

This is a valid point, though it gets carried too far when it is argued that private firms are <u>incapable</u> of such responsibility:[10]

> Innovation and flexibility, when proposed by the CCA or some other such organization, can be motivated only by profit enhancement, hardly a purpose inspiring to those who are grappling with corrections.

However, we do not have to choose in an all-or-nothing fashion between due process protections on the one hand and the ability to innovate on the other. Particular innovations may be either good or bad, but a structure conducive to innovation is, on the whole, positive.

The argument that contracting passes some risks from government to the private sector is usually presented as a point in favor of contracting. John Donahue, however, sees it as a criticism. While conceding that "uncertainty about the future is the whole rationale of a market for risk," Donahue questions the

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[10]Jess Maghan and Edward Sagarin, "The Privatization of Corrections: Seeking to Anticipate the Unanticipated Consequences" Presented to American Society of Criminology (San Diego, CA: November, 1985), p. 53.

wisdom of passing risk from the government to the private sector. His primary argument against doing so is that "governments in general are better at spreading risks than private companies are, simply because they encompass more people."[11] What he means is that governments are better at absorbing costs, when risks turn out to be bad risks.

Why should the ability of government to absorb costs be seen as an advantage? If our goal is to avoid costs, the best strategy is to transfer risk to the party most motivated to minimize it, not to the party best prepared to absorb it. This is especially effective if the party least able to bear a risk is also the party best prepared to act quickly in response to changes in risk.

Flexibility and the Uncertainty of Social Policy

Flexibility is especially important in the administration of public policy, where the concentration of decision-making magnifies the consequences of ignorance, uncertainty, and error. Policies regarding imprisonment, for example, contain implicit or explicit projections about trends, distributions, and patterns of crime and punishment. Even where broad trends are discernible, however, it is beyond the powers of social science to make highly accurate and reliable forecasts. Because of the scale on which it operates and the ponderous way in which it moves, government is much more dependent than is private enterprise on the long-term accuracy of projections. Of course, the private sector must also be able to predict, if it wishes to make a profit, but it can make better use of short-term (and therefore more accurate) predictions because it can generally respond more quickly to changes in information.

A market in corrections would share in the general advantages of markets over central planning. The advantage most relevant here is that while central planning magnifies the consequences of erroneous predictions, competition isolates and minimizes them. If a state launches a major prison construction plan and hires an army of civil servants, based on a long-term projected trend that does not materialize, or that unexpectedly reverses itself after a few years, the cost will be much greater than if several competing contractors are responding continuously to projected needs. Some contractors will predict better than others, or be able to respond more quickly to altered predictions. These companies will survive and prosper by being able to meet the changing needs of the state more effectively. The less successful companies will have to absorb and thereby contain the cost of their inaccurate predictions. In contrast, when the state has a

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[11]John D. Donahue, Prisons for Profit: Public Justice, Private Interests (Washington, DC: Economic Policy Institute, 1988), p. 18.

monopoly on the prison business, it can simply pass on to taxpayers the full cost of its errors, and thus has less incentive to avoid them in the first place.

Contracting can help respond to changes in prison populations brought about by changes in legislation. In recent years, these changes have generally meant increases, but contracting can help with decreasing correctional needs also. In 1984, the Bureau of Prisons signed a three-year contract to house about 60 Youth Corrections Act offenders in a private facility in LaHonda, California. Repeal of the Youth Corrections Act that year had made it clear to the Bureau that its YCA population would disappear through attrition over the next few years. The Bureau's director later reported to Congress that: "Contracting to house these offenders gave us the flexibility to handle our population without acquiring additional permanent spaces. This allowed us to respond to the YCA population reduction in the most cost-effective way."[12]

Flexibility Enhances Justice

The flexibility of private prison contracts may also enhance justice, at least according to a "just deserts" model. Public concerns over justice and punishment (usually expressed as "getting tough") have led to reforms in many components of the justice system. Abolishing parole, limiting judicial discretion, banning or restricting plea bargaining, and other such reforms, are intended to curb abuses and to make punishment more uniform and just. Generally, though not necessarily, this is seen as replacing leniency with greater firmness and punitivity. One objection to these reforms has been the fear that they will produce further overcrowding of prisons. Therefore, so-called front-door and back-door mechanisms have been urged that would seem to defeat the purpose of the anti-discretion reforms. Back-door options include emergency release mechanisms and ongoing early re-entry programs. Front-door mechanisms include diversion programs and sentencing guidelines that specifically require judges to take capacity into account.[13]

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[12]U.S. Congress. House. Committee on the Judiciary. Privatization of Corrections. Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, 99th Cong., 1st and 2nd sessions, November 13, 1985 and March 18, 1986, Serial No. 40 (Washington, DC: U.S. Government Printing Office, p. 140 (statement of Norman A. Carlson, Director, Federal Bureau of Prisons, submitted with testimony on March 18, 1986).

[13]Robert Mathias and Diane Steelman, "Controlling Prison Populations: an Assessment of Current Mechanisms." (National Council on Crime and Delinquency: unpub., 1982).

The search for new mechanisms of diversion and release, to prevent or reduce overcrowding, rests on a faulty assumption: that prison flow can and should be fine-tuned by the state, while prison capacity remains virtually fixed. A penal system based on the justice model, however, makes just the opposite assumption: prison flow should respond to the crime rate, which is largely beyond the control of the state; therefore, prison capacity must be flexible. Reduction (or increases) in imprisonment under a justice model should occur because such changes are perceived as improving justice, not because of limited (or expanded) prison space. At least at the margins, then, the prison system must be able to expand and contract as the shifting demands of justice require. Flexibility at the margins will tend to maximize the supply and minimize the cost of imprisonment. Commercial prisons, with efficient management, multiple vendors, and renewable, adjustable contracts, offer an increased prospect of achieving this marginal flexibility.

9. ISSUES OF SECURITY

One of the strongest reservations about private prisons relates to their ability to run high security institutions. The former director of the Federal Bureau of Prisons, for example, has expressed doubts that private firms could ever run maximum security prisons.[1] The Council of State Governments and the Urban Institute recommend that only minimum security facilities be contracted at this time.[2] Their rationale for this is unclear, however. It appears to be based largely on the expectation that local communities will object to privately-run maximum security institutions being located in their neighborhoods.[3]

While private firms have not yet run a maximum security prison, they are running jails that include all levels of security. A February, 1987, visit to the Bay County (Florida) jail, which is run by CCA, found over half a dozen capital murderers along with other offenders in their maximum security wing. Also, some private juvenile institutions are designed for serious, including violent, offenders.

Why should private management be more problematic at a maximum security institution? Probably because, in most people's minds, the higher the level of security, the greater the need for coercion, including the use of potentially deadly force.

Deadly Force

The right to use deadly force is widely regarded as an exclusive prerogative of government, but this is a misconception. Legitimacy in the use of force is determined by conformity to

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[1]Warren I. Cikins, "Privatization of the American Prison System: An Idea Whose Time Has Come?" Notre Dame Journal of Law, Ethics and Public Policy 2(1986): 462.

[2]Judith C. Hackett, Harry P. Hatry, Robert B. Levinson, Joan Allen, Keon Chi, and Edward D. Feigenbaum, Issues in Contracting for the Private Operation of Prisons and Jails (Washington, DC: Department of Justice, October, 1987), p. 25. Note, however, that the restriction to minimum security facilities, while mentioned in the body of the report, does not appear in the summary of recommendations.

[3]Ibid., p. 25. Of course, there is also community resistance to the location of prisons when government runs them. While government may be exempt from some zoning laws and can use force (e.g., eminent domain) to overcome community opposition, private agencies must rely on persuasion. Some communities find the prospect of new jobs and added property taxes hard to resist.

provisions of law not by the governmental status of the person who exercises force. Thus, the use of force by private actors is often both legal and legitimate.

For example, the power of arrest has been delegated to private railway police, to humane society agents, and to bail bondsmen. The arrest powers of bondsmen were established under common law, while a majority of states empower private railway police by statute. Such police may carry concealed weapons and have all the arrest powers of public police. Though nominally appointed by a public official and sworn to office, they are in fact employed and supervised by the railroads.[4]

Under common law, a private citizen has the right to use deadly force in self-defense, in defense of another, or to prevent the escape of a felon. In 1985, however, the Supreme Court held, in Tennessee v. Garner, that deadly force may be used by police against a fleeing felon only where it is "necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others."[5]

It is not clear what the implications of this decision are for prison guards, but it appears that the powers of police, and probably of corrections officers, are approaching those of ordinary citizens, rather than diverging from them. The Garner decision is a recognition of the precept that, whatever the specific rules and regulations, the general principles justifying the use of force by state agents should not be significantly different from those justifying the use of force by civilians. In this connection, an observation from the report of the Council of State Governments and the Urban Institute, is significant: "In States that subscribe to the provisions of the Model Penal Code, the proper use of deadly force by private correctional officers would not require further legislation. The definitions in the Model Penal Code appear to sufficiently include private prison guards."[6]

There is no moral distinction between governmental and private actors as individuals that would justify a governmental monopoly on the use of force. There is, however, a practical rationale for limiting particular uses of force to small and highly visible subsets of the population. The rationale is that, by so doing,

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[4]David M. Lawrence, "Private Exercise of Governmental Power," Indiana Law Journal 61(1986): 666, note 77.

[5]Connie Mayer, "Legal Issues Surrounding Private Operation of Prisons," Criminal Law Bulletin 22(1986): 318.

[6]Hackett et al, p. 13.

it is easier to keep those uses of force within the limits specified by law. That is why powers of arrest are generally linked to certifications of some sort, such as licenses or deputization. The certification does not confer legitimacy in itself, through incantation or some sort of voodoo jurisprudence. Rather, it aids the enforcement of laws that restrict the legitimate uses of force.

It is consistent with this goal of limiting and constraining the use of force, for the state to recognize, allow, or authorize the use of force by non-state actors, under certain circumstances and within the same legal guidelines that determine whether the use of force by a state actor is legitimate. Civil servants are not necessarily the only, or the most, responsible, accountable, or controllable wielders of power or appliers of force.

Also consistent with the practical rationale for limiting and controlling the use of force would be for the state to certify, license, deputize, or swear all correctional officers, both public and private. This would bind them formally to specific codes that authorize and restrict their permissible uses of force and provide mechanisms for disciplining them if they overstep their authority. The training and other requirements for such certification should be the same for public and private guards.

In the state of Florida, for example, all correctional officers, including those employed by private contractors, must be certified by the state. In New Mexico, legislation authorizing private prisons designates a contractor's employees as peace officers while in the performance of their duties.[7]

Guards do not carry guns inside most prisons and jails, either public or private, and the use of deadly force against inmates is rare.[8] Some private prisons have guns available outside, with employees who are authorized to carry them.

What happens in the case of a riot, or other emergency? Critics often ask this question, then move on to other issues as if it were unanswerable, or required no answer. The answer, however, is about the same as for a government-run prison. In the event of disturbances at most prisons and jails, force is deployed from outside. Major disturbances often require reinfor-

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[7]Massachusetts Legislative Research Council, Report Relative to Prisons for Profit. House Report No. 6225 (Boston: Massachusetts House of Representatives, July 31, 1986), p. 100.

[8]Most deadly force in prisons is exercised by inmates, not guards. It is a common complaint among guards that they are surrounded by inmates who are often better armed than their keepers.

cement from state police or national guard units. This practice would not be different in a privately run prison.

Routine Security

Experience at most contracted facilities, in terms of routine security, has been positive. At the Bay County Jail, CCA has assigned officers to each floor so that they can observe violations and response time will be quicker. Under the county, there were often no officers on the floor, which was a major factor in a lawsuit filed against the sheriff and the county by an inmate who said the lack of supervision resulted in his being sexually abused by other inmates.

When Buckingham Security took over operation of the Butler County Prison, the first thing they had to do was take back control from the inmates. Even allowing for the partiality of the source, a First Year Report by Buckingham is worth a lengthy quote on this score:[9]

> Prior to Buckingham's arrival, the staff remained out of the ares where inmates lived. They stayed out of the passageways when inmates were moving through them. During the infrequent outdoor periods, a staff member watched from an overlooking window. The myth existed that various areas in the prison belonged to the prisoners whenever they were in them. It was thought to be dangerous to intrude. . . .
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> Beginning immediately, Buckingham took control of the prison. All staff, including the warden, mingled with the inmates daily. . . . The entire prison now belongs to the county and the county employees govern all of it at all times. All inmates are now assigned specific bunks in specific cells and the staff knows that each is accounted for.

Among the security reforms instituted by Buckingham were: routine physical security checks (bars, locks, doors, windows, walls and perimeter); a key control system; a professional headcount system; an organized system for inmate files; a tracking system to determine proper release dates; a sally-port system for security doors; and an inmate classification system. A prior custom of allowing police to wear their guns inside the prison was ended.

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[9]Buckingham Security Limited, Private Prison Management: First Year Report 1985-1986, Butler County Pennsylvania (Lewisburg, PA: Buckingham Security Ltd., 1986), p. 6.

At Silverdale, the private prison run by CCA for Hamilton County, Tennessee, security was significantly enhanced following a minor disturbance in August of 1986. In his detailed and objective case study of this prison, Jan Brakel describes how security measures that were already under way were accelerated after this incident. Guns and other riot gear were located in a secure area below the control tower (guns are not worn inside the prison); a new fence topped with razor wire was built around the men's unit; a more restrictive checkpoint was set up at the gate; new key control and inmate pass systems were implemented; staff assignments were reviewed to assure 24-hour coverage of all crucial stations; visitation, transportation, and shakedown procedures were tightened; surveillance of cells and dorms was increased; and emergency evacuation drills and procedures were instituted.[10]

Escapes

There have been escapes from private prisons, but their record in this regard is no worse than their public counterparts, and often better. Certainly no private facility has been as lax in its security as the District of Columbia's Oak Hill Youth Center, a high security detention facility for juveniles in Laurel, MD, where a recent check of the official log showed that 30 percent of the 197 detainees were missing and listed as escapees[11], or the new Prince George's County (MD) Jail--much celebrated for its New Generation design--which 11 times during its first year released wrong prisoners under mistaken identities.[12]

During the first 7 months of operation at the Marion Adjustment Center, there were 4 walk-aways, 3 of whom were recaptured within 24 hours. In a comparison state facility, walk-aways averaged 1.5 per week.[13] Differential selectivity of admission at these two facilities, however, makes this comparison not too useful. At the Okeechobee School for Boys, the escape rate was 25.6, 27.6, and 25.6 per 100 inmates in the years before, during, and after transfer from government to private hands. This is

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[10]Jan Brakel, "Prison Management, Private Enterprise Style: The Inmates' Evaluation" (Chicago: The American Bar Foundation, January 1988 manuscript), p. 18.

[11]The Washington Post, August 9, 1987.

[12]The Washington Post, February 5, 1988.

[13]Commonwealth of Virginia, "Study of Correctional Privatization" (Richmond, VA: Secretary of Transportation and Public Safety, 1986), pp. 57-58.

essentially no change, in spite of a difficult transition year with extremely high turnover among the cottage counsellors.[14]

Over the first few years of private management at Silverdale, the number of escapes went down slightly. This was in spite of the fact that the population was increasing and moving sharply toward a higher mix of felony cases. During most of 1984 (until October 15), the prison was under county management. There were 42 escapes during 1984, all but 9 of which occurred while the prisoners were on outside work crews under the custody of the sheriff. In 1985, there were 39 escapes--9 from within the compound. In 1986, of 35 total escapes, 7 were from within. During this three year period, the population rose to 358 from a base of 250-300, and the percent who were state felons rose from 10% to 34%. Thus, where more escapes might have been expected, given the changing nature of the population, there were slightly fewer under private management.[15]

Strikes

The National Labor Relations Act (NLRA) makes it unlawful for an employer to interfere with the right of workers to strike. Public employers are specifically exempted from NLRA coverage and in most jurisdictions there are laws making it illegal for at least some categories of public employees to strike. In a review of legal issues relating to private prisons, Mary Woolley concludes that private prison guards do possess the legal right to strike.[16] They will be covered by the National Labor Relations Act unless Congress clarifies or amends the Act or the National Labor Relations Board reverts to an interpretation they abandoned in 1979. While they ruled in 1975 that a private fire department was exempt from the act and had no legally protected right to strike because it provided an essential municipal service, they rejected that standard in a 1979 case involving private busing of public school students.[17]

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[14]At Dozier School for Boys, a "comparison" (but not truly comparable) state-run facility, the escape rates for those three years were 10.6, 8.0, and 6.3 per 100. American Correctional Association, p. 58.

[15]All information for this paragraph is from Samuel Jan Brakel, "Prison Management, Private Enterprise Style: The Inmates' Evaluation" (Chicago: The American Bar Foundation, January 1988 manuscript), pp. 17-19.

[16]Mary R. Woolley, "Prisons for Profit: Policy Considerations for Government Officials," Dickinson Law Review 90(Winter 1985): 324-327.

[17]Ibid.

Public Employee Strikes

Those who fear strikes by correctional workers would be better advised to oppose public employee unionization than to oppose prison privatization. Although strikes are generally more common in the private sector, they are rapidly increasing among public employees. From 1960 to 1984 there was a tenfold increase in the number of public sector work stoppages and a thirtyfold increase in number of days idle.[18] A state-by-state study of public employee unionization showed that, in each state, the number of strikes increased dramatically in the years immediately after enactment of collective bargaining legislation. In some states, the effect was astounding. Michigan had only one strike in the seven years prior to its legislation, compared to 290 strikes in the six years thereafter. New York jumped from an average of 4.1 strikes a year before to 27.75 strikes a year after.[19]

Strikes and other job actions are illegal for correctional officers (guards) in all states except Hawaii, and generally they are illegal for most other correctional employees as well.[20] The absence of a right to strike, however, has not prevented public prison guards from engaging in many strikes, sickouts, and other job actions.

Under the leadership of the American Federation of State, County, and Municipal Employees strikes by correctional workers have been not merely local, but sometimes regional and even national affairs. In 1974, under coordination by the AFSCME, prison guards in Rhode Island and at six penal institutions in Ohio walked off their jobs.[21] In 1979, almost all the guards at New York's 33 correctional facilities went out on a strike that lasted 17 days. The Governor called in the National Guard, who were met with violence and property damage by the striking prison guards.[22] A study of correctional employee unionism in 17 states

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[18]Morgan O. Reynolds, Power and Privilege: Labor Unions in America (New York: Universe Books, 1984), p. 195.

[19]Research cited in Ralph de Toledano, Let Our Cities Burn (New Rochelle, NY: Arlington House, 1975), pp. 84-86.

[20]John M. Wynne, Jr. Prison Employee Unionism: The Impact on Correctional Administration and Programs (Washington, DC: U.S. Dept. of Justice, NILECJ, January, 1978), pp. 223-224.

[21]de Toledano, p. 46.

[22]James B. Jacobs, New Perspectives on Prisons and Imprisonment. Ithaca, NY: Cornell University Press, 1983, p. 142.

found that correctional officers had engaged, illegally, in strikes or similar job actions in about half of the research states.[23]

Contrary to popular impression, prison strikes do not generally create situations that are difficult to control. Lockdowns are frequent, but inmates tend to stay on good behavior during strikes even when supervisors attempt to run things on a near normal basis, without a full lockdown.[24]

Thus, the risk of strikes in private prisons is neither as new nor as serious as most people suppose. Still, it is a risk to be avoided or minimized as much as possible. Whether the risk will be higher or lower in a private prison remains an open question.

Strike Risks under Contracting

Privatization provides an opportunity to deal with the problem of strikes in a fashion more realistic than simply outlawing them. Mary Woolley recommends that both enabling legislation and contracts address the possibility of strikes. For example, it could be provided that in the event of a strike, state police will perform as guards, as they do already during emergencies at correctional institutions. Insurance or performance bonds could be required to cover the cost of emergency staffing.[25] Another possibility, not mentioned by Woolley, would be to couple legislation requiring that all correctional officers -- public and private -- be certified, with legislation providing for automatic decertification of officers who participate in a strike.

The Council of State Governments and the Urban Institute recommend that private prison contracts should "require sufficient advance notice of the end of an employment contract period, the onset of labor difficulties or major grievances that could result in a work stoppage or slowdown."[26]

The contract between CCA and Hamilton County specifies that "A default shall immediately occur if any threat to the security of property or persons . . . is caused by strike (whether by

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[23]Wynne, p. 202.

[24]Wynne, p. 221.

[25]Woolley, pp. 326-327.

[26]Hackett et al., p. 11.

employees or inmates) . . . ."[27] The contract also specifies procedures for the county to resume immediate control of the prison in the event of default or serious disruption. Other prison contracts also typically include contingency plans to deal with emergencies or disruptions such as strikes, riots, or bankruptcy.

State police and the National Guard would be the ultimate recourse in a strike by private guards, as they are now for public employees. However, the cost of such intervention could be negotiated and specified in the contract, so that it might or might not distribute differently from how it does now. Also, a performance bond can be used to defray the government's cost if it has to take control of a contracted facility.

Since a strike or other disruption would allow the government to terminate a contract, unemployment as the result of a strike will be a credible threat to private guards. In contrast, it is difficult to deter strikes with such threats in the public sector. Although numerous strikes took place in Ohio from 1970 to 1975, it was not until May 1975 that any striking guards were fired. Likewise, when Walpole State Prison officers were fired for a strike in 1973, the Governor of Massachusetts was pressured into rehiring them, by an AFSCME threat to declare a strike by all state employees.[28] Amnesty for strikers is a universal demand in public employee strikes and generally (except occasionally for violence or other illegal acts incidental to the strike) they get it.

If a strike should occur in a private prison, there are several reasons to expect that it would be even more quickly resolved than in a government prison, where it would typically last only a few days and three weeks would be an extreme case (Wynne: 203). Private management will have a greater and more personal stake in rapidly ending a strike and resolving the underlying issues. They will also have more direct control over many matters at issue, and where they do not, that fact will be clearer than in the public situation, where a strike is often not merely against management but against the executive and legislative agencies as well. Private guards, unlike their public counterparts, will not have a claim on the support of noncorrectional public employees, especially given the opposition of public employee unions to privatization. Even inmates in a private prison might be in a better position to prevent or resolve a strike. Inmates will suffer the most from any strike, but ordinarily they will have no power to influence the out-

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[27]"Hamilton County, Tennessee Corrections Facilities Agreement," September 20, 1984, section 13(4), p. 37.

[28]Wynne, p. 204.

come.[29] As third-party beneficiaries to a contract, however, they will have a new legal standing from which to petition for a court injunction against a strike or threaten to sue the company.

Finally, the experience of the federal government is reassuring on the question of strikes against contractors. In a review of almost 30 years of contracting experience under Circular No. A-76, "Performance of Commercial Activities," the Office of Management and Budget lists the fear of strikes as one of the common misconceptions about contracting:

> Available evidence has not borne out the fear that contracted services would be more susceptible to employee strikes than if they were retained in-house. There have been two cases of strikes by contract employees and in both cases contingency plans proved effective. The Circular requires that contractors be held accountable in the case of strikes and that contingency plans be included in contracts.[30]

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[29]Wynne, p. 223.

[30]U.S. Office of Management and Budget, Enhancing Governmental Productivity through Competition: Targeting for Annual Savings of One Billion Dollars by 1988 (Washington, DC: Office of Federal Procurement Policy, March 1984), p. 11.

10. ISSUES OF LIABILITY

Critics warn that governments will not escape liability by contracting the administration of their prisons, as some advocates supposedly claim. To some extent, this is a strawman argument. Contractors do claim that the quality of their operations will reduce the risk of lawsuits, and that they can serve as a buffer between government and plaintiffs by defending the government in court, by indemnifying it against legal damages, and by carrying insurance. However, it is hard to find any private vendor or privatization advocate who claims that contracting can actually immunize the government from legal liability. If anything, it is the opponents of private prisons who imply that government can escape liability (through sovereign immunity) if only it stays away from contracting.

Lawyer and privatization critic J. Michael Keating summarizes the liability picture as follows:

> What seems reasonably clear is the likelihood that private jail and prison operators will be subject to all of those statutes fashioned to render state agencies liable for their misconduct, such as the Civil Rights Act, while remaining ineligible for the benefits derived from those statutes and common law doctrines formulated to preclude or limit the liability of public bodies, such as state tort liability statutes and the doctrine of sovereign immunity.[1]

From context, it is clear that Keating regards this vulnerability of private prisons as an argument against them, but it is not at all clear why this should be so.

Since critics of private prisons are particularly concerned about prisoners' rights and the accountability of those who exercise power, they should regard the increased liability of private prisons as an argument in favor of contracting. Prisoners in private facilities gain by the addition of an extra layer of liability, accountability, and responsibility for their rights and welfare. They are certainly not worse off in this regard than they would be under total government management. It is therefore ironic for prisoners' rights groups to raise liability concerns in opposition to contracting.

One would think that these litigious groups would be reassured, not alarmed, by the legal vulnerability of private

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[1]J. Michael Keating, Jr., Seeking Profit in Punishment: The Private Management of Correctional Institutions (American Federation of State, County and Municipal Employees, 1985), p. 43.

prisons. So far, there has been at least one case in which an inexperienced private detention vendor was sued, made a monetary settlement, and went out of the detention business.[2] The government was also sued in this case, but only for declaratory relief, not monetary damages. When government is sued for damages, it passes the cost on to taxpayers; no government agency yet has been litigated into bankruptcy. This may be a plus in terms of stability, but it is a minus in terms of accountability.

Civil Rights and Wrongs

On at least one liability issue, there seems to be universal agreement: with or without privatization, government remains ultimately responsible for the constitutional rights of citizens, including prisoners. Government may not shirk its constitutional duties, nor can it avoid liability if it tries to do so. Careful legal scholars holding opposite views on the general wisdom and propriety of private prisons are nonetheless in agreement that both government and contractors definitely can be held responsible under 42 U.S.C. Section 1983 for violations of constitutional rights by private prison contractors.[3] Private prisons will qualify as Section 1983 defendants because they will be acting "under color of law" and thus "state action" will be present. Therefore both private prisons and their contracting units of government can be sued under the provisions of this Section.[4]

The most pertinent case so far has been Medina v. O'Neill,[5] the facts of which were as follows:

In 1981, a vessel arrived in the Port of Houston carrying 26 stowaways. Ordinarily, the INS orders that stowaways be detained on board the same vessel for immediate return transportation. In

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[2]Ira Robbins, "Should Private Firms Run Prisons for Profit?" Newsday, March 31, 1985.

[3]Charles Thomas, Lonn Lanza-Kaduce, Linda S. Calvert Hanson, and Kathleen A. Duffy, The Privatization of American Corrections (Gainesville: FL: Center for Studies in Criminology and Law, University of Florida, June 15), p. 142; Ira Robbins, The Legal Dimensions of Private Incarceration (Washington, DC: American Bar Association, 1988), p. 118.

[4]Actually, Section 1983 applies only to states and not to the federal government. However, it is discussed here as though applying to both levels because it is very similar in logic to so-called Bivens actions against the federal government. See Thomas, p. 114, note 71.

[5]Medina v. O'Neill, 589 F. Supp. 1028 (1984).

this case, however, the ship lacked facilities for detention, so 20 aliens were placed in a local jail, while 6 were placed in a private security firm, in a cell designed to hold that number and measuring 12 feet by 20 feet. After one day, 10 of the aliens were transferred from the jail to the private firm and placed in the cell containing 6 already. The next day, the aliens attempted to escape and a private guard accidentally killed one of them with a shotgun.

The federal district court ruled that the plaintiffs were entitled to sue the INS for violation of constitutional and statutory rights. The ruling had three significant parts. First, the actions of the private party were held to constitute "state action." Second, the conditions of confinement were held to violate constitutional standards of due process. Third, the INS was held to be responsible for ensuring that detention meets constitutional standards.

In 1988, the Fifth Circuit Court of Appeals vacated and reversed the district court ruling on two of the three parts listed above. The Appeals Court held that "(1) INS officials had no statutory duty to provide appropriate detention facilities for excludable aliens, and (2) aliens' due process rights were not violated."[6]

What is important for the current issue, however, is that the Appeals Court did not object to the district court's ruling that the contractor's acts constituted "state action." If it did not do so in this case, it is unlikely that it would do so in other cases. Excludable aliens have practically no rights, and the relation between the INS and the private firm in the Medina case was very weak. All costs for the detention and transportation of stowaways must be borne by the carrier on which they arrive.[7] Though it may designate someone other than the carrier to provide detention, the INS itself does not have to financially contract for that service in the special case of excludable aliens. Compared to this, any correctional facility privately managed under a direct, formal contract to the government would be operating even more clearly "under the color of law."

In sum, there seems to be little doubt that violations of constitutional rights by private prison staff would constitute "state action" under Section 1983,[8] thus allowing plaintiffs to sue either the government or the private provider.

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[6]Medina v. O'Neill, 838 F.2d 800 (5th Cir. 1988) at 800.

[7]589 F. Supp. at 1028.

[8]Or in a Bivens-type action against the federal government.

Professor Ira Robbins both prefaced and concluded his discussion of this issue with the statement that one argument in favor of prison privatization has been the claim that it will reduce or eliminate government liability.[9] However, just the opposite claim -- that prison contracting does not reduce either governmental or private liability -- would seem to be an even stronger argument in favor of privatization, because it emphasizes that accountability and protection of prisoners' rights will not be compromised. Indeed, the legal recourse of prisoners may well be increased.

In testimony to the President's Commission on Privatization,[10] Professor Robbins has noted an unexpected expansion of prisoner's rights resulting from contracting. Prison contracts will create two categories of third-party beneficiaries to the contract: prisoners and the public. This gives prisoners the potential benefit of a contract cause of action, which they would not have had before. In addition, this new cause of action will generally have a longer statute of limitations than a suit under Section 1983 or an ordinary tort action.

Sovereign Immunity

Another liability question is whether private jailers should be allowed to protect themselves against monetary damages by asserting the defense of sovereign immunity.

In principle, there is a basic distinction between "policy-making, planning, or discretionary decision making activities, which remain fully protected by the sovereign immunity defense, and operational or ministerial activities, which are not immune."[11] In practice, however, the distinction between making and implementing policy is often fuzzy. To minimize or avoid legal challenges on delegation grounds, this distinction should be clarified as carefully as possible in the private prison context.

In some states, legislation authorizing prison privatization includes a statutory prohibition against the defense of sovereign immunity. In Florida, legislation permitting correctional privatization at the state and local levels specifies that private companies are liable for damages in tort with respect to

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[9]Robbins, The Legal Dimensions of Private Incarceration, pp. 72, 118.

[10]Ira Robbins, Testimony to President's Commission on Privatization, Washington, DC, December 22, 1987, unpublished transcript, pp. 294-295.

[11]Thomas et al., p. 93.

the care and custody of prisoners under their supervision; the Tennessee Private Prison Contracting Act denies the defense of sovereign immunity to private contractors or their insurers.[12]

Most states have waived sovereign immunity in either a general or substantial way.[13] In those states, liability for the tortious acts of correctional employees will exist whether those acts are committed by government or by contract employees. On the other hand, many states waive immunity only if the government purchases liability insurance, and then only up to the amount of coverage.[14] Thus, even where sovereign immunity is waived, the waiver is generally limited, and liability is capped. Given the large insurance coverage required of private prisons, and the historically modest size of damages awarded in correctional lawsuits (both discussed below), a legislated cap on the liability of private prisons may not be necessary at this time.[15]

Serious questions can be raised about the advisability of imposing a legal double standard, in which state actors are protected by sovereign immunity while private actors performing the same function are not. The major argument for sovereign immunity is that public officials need that protection in order to perform their jobs effectively. The major argument for denying sovereign immunity to contractors is that they need to be held responsible.

The implicit theory behind such a double standard is that government actors can be trusted while private actors cannot; that government actors respond best to carrots while private actors respond best to sticks; and that immunity allows people to act without inhibition according to their true characters, which for public actors means altruistically but for private actors means selfishly. But public and private actors are the same people at different times and in different roles. It simply won't do to assume that they have different human natures or respond to incentives in radically different ways.

The doctrine of sovereign immunity was originally based on the notion that because the King ruled by Divine Right, he could do no wrong. This notion has now been replaced by one that is only

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[12]Ibid., p. 95, note 32.

[13]Ibid., pp. 89-90.

[14]Ibid., p. 91.

[15]However, if private prisons are required to carry insurance at levels too much higher than the liability of the state, this may create unnecessary problems. This problem will be discussed below, in the section on "Insurance and Indemnification."

slightly less questionable: that "public servants," because they are disinterested and benevolent and act only for the public good, must be granted immunity so that they can act boldly to maximize the public good.

Qualified immunity for government actors also rests on the proposition that it would be unfair to prosecute persons who are legally required by their jobs to exercise discretionary power. However, it is an obligation that they take on voluntarily, largely for personal gain (satisfaction, salaries, job security). Except perhaps for draftees, they are not legally required to hold their jobs in the first place, or to remain in them. Therefore, a government employee who by virtue of his job is required to exercise discretionary power is in no different position from a contractor, who by virtue of his contract may be required to exercise discretionary power.

It may be that some jobs--like police and prison wardens--are so fraught with discretionary power and potential litigation that the public interest requires a grant of immunity as part of the incentives needed to fill these posts. Where this is true, I see no reason why it would be less true for contractual police or wardens than for those who are direct government employees. Qualified immunity is a device to make a risky job more attractive (i.e., more profitable) to a government employee. The alternative would be to pay him enough extra that he could buy insurance. Exactly the same logic applies to contractors: they too need an incentive, in the form of either qualified immunity or fees high enough to pay for extra insurance.

Actual Risk vs. Legal Exposure

As discussed above, prisoners in private facilities have at least as many avenues of civil redress as do their fellows in government-run prisons. Total liability, in other words, is not decreased. Spreading the liability neither immunizes the government nor relieves it of its ultimate responsibility and liability for the rights and welfare of prisoners.

However, it is possible that government, by contracting, could reduce its actual liability risks, as opposed to its potential legal exposure. That is, the financial damages likely to be suffered by government as a result of its legal liabilities can be reduced. Lowering liability risks not only avoids financial damages, it reduces litigation and insurance costs as well.

Liability risks can be reduced in several ways:

1. by running prisons better, and thus avoiding lawsuits;
2. by achieving certification, which greatly enhances the defense against lawsuits;
3. by carrying adequate insurance;

4. by agreements in which the contractor defends the government in court and indemnifies it against legal damages;
5. by developing extensive legal expertise and resources, both for preventing and for fighting lawsuits; and
6. by settling quickly out of court, which is easier for private firms than for public entities.

Private prison contractors today are reducing risks by all of these methods.

CCA believes that litigation, and thus liability exposure, can be reduced by taking a proactive, rather than a reactive approach. For example, they invite the ACLU to inspect their facilities. As they put it, "That's good free advice; and they're the ones most likely to sue us."[16] When they won the Texas contracts, they took a positive step toward assuring that they would be able to comply with the massive and comprehensive court orders that govern corrections in that state. They retained as counsel a former Texas Department of Corrections attorney intimately familiar with the Ruiz decision.

At several of their facilities, including Laredo, Bay County, and Silverdale, CCA is required to supply legal assistance to inmates beyond the mere provision of a law library. To represent inmates in lawsuits against them, CCA retains private counsel under contracts that enable the lawyers to act like public defenders, immune to any legal control by CCA. One benefit to CCA is that they hear about potential problems before a suit is filed and can resolve it more easily then. To represent CCA when it is sued, the company hires other outside counsel; the job of their own legal staff is mainly to keep them from being sued in the first place.[17]

Prior to its contract with CCA, Bay County, Florida, was under court order to reduce overcrowding in its jail and faced a lawsuit for the death of a prisoner. The uninsured county commissioners were named as defendants personally.[18] Nine months after CCA's takeover, three prior lawsuits against the county

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[16]October 28, 1987 interview with Richard Crane, then Vice President for Legal Affairs at Corrections Corporation of America.

[17]Ibid.

[18]Bruce Cory, "From Rhetoric to Reality: Privatization Put to the Test," Corrections Compendium, May 1986, p. 10.

over jail conditions "were dropped in the wake of substantial improvements in conditions."[19]

Changes in procedures instituted by Buckingham Security when it took over operation of the county jail and prison at Butler County, Pennsylvania, were designed to take back control of the facility from the inmates. Those changes should also make less likely any serious injuries or harmful incidents and reduce legal liability that might result from a lack of proper procedures in the event of a significant incident. One measure of the effect of these changes (which were detailed in the chapter on "Issues of Security") is that prior to Buckingham's takeover, emergency trips to the hospital had been averaging 4 or 5 a week, but after the takeover they were rare.[20]

The liability experience of private prisons has not been all positive, however. Corrections Corporation of America recently resolved a $100 million lawsuit filed against the company and 11 other defendants in Hamilton County, Tennessee. The suit, which alleged that a female inmate died as a result of inadequate medical treatment, was settled out of court for $100 thousand.[21] As will be noted below, this amount is not unusual for a medical malpractice case.

The Modest Size of Correctional Damages

It is too soon, and there are too little data, to tell whether private prisons will be sued less often, less successfully, or for lower amounts than government prisons. In the final analysis, the effect of privatization on liability costs will depend more on operational differences than on legal differences. It is worth noting, however, that while the volume and total cost of litigation by inmates is enormous,[22] and the costs of insurance

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[19]National Criminal Justice Association, "Private Sector Involvement in Financing and Managing Correctional Facilities" (Washington, DC: National Criminal Justice Association, April 1987), p. 20

[20]Buckingham Security Limited, Private Prison Management: First Year Report 1985-1986, Butler County Pennsylvania (Lewisburg, PA: Buckingham Security Ltd., 1986), p. 9.

[21]See "CCA Settles Lawsuit," press release, October 3, 1988.

[22]Roger Hanson reports that prisoner grievances account for seven percent of all U. S. district court cases and twelve percent of the dockets of U. S. courts of appeals. Hanson estimates the costs of processing these cases at well over $100 million a year. By comparison, the total budget of the entire federal judiciary is $950 million. See Roger A. Hanson, "What

and self-insurance are high, a recent study indicates that monetary damages and settlements in corrections tend to be rather modest.[23]

In that study, the Federal Bureau of Prisons and 33 states returned surveys reporting their costs for inmate lawsuits in 1983 and 1984. In compensatory damages, punitive damages, settlements, and court-awarded attorney fees, these 34 jurisdictions paid a total of $5,920,922 over the two-year period.[24] Using adult inmate population figures for these systems on June 30, 1984, these payouts come to a per capita, per diem value of just four cents.[25]

Though a big award could have a serious effect on a small county, it is evident that for large systems, liability costs resulting from privatization would have to be several times what they are now, before they would substantially affect costs on a per unit basis. And for successful suits to multiply, the total volume of litigation would have to explode, since only a minuscule proportion of inmate lawsuits result in damages or settlements.[26]

Thus, unless there are big differences between government and private prisons in the number of tortious actions, the number and size of lawsuits, or the successfulness of defense, it is unlikely that differences in damages alone would be big enough to significantly affect per diem costs.

Should Be Done when Prisoners Want to Take the State to Court?" Judicature 70(December-January,, 1987): 223-227, at 223 and 225.

[23]Contact Center, Inc., Inmate Lawsuits: A Report on Inmate Lawsuits against State and Federal Correctional Systems Resulting in Monetary Damages and Settlement (Lincoln, NE: Contact Center, Inc., 1985). I am grateful to Charles Thomas for drawing my attention to this report.

[24]Ibid, p. 14

[25]Ibid. Calculated from figures presented on p. 14.

[26]Ibid, p. 1. This survey identified 87 lawsuits lost and 161 settled for money over a two-year period in 1984 and 1985. In the year ending June 30, 1985, over 22,000 civil rights actions were filed in district and appeals courts. That does not include the smaller number of tort claims filed in state courts.

Insurance and Indemnification

Although liability risks in corrections are generally low, the cost of insuring against them can be high. In 1986, CCA spent about $940,000 on premiums for $5 million in general liability insurance, which did not cover officers of the corporation. No claims were filed against CCA or its officers during that year. By 1987, CCA had established a self-insurance plan covering both the corporation and its officers. For this plan, $5 million from their initial public stock offering was placed in an interest-bearing trust fund. An outside firm was paid about $150,000 a year to service or administer claims. CCA projected savings of about $800,000 on insurance premiums for 1987.[27]

At one time, CCA was required by its contract with Hamilton County, Tennessee to carry $25 million, and by its contract with Bay County, Florida to carry $15 million. At first, the company did obtain $25 million coverage, but later they found it impossible to find an underwriter who would write a policy that large. The company felt that its assets -- $30 million in lines of credit and $12 million in net worth -- were adequate to cover risks beyond a $5 million insurance plan.[28]

Other corrections companies also carry large amounts of insurance. Behavioral Systems Southwest carries $5 million.[29] Pricor, which manages four correctional facilities, carries $2 million in general liability insurance.[30]

In addition to carrying high levels of insurance, private prison companies typically offer contracts in which they indemnify the government against all costs of any harms resulting from the operation of their facilities. In Bay County, as elsewhere, CCA promises to defend the county in court against any legal actions arising out of the operation of the jail. The contract contains the following indemnification provision:[31]

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[27]Corrections Corporation of America, 1986 Annual Report, p. 31.

[28]Chattanooga Times, August 12, 1986.

[29]Los Angeles Times, March 29, 1985.

[30]Pricor, Prospectus, July 23, 1987.

[31]"Bay County Detention Facilities Contract between Corrections Corporation of America and Bay County, Florida, September 3, 1985," pp. 32-33.

> CCA shall save and hold harmless and indemnify the COUNTY, the members of the Board of County Commissioners, county employees, and agents, including attorneys, and their respective legal representatives, heirs and beneficiaries, whether acting in their official or individual capacity, and shall pay all judgments rendered against any or all of them for any and all loss or damage of whatever kind against any and all liability, claims, and cost, of whatsoever kind and nature for physical or personal injury and any other kind of injury, including specifically deprivation of civil rights, and for loss or damage to any property occurring in connection with or in any way incident to or arising out of the occupancy, use, service, operation or performance by CCA, its agents, employees or representatives of any of the provisions or agreements contained in this Contract, including any Appendices, for which the COUNTY, the members of Board of County Commissioners, county employees and agents, attorneys, or other persons, as noted hereinabove, whether acting in their official or individual capacity, who may become legally liable resulting in whole or in part from the acts, errors, or omissions of CCA, or any officer, agent, representative, or employee thereof, and for which CCA shall pay all judgments which may be rendered against the COUNTY, members of Board of County Commissioners, county employees and agents, including attorneys, and other persons as noted hereinabove, whether in their individual or official capacity.

As formidable as this sounds, CCA is sound enough financially to shoulder the risk, and may even be overinsured against it. As documented previously, most awards of monetary damages in corrections cases tend to be relatively small. CCA researched this question with understandable interest. The largest award they could find in a correctional negligence case was a medical malpractice judgment for $750,000, when an inmate died in a prison hospital.[32] In the national survey by Contact Center, Inc., nearly all the large (six-digit) figures were for medical malpractice cases.[33] Health care is the most frequently contracted component of corrections, representing about 23% of all

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[32]Testimony of Thomas W. Beasley, Chairman, CCA, to President's Commission on Privatization, Washington, DC, December 22, 1987, unpublished transcript, p. 287.

[33]Contact Center, Inc. Corrections Corporation of America recently resolved a $100 million lawsuit against the company and 11 other defendants in Hamilton County, Tennessee. The suit, which alleged that a female inmate's death was the result of inadequate medical treatment, was settled out of court for $100 thousand. See "CCA Settles Lawsuit," press release, October 3, 1988.

correctional service contracts.[34] Apart from this troublesome area, which correctional officials are often glad to contract out, liability risks in corrections are no greater than those that occur in many other enterprises, both public and private.

Ira Robbins has proposed that every private prison contract should be required to carry insurance in the amount of $25 million per occurrence.[35] Such a requirement would slap a big "Sue Me" sign on the back of every private warden, an open invitation to lawyers in search of deep pockets. Many states place dollar limits on their own liability. In Virginia, for example, this limit is $25,000.[36] The law does allow higher awards where they are covered by insurance, but it is hard to see what incentive a state agency would have to voluntarily carry insurance greater than $25,000. Thus, in Virginia, under Robbins' proposal that private prisons must carry $25 million in liability insurance, the incentive to sue a private prison would be 1,000 times as strong as the incentive to sue an uninsured state prison.

One has to wonder if Robbins, a foe of private prisons, really just wants to see them sued out of existence. On the other hand, Robbins is a sincere champion of prisoners' rights, and the private companies would be insured, so perhaps he just wants to see that prisoners' interests are well covered. But if that is the case, why not insist at the same time that states also be required to set their own liability limits at $25 million per occurrence? Actually, overinsurance is not a good idea for either type of prison. In addition to inviting opportunistic lawsuits, overinsurance may create a "moral hazard" by weakening the insured's incentive to guard against risk.

Overinsuring only the private prisons will create other problems also. Since contractors will pass their insurance costs on to the state in the form of higher fees, a massive insurance requirement could price them out of the market. In theory, governments could be required to calculate what it would cost them to carry that much insurance themselves, when comparing their own costs against contractors' bids. In practice, however, that is unlikely to happen if the government is not actually required to have that much insurance itself. This would become another hidden cost not accurately compared between public and private corrections.

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[34]Camp and Camp, Feb. 1984, p. 6.

[35]Robbins, The Legal Dimensions of Private Incarceration, pp. 238-239.

[36]Brian Evans, "Private Prisons" [Note] Emory Law Journal 36(Winter 1987): 253-283, at p. 273, note 106.

Conclusion

Privatization does not offer government any easy escape from its responsibility and liability for imprisonment of offenders. What it does offer, however, is the prospect of sharing that liability, buffering the government through indemnification, and possibly reducing the number of lawsuits through improved management.

11. ISSUES OF ACCOUNTABILITY AND MONITORING

Critics claim that contracting reduces accountability because private actors are insulated from the public and not subject to the same political controls as are government actors. Also, the critics charge, contracting diffuses responsibility; government and private actors can each blame the other when something goes wrong. Further, contracting may encourage the government to neglect or avoid its ultimate responsibility for prisons; supervision may slacken.

This chapter will discuss the issues of accountability and monitoring as they apply to both public and private prisons. The first step is to recognize that accountability can take many different forms.

Administrative Accountability

Accountability does not come easily under any sort of system. Blame avoidance is an art form in both public and private bureaucracies. While a major purpose of all contracts is to identify areas of responsibility, critics of contracting are right to point out that this does not automatically achieve accountability. Contracting could even confuse and diffuse responsibility and accountability. The state may attempt to avoid responsibility by pointing its finger at the contractor; the contractor may hide behind the contract by insisting that its responsibilities are limited to those that are explicitly spelled out in the contract.

On the other hand, the process of contracting can force both the state and the contractor to be accountable to a goal. Contracting encourages the government to define the purposes of imprisonment, the responsibilities of prison managers, and measures of performance by which they will be judged. These definitions and measures can then be applied to governmental as well as private prisons.

Two other considerations will limit the ability of a contractor to hide behind the contract to an excessive degree. First, a contractor who is willing to live up to the spirit of a contract will have an edge over competitors who use their contracts as shields to protect themselves against even reasonable, but unanticipated, demands. Second, contracts can contain provisions incorporating detailed and comprehensive specifications and standards that are spelled out by authoritative third parties such as state statutes, corrections department policies, or American Correctional Association standards.

Legal Accountability

Governments are held accountable not only through the political process but through the rule of law. This is especially the case in the area of corrections. It is the legal system that protects due process and other rights of prisoners. The legal accountability of proprietary prisons can be no less than that of government prisons and will probably be greater, since the private sector enjoys no rights of sovereign immunity.

The importance of the rule of law was discussed at length in the chapter on the propriety of private prisons. The issue of liability was examined in the last chapter. In addition to those discussions, however, it may be instructive here to compare the accountability of contractors to that of judges who have been appointed for life.

Life-tenured judges are appointed by an elected representative of the people (e.g., a governor). Contractors are selected through a politically and legally regulated process either by officials (like the Commissioner of Corrections) who are accountable to elected representatives, or directly by such representatives themselves (e.g., county commissioners). Tenured judges are accountable in three ways, each with a parallel for contractors.

First, even life-tenured judges are subject to the rule of law. They are not free simply to rule as they see fit, without legal constraint. Contractors are even more subject to legal restrictions since, unlike judges who often have absolute immunity, contractors do not enjoy even limited immunities. They can easily be prosecuted in criminal courts and sued in civil courts.

Second, the decisions of all but nine judges are subject to appellate review. Likewise, correctional contracts can be written so that all contractor decisions affecting the rights or liberty of prisoners are subject to review by governmental and judicial agents. Even if there is no such contractual provision, it is becoming increasingly clear that correctional contractors act "under color of law" such that their actions constitute "state action" under Section 1983 of the U.S. Code. This means that prisoners, or others acting on their behalf, can sue not only the contractors but the contracting government agency, and officials thereof, for any actions that violate constitutional rights.

Third, tenured judges are ultimately accountable through articles of impeachment. In a similar vein, the ultimate mechanism of accountability for contractors is termination or nonrenewal of contract. Surely breaking or failing to renew a

contract cannot be more difficult than impeachment. Nor is it as likely to be reserved for only the most extreme cases of misbehavior or nonperformance.

In short, there are at least as many, and probably more, legal remedies for malpractice or abuse of power by private contractors as by judges.

Economic Accountability

Competition is a powerful mechanism of accountability and discipline in the control of quality and cost. Vendors who are subject to competition are not only accountable to the government, through their contracts; they are accountable also to other audiences who have interests that sometimes conflict with, but mostly parallel, or derive from, those of the government. Chief among these other audiences are competitors, insurers, and the capital market, i.e., investors.

Competitors hold each other accountable to standards of cost and quality set by the governmental purchaser of their services. Less effective or more costly contractors will lose business to competitors. In competing for contracts, vendors provide comparative information about themselves and each other (including their governmental agency competitor). Such information is essential to accountability.

Insurers provide independent evaluations of quality in the form of risk assessments. Their premiums provide discipline by punishing or rewarding high or low risk. A company with a bad record or other high risk profile may be unable to obtain any insurance at all.

Investors and capital markets hold commercial enterprises accountable in various ways. Contractors who are successful because they run well-managed and profitable businesses will be able to attract investors. Newly invested capital, in turn, can be used by such a business to improve its services even further. The independence and discrimination of investors and knowledgeable investment advisors adds a powerful form of "supervision" in the private sector to supplement the direct supervision and regulation required by the state.

But wouldn't potential investors just concentrate on a company's bottom line (profits) and neglect or even discourage attention to quality of service? This is not likely. Investors have a stake in the reputation and the future of their company, not just in immediate or short-term profits. Stock prices anticipate the future. A private prison corporation that is headed for scandal, lawsuits, prosecution, uninsurability, etc., as a result of mismanagement, will see its stock begin to fall even before it begins to lose actual contracts. Moreover, if

employees are also stockholders, this distributes the supervision motive to where it will do the most good. In severe cases of mismanagement, investors can force reform from within or from without, through takeovers if necessary.

Citizens who invest in a private prison company are risking their money on a careful judgment that the company's prisons are needed and will be well-built, well-managed, and in good favor with government and taxpayers for a long time to come. In contrast, those who buy general government bonds often don't know or care what they are financing, or whether it is ultimately a sound investment. They only know that the government guarantees them a fixed return, regardless of the success or failure of the project they are capitalizing.

Critics sometimes claim that private prison companies, by their very nature, and particularly because they are accountable to stockholders, will have to put private goals and interests first and those of the public second. If this is true of private prisons, it will make them unique among commercial enterprises. It is true that a profit-making company must sooner or later make profits if it wishes to stay in business in that form. It is also true that businesses are answerable to the interests of their owners and investors. Neither of these facts, however, places private interests above all others. Would we say of other commercial enterprises that they must place their stockholders ahead of their customers? Or that the company is accountable to the Board of Directors before it is accountable to the law?

Economic controls do not displace political controls, but they can operate more quickly and allow finer adjustments. As Joseph Kalt points out[1], the "political 'marketplace' . . . meets relatively rarely; when it does voters are presented with a bundle of numerous and durable choices that cannot be marginally altered. Moreover, political competition is plagued by high transaction costs; the costs of organizing and promoting changes in the bundle of policies offered by the government are substantial." In contrast, renegotiating and changing a contract is quicker and more discriminating than reelecting a new administration. If wholesale change is called for, however, that too can occur through contract termination, without the long interval required between elections.

For proprietary prisons, market mechanisms of supervision, discipline, and accountability add to those of the political and legal systems. Economic accountability supplements, more than it conflicts with, political and legal accountability.

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[1]Joseph P. Kalt, "Public Goods and the Theory of Government," Cato Journal 1: 565-584 (No. 2, Fall, 1981).

Political Accountability

Since prisons carry out public policies, they somehow must be held accountable to the public. Where policies are codified into law, mechanisms of legal accountability will serve. Where policy is administratively created or interpreted, however, it is desirable that there be mechanisms for public input, public scrutiny, and public control. These mechanisms may be characterized broadly as "political" and can take many forms.

Direct popular election is the most obvious form, and it is clear that an elected jailer is politically accountable, at least in principle.[2] In practice, however, direct election is not necessary for effective political accountability. If it were, only those jails that happen to be administered personally by a sheriff would be politically accountable. Other jails, and all prisons, are run by administrators who are appointed or hired, not elected.

The political accountability of a contractor is like that of an appointed, rather than an elected, official. Appointees and contractors are only indirectly accountable to the electorate, but this does not make them less responsible. One study compared the fiscal accountability of cities with a mayor-council structure to that of cities with a council-manager structure. It found that in mayor-council cities the actual cost of refuse collection was 41% higher that what was shown in their official budgets, compared to 22% higher for the council-manager cities.[3] If the first step toward greater accountability is the provision of more accurate information, then it is significant that accountability was greater with a hired professional manager--which is closer to a contractual arrangement--and lower under direct electoral accountability.

For most public sector functions, including corrections, accountability to the public is only indirect. Of the many millions of public functionaries and workers responsible for the execution of public policy, only a tiny proportion are directly accountable to the electorate. All the rest can be said to be accountable only in the sense that somewhere up a line of command, or up a network of crisscrossing chains of supervision, there lies an elected official. But contractors, too, can make at least that strong a claim. Indeed, their claim may be

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[2]The high re-election rate of sheriffs, in spite of the deplorable condition of many of their jails, casts doubt on their political accountability in practice, at least on this one score.

[3]E. S. Savas, "How Much Do Government Services Really Cost?" Urban Affairs Quarterly 15(1979): 23-41, at p. 30.

stronger, since a contract makes a whole network of workers and supervisors simultaneously liable to the threat of termination by a higher authority.

A good case can be made that most of the actors involved in running a prison under contract have a higher degree of political accountability than do most of the actors under straight government employment. Only the highest government officials and administrators are politically accountable by virtue of election or appointment.[4] Working down the ranks through middle and lower management, down to line staff, public employees become progressively less politically accountable. Accountability in the public sector is very low at the level of line staff. Most government employees enjoy civil service protections that make them virtually immune to being fired. They may be reassigned, but are not likely to be left totally unemployed. In 1978, for instance, "only 300 of the 2.8 million federal employees reportedly were dismissed or terminated for incompetence."[5] Public employees at state and local levels of government are also very difficult to discipline. An extreme example of political and legal nonaccountability on the part of government employees can be seen when they go on strike. During strikes--illegal to begin with--public correctional employees often continue their job actions even in defiance of court orders.[6]

At the federal level, the judicial branch of government is insulated from direct electoral accountability and the legislative branch seems to be getting more so. Members of the House of Representatives are practically immune to removal by election. In the 1986 elections, 98.4% of House incumbents seeking reelection were returned to office.[7] The executive branch, to be sure, is more susceptible to electoral influence. However, to the extent that executive governmental agencies are entrenched in civil service tenure and insulated from the political process, the accountability of the executive branch at the highest level may not translate into accountability at the operational level.

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[4]In Washington, these officials are regarded as the "summer help" by the lower echelons of civil service bureaucrats, who form a kind of permanent government.

[5]Morgan O. Reynolds, Power and Privilege: Labor Unions in America (New York: Universe Books, 1984), p. 181.

[6]John M. Wynne, Jr. Prison Employee Unionism: The Impact on Correctional Administration and Programs (Washington, DC: U.S. Dept. of Justice, NILECJ, January, 1978), p. 203.

[7]Wall Street Journal, July 22, 1987, p. 20.

By the logic of the political accountability argument, the claim of authority and legitimacy becomes progressively weaker as one approaches the level of direct administration of a prison. There exists a long chain of accountability that runs from the public at large down, eventually, to those who actually deliver public services. Political accountability at the head of the chain does not necessarily transmit all along its length. Contracting can help shorten that chain and strengthen the linkage by making the entire set of actors involved with running a particular prison more directly vulnerable, and therefore more accountable, to officials and administrators at the highest levels.

Contracting can also be used to hold government, as well as vendors, accountable. Where poor management has become entrenched and resistent to reform, contracting provides a surgical solution. In Bay County, Florida, part of the motivation for contracting the jail was a belief on the part of some county officials that the sheriff was too powerful and too difficult to control.[8] One official said he believed the sheriff should not be an elected officer at all, but a professional employee hired by the county commission, which is elected, is responsible for the budget, and is given statutory authority to incarcerate offenders in a jail or prison. He pointed out that most sheriffs are re-elected continuously and argued that much of a sheriff's political power comes, in effect, from the point of his gun. Citizens are intimidated by sheriffs in a way that they are not by county commissioners. Sheriffs control large budgets and extensive job patronage in addition to the power inherent in their discretionary arrest authority. "People are absolutely scared to death to disagree with the sheriff, no matter who he is," said this county official, who cited acts of intimidation against himself and other county officials.

Bay County knows too well that simply leaving the jail in the hands of an elected sheriff is no easy solution to the problem of accountability. A jury awarded $10,000 damages against the sheriff in a lawsuit brought by an inmate complaining of inadequate medical care when the jail was under the sheriff's administration.[9] The sheriff was also charged with sexual harassment in another lawsuit brought by several female employees. In addition, the sheriff's department was the subject of internal and external investigations regarding money that was missing from the department's evidence locker: $2,270 in 1987 and $12,600 in 1983. The money was never accounted for.[10]

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[8]Site visit by author and interviews with county officials.

[9]The News-Herald, Panama City, August 6, 1987.

[10]The News-Herald, Panama City, June 26, 1987.

Community Accountability

One time at which a prison is directly accountable to an identifiable segment of the public is at birth. Before a new prison can be constructed, it must be located in a community willing to accept it. Public fears about safety and effects on property values must be overcome. Fortunately, prisons have positive contributions to offer a community also. In a depressed area, they bring jobs to the unemployed and unskilled. They buy food, fuel, and other items, often locally. So in spite of often strong and widespread resistance, it is not impossible to convince at least some communities to accept prisons in their backyards.

In this regard, private prison companies may be forced to be more accountable to the public than is the state. Private firms do not have the power of eminent domain. They must rely on persuasion and offers of benefits rather than using governmental power to overcome community resistance and fears. When Arbor, Inc., wanted to open a work release facility in Chicago, it created a community board of advisors and hired locals to help renovate an abandoned local building. In contrast, when the state proposed a similar facility in the same area without consulting the community, local protests aborted the plan[11].

Site planning also played a role in the final decision by the Kentucky Corrections Cabinet to award a contract to the U.S. Corrections Corporation for the Marion Adjustment Center. The state's first choice of contractor was unable to find a community willing to accept its proposed facility, while USCC won the approval of Marion County's Fiscal Court.[12] Some of the Center's neighboring residents, however, remained opposed and instituted lawsuits, which were not successful in removing the prison. A study for the Commonwealth of Virginia describes the results of USCC's public relations efforts:[13]

> The "NO PRISON" signs which grace the residents' front yards are gradually disappearing and only a small group of 3-4 hard core foes remain. U.S.C.C., actively working on better public relations in the community,

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[11]Judy S. Grant and Diane Carol Bast, "Corrections and the Private Sector: A Guide for Public Officials," (Chicago: The Heartland Institute, 1986), p. 13.

[12][Louisville] Courier-Journal, June 9, 1986.

[13]Commonwealth of Virginia, "Study of Correctional Privatization" (Richmond, VA: Secretary of Transportation and Public Safety, 1986), p. 58.

held an open house the last week of July and invited all the townspeople (over 90% attended). Tours of the facility were given and questions answered. The residents complimented the owners and director on their quality staff and were amazed when told that the tour guides were not staff but rather (college-educated) inmates. Two mothers made a specific point of thanking U.S.C.C. for the employment opportunities presented to their newly employed sons. This is noteworthy since unemployment is a persistent problem in the small farm community.

Visibility of Prisons

Prisons are more open to public inspection than most people realize. Nonetheless, except during periods of crisis, they tend to have low visibility to the broader public. Private facilities are currently subject to a great deal of publicity. Most of this is due to their novelty and cannot be expected to last. Even after the novelty wears off, however, they are likely to remain controversial and to draw at least some additional attention indefinitely. Having a mix of governmental and contractual operations invites comparisons and generates interest. It creates a bigger audience, with more diverse and conflicting interests.

Even those with strong objections to private prisons credit them with drawing attention to problems and issues that are common to all prisons and worthy of more public examination. Although he is highly critical of private prisons, Michael Keating, Special Master of Rhode Island's state facilities, nonetheless notes that the use of private providers "opens up the process to outsiders," and exposes facility operations to public view.[14] The contract for the Okeechobee School for Boys specifies that failure of the Eckerd Foundation to allow public access to records shall be grounds for termination of the contract.[15]

Experience in other parts of the criminal justice system supports the idea that contracting increases visibility and critical evaluation. For example, privately prepared presentence investigation reports (PSIs) are subject to much closer scrutiny by more parties than are those prepared by governmental investigators. The most important part of a PSI is the section where

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[14]Cited in Joan Mullen, Kent John Chabotar, and Deborah M. Carrow, The Privatization of Corrections (Washington, DC: National Institute of Justice, February 1985), pp. 73-74.

[15]American Correctional Association, Private Sector Operation of a Correctional Institution (Washington, D.C.: U.S. Dept. of Justice, National Institute of Corrections, April, 1985), p. 11.

a disposition is recommended. As Herbert Hoelter, director of the National Center on Institutions and Alternatives, points out:[16]

> In many state and federal jurisdictions, the recommendation section of the PSI, the section which demands the most accountability, is not disclosed. The opposite is the case with the private report, where the recommendations and relevant rationale for them are subject to full disclosure. Any responsible private report must demand a higher standard as a result of its disclosure and exposure.

Prison Constituencies

Most citizens have little incentive to monitor the management of their prisons. As individual voters they can have little effect on the policies, and still less on the personnel, that govern prisons. Most citizens will never serve time. Apart from dramatic events, like riots or escapes, they have no interest in routine information about their prisons. Hence, there is no general public constituency for prisons.[17]

Prisoners, of course, are interested in prisons, and in recent years they have gained considerable legal power to promote their interests. However, they have almost no political power. Prison reform groups, like the American Civil Liberties Union, through its National Prison Project, have some political influence, but most of their efforts are legal, rather than political.

The most politically effective constituency for corrections is correctional officials themselves. It is not through their voting power that they influence their executive and legislative overseers, but through their control over information.

It is well known that bureaucracies attempt to control the flow of information so as to advance or protect their own interests. Various measures, such as the Freedom of Information Act, limit the ability of public bureaucracies to control information completely. However, when the agency that generates the bulk of routine information about itself is the same as the agency that receives and controls its dissemination, accountability is compromised.

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[16]Herbert J. Hoelter, "The Private Presentence Report: Issues for Consideration" The Prison Journal 65(1985): 57. Emphasis in original.

[17]John P. Conrad, Corrections and its Constituencies," The Prison Journal 64 (Fall/Winter 1984): 47-48.

Under contracting, there is at least some independence of interest between the agencies that generate information and those that then receive and control it. In addition, with monitoring, there will also be an independent, original source of information.

Monitoring

Monitoring is important for private prisons. On that, all parties, including vendors, agree. Private prisons need to be monitored partly because they are contracts and partly because they are prisons. As contracts, they need to be monitored for compliance with contractual provisions. As prisons, they need to be monitored for performance. Clearly, compliance and performance are overlapping concerns, but it is worth stating them separately to emphasize their mutual importance. Moreover, as will be argued below, monitoring for performance--as distinct from monitoring for contract compliance--should not be viewed as a need that is special to contracted prisons only.

In a report for the National Institute of Justice, the Council of State Governments and the Urban Institute reviewed prison management contracts from the early 1980's and the Requests for Proposals (RFPs) issued by government agencies that shaped those contracts. They found that both the RFPs and the subsequent contracts were, overall, quite general.[18] As a guide for future contracts, the report recommended a monitoring process with the following components:[19]

> 1. Statistical summaries of reported unusual incidents, such as escapes, deaths, major injuries or illnesses, assaults, disturbances, staff use of force, and major disciplinary actions (e.g., loss of good time, lockdowns, or solitary confinement).
> 2. Surveys of inmates regarding programs and conditions.
> 3. On-site inspections using standardized evaluation forms that focus on actual conditions and behavior, not just written procedures. These should be conducted by outsiders at least annually and by on-site or local monitors on a continuous basis.
> 4. Timely feedback to contractors, so they can adjust their practices, and to government officials, so they can make informed decisions on contract renewal.

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[18]Judith Hackett, Harry P. Hatry, Robert B. Levinson, Joan Allen, Keon Chi, and Edward D. Feigenbaum, Issues in Contracting for the Private Operation of Prisons and Jails (Washington, DC: National Institute of Justice, October, 1987), p. 43.

[19]Ibid., pp. 50-51.

The report also recommended that the same monitoring procedures be applied to publicly operated facilities, for comparison.

Though government may be more inclined to monitor contractors than to monitor itself, it should not be assumed that this monitoring will occur automatically. The government needs to provide a specific mechanism for monitoring. Since contracting does relieve bureaucrats of many daily headaches, they may be tempted to treat it as a quick fix and neglect their duty to oversee.

Something like this apparently happened for a while in Florida, with the Okeechobee School for Boys. The Department of Health and Rehabilitative Services, which was responsible for monitoring the contract at Okeechobee, requested but did not receive authorization for a full-time monitor, so the task was assigned to a staff member with other responsibilities in West Palm Beach. However, after the lack of monitoring was mentioned critically in the first draft of an evaluation study by an American Correctional Association research team, the Department of Health and Rehabilitative Services initiated a regular, formal auditing process.[20] In its final draft, the ACA study noted that, in addition to the HRS response, the private administration at Okeechobee also responded remarkably, "in a very positive direction,"[21] after the ACA's initial report. The ACA's own "monitoring" found the contractor to be in compliance on 91% of the items in its contract.[22]

The lesson here seems to be that both government and contractors benefit from outside scrutiny as well as from a system of monitoring.

Monitoring has, in fact, been a regular feature of most recent prison and jail contracts. At the Marion Adjustment Center (a pre-parole facility), an on-site state employee (a parole officer) monitors the contract, approves inmate furloughs, and gives final approval or disapproval to all good-time determinations made by private employees.[23] The situation is much the

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[20]American Correctional Association, Private Sector Operation of a Correctional Institution (Washington, D.C.: U.S. Dept. of Justice, National Institute of Corrections, April, 1985), p. 79, footnote 4 and accompanying text.

[21]Ibid., p. 99.

[22]Ibid., p. 78.

[23]National Criminal Justice Association,"Private Sector Involvement in Financing and Managing Correctional Facilities" (Washington, DC: National Criminal Justice Association, April

same at the Bay County Jail and Annex, except that the monitor is a county employee who also has an office and duties downtown. At Silverdale, the county prison and women's jail at Hamilton County Tennessee, monitoring is provided by the county's Superintendent of Corrections, who was the warden at Silverdale before the contract to Corrections Corporation of America. The Superintendent handles all release and good time decisions and makes all work assignments for prisoners doing county work outside the walls. He also serves as liaison between the prison and the county commission, the courts, the parole board, the probation board, and the state department of correction.[24] Hidden Valley Ranch was monitored daily by a federal official when it was under contract to the Bureau of Prisons. At the Butler County Jail, run by Buckingham Security Limited, the contract is monitored by a county employee and disciplinary protocol is outlined in the contract.[25]

Reports[26] that the Immigration and Naturalization Service had to hire twelve employees to provide 24-hour monitoring at their contracted Houston detention facility are not accurate. Essentially, the contractor rents space to an INS staff of about a dozen at that site. Most of those people spend most of their time on work for the INS that is independent of the contract. Only one is designated officially as the contract monitor and even he spends only about 30-40% of his time on monitoring duties. An evening monitor spends 20-30% of his time on activities related to monitoring.[27]

Informal Monitoring

In addition to formally designated monitors, prison contracts can be monitored in many other ways. External observers and watchdogs, like the media and the ACLU, are at least as interested in private as in governmental prisons, if not more so. Internal "monitoring" will be provided by prison inmates, who are veteran whistleblowers and will take legal actions against

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1987), p. 17.

[24]Interview with Floyd Fuller, Superintendent of Corrections, Hamilton County Tennessee, October 27, 1987.

[25]National Criminal Justice Association, p. 20.

[26]National Criminal Justice Association, p. 10; J. Michael Keating, Jr., Seeking Profit in Punishment: The Private Management of Correctional Institutions (American Federation of State, County and Municipal Employees, 1985), p. 46.

[27]Interview with Robert Schmidt, Supervisor of Detention Services, Immigration and Naturalization Service, May, 21, 1987.

private wardens as energetically as they do against the government. Significant input from prisoners could be very useful in contract renewal decisions. While it would not be wise to give inmates any formal power over the choice of their keepers, some kind of mechanism for inmate evaluation of their treatment would help to reinforce accountability.[28] Critics who fear neglect or abuse of inmates as a result of a cost-cutting ethic in private prison management might be reassured by this provision for inside evaluation.[29]

Insurance companies provide a form of monitoring for private prisons that is often lacking for the government. Insurers have a vested interest in gathering valid and objective data about areas of performance that relate to legal liability costs. The premiums they set for different vendors or types of vendor will give an independent assessment of risk and, thereby, of quality. This is analogous to the use of household fire insurance premiums to evaluate fire departments in different areas, or the use of hospital liability premiums to evaluate hospitals.

Sauce for the Gander

It should be emphasized that monitoring is not just a burden on corrections, it is a benefit. Monitoring adds another level of supervision to an activity that needs as much of that as it can get. More importantly, it brings a new element of <u>independence</u> to the system of checks and balances controlling an awesome exercise of domestic power: the deprivation of human freedom. As noted in an earlier chapter, independent review is vital to due process. Here, the point is that independent monitoring promotes objectivity and rigor in the overall supervision of a prison. It

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[28]At the Volunteers of America Regional Correction Center, a contracted jail for women serving Ramsey County, Minnesota, inmates are asked to complete an evaluation questionnaire at the time of their release. The questionnaire asks about safety, food, physical facilities, and program results. The responses are available to county officials and are used by the contractor to make changes. One other function of the questionnaire is to allow departing inmates to vent their feelings. (Telephone interview with Bill Nelson, VOA, Roseville, MN, October 15, 1987.)

[29]Inmate evaluations of one county prison (Silverdale) were described in the chapter on "Issues of Quality." See Samuel Jan Brakel, "Prison Management, Private Enterprise Style: The Inmates' Evaluation" (Chicago: American Bar Foundation, 1988).

is easier to be consistent when imposing standards on outsiders than when enforcing them on ourselves or our close colleagues.[30]

T. Don Hutto, a former commissioner of corrections in two states, is now President of CCA International, a division of Corrections Corporation of America. He observes that: "As a director of corrections, I did a better job of monitoring and evaluating private sector contracts than I did of monitoring and evaluating my own operations. I also did a better job of monitoring and evaluating the jails, which I did not have responsibility for operating. Through the contracting process, government can be more objective about the goals it wants to reach."[31]

In any case, whether monitoring is seen as a burden or a benefit, it is not something that is appropriate only to contractual operations. It is necessary and desirable to monitor the operation of correctional facilities no matter who is running them. Government-run facilities are routinely inspected, audited, regulated, supervised and monitored not just by correctional agencies but by other agencies, and sometimes other branches and other levels, of government.

Beyond these routine forms of inter- and intragovernmental monitoring, there are others. One third of jails surveyed in 1986 were under a court order.[32] At least 60 jails are supervised by a court-appointed Jail Master.[33] In 1984, 31 states and the District of Columbia had at least one major prison operating under a court order or a consent decree. For six of the states and DC, the entire prison system was under a court order or a consent decree.[34] In 1986, 14 states had court-appointed overseers, such as masters or compliance monitors, for their

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[30]The Massachusetts Department of Mental Health was recently quoted as deploring the worsening conditions of state institutions, with the comment, "If private psychiatric hospitals we license did this, we'd close them down" (National Review, September 16, 1988, p. 11).

[31]Interview with T. Don Hutto, Nashville, October 28, 1987.

[32]See Corrections Compendium, November, 1986, p. 14.

[33]Estimate by Howard Messing, NIJ Reports, July/August 1987. Some unpublished figures provided by Messing, however, indicate that, of jails under court order, 24% had a Master appointed, which would imply far more than 60 such jails.

[34]U.S. Department of Justice, Crime and Justice Facts, 1985 (Washington, DC: Bureau of Justice Statistics), p. 26.

prisons.[35] Court orders and consent decrees are analogous to contracts, and jail masters are like contract monitors.[36]

This form of monitoring government-run prisons can be extremely expensive. Monitoring and enforcing a court order may require a special master with a staff of attorneys and investigators and an annual budget running into millions of dollars.[37] Moreover, such masters commonly serve long and indefinite terms on any single case.[38] Even when a consent decree is supervised directly by a judge, without a special master, that also entails a cost.

Monitoring, therefore, should not be seen as a new burden created by contracting. Rather, private prisons serve to focus attention on an important question we should ask of all prisons: How best can we monitor, regulate, and evaluate them?

The Council of State Governments and the Urban Institute, as noted above, have suggested what the ingredients of monitoring and evaluation ought to include. More important than the specific ingredients of the process, however, is a recognition of its importance, and of the fact that it is just as important for public as for private prisons.

The requirements and procedures for monitoring prisons ought to be similar for both government and contracted prisons. At least two states--Massachusetts and Pennsylvania--have implicitly recognized this principle. They have developed standardized monitoring systems, to be applied to both state-run and contracted facilities for juveniles. In both states, procedures

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[35]John J. DiIulio, Jr., Governing Prisons: A Comparative Study of Correctional Management (NY: The Free Press, 1987), p. 246.

[36]William C. Collins, "Privatization: Some Legal Considerations from a Neutral Perspective." Pp 81-93 in Collins: Correctional Law, 1986 (Olympia, WA: William C. Collins), p 93.

[37]The State of New Mexico, with a relatively small prisoner population but operating under a consent degree, pays $1.8 million a year to support the activities of a court appointed monitor, his support staff, and his consulting experts and investigators. When the cost of state attorneys and inmate legal expenses are included, the direct legal costs of the consent decree amount to over $4 million a year. See The Annual Report of the New Mexico Corrections Department for the Seventy-Fifth Fiscal Year, July 1, 1986 through June 30, 1987 (Santa Fe: New Mexico Corrections Department), p. 16.

[38]Lawyers have been known to pursue appointment as a special master in order to retire from all other practice with an expected source of long-term income.

call for examination of institutional records, site visits by an outside team, and interviews with staff. In addition, the Massachusetts procedures include interviews with inmates.[39]

While monitoring is necessary for all prisons, it is not sufficient. Monitoring has not, by itself, saved governmental prisons and jails from poor management or physical deterioration. What is required, beyond supervision, is motivation. Court monitoring has included threats of heavy fines, or total shut-downs, as motivators for governmental prison systems. This has produced some good results, but it is clearly a meat-axe approach, suitable only for extreme cases. In contrast, one of the major advantages of private contracting is the opportunity to systematically structure incentives so that performance will respond to feedback on a regular and routine basis.[40]

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[39]Hackett et al., pp. 49-50.

[40]For an elaborate discussion of monitoring and structured incentives for private prisons, see James T. Gentry, "The Panopticon Revisited: The Problem of Monitoring Private Prisons" The Yale Law Journal 96(1986): 353-375.

12. ISSUES OF CORRUPTION

Wherever large sums of money and great discretionary power come together, especially if accountability and control are weak, there will be a risk of corruption. Corruption has been a problem in prison contracting historically and it is a problem in other types of government contracting today. It is therefore quite reasonable to be concerned about the possibility of corruption in correctional privatization.

Writing for the AFSCME, John Hanrahan asserts:[1]

> In recent years, there have been scores of publicized cases of payoffs and kickbacks in connection with state and local governmental contracting; of price-fixing and bid-rigging; of major contracts being given to cronies and campaign contributors of public officials; of contractors' conflicts of interests, and of contracts going to companies with links to organized crime.

Certainly, these are real problems, with potential for subverting the contracting process. Prison contracts, just like other types of government contracts, carry with them temptations and opportunities for corruption.

To use the possibility of corruption as an argument against contracting per se, however, is illogical. It is fallacious to imply that corruption-related problems are uniquely inherent in private contracting, or would necessarily diminish if contracting were not allowed. Political corruption is a corollary of government, not just of government contracting.

Corruption as a Corollary of Government

People who spend other people's money are always tempted to cheat, to find ways to keep or to spend some of the money on themselves. This trait is not limited to contractors and their governmental collaborators. Public administrators who do not use contractors have other ways of cheating. They may wastefully expand their budgets and activities, thereby increasing their salaries, their perquisites, their status, and their power. They can cheat by building and protecting sinecures for themselves, thereby lowering the ratio of work to reward. They may pad their payrolls, their offices, and their staffs. In addition to their own cheating, they may countenance the cheating of other administrators because it doesn't cost them anything directly, and it serves as camouflage.

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[1]John Hanrahan, "Why Public Services Should Stay Public" The Des Moines Register, March 31, 1983.

Payroll padding, nepotism, cronyism, patronage, bribery, payoffs, featherbedding, dishonest budget inflation, conflicts of interest, misuse of public funds, links to organized crime, and many other kinds of corruption are known to occur within public employee unions and within governmental units that provide services directly, rather than through contracts. Thus, the potential occurrence of any of these (for example, the involvement of organized crime) is no more legitimate as an argument against contracting public services per se than it would be as an argument against the existence of government, or of unions.[2]

Bernard McCarthy[3] has studied the many ways in which correctional officials and employees sometimes abuse their discretionary power for personal gain in the form of money, drugs, sex, or other goods and services. He identifies three categories of correctional corruption. Misfeasance includes granting special privileges or preferential treatment, selective use of authorized rewards and punishments, the sale of paroles or other releases, and misuse or misappropriation of state resources for personal purposes. Malfeasance includes theft, embezzlement, traffic in contraband, extortion or exploitation in inmates or their families, protection rackets, assisting escapes, or engaging in criminal conspiracies. Nonfeasance includes overlooking inmate violations of rules or criminal activity, and failure to report or stop corrupt acts by fellow workers.

All forms of corruption, whether misfeasance, malfeasance, or nonfeasance, involve the abuse of public power to pursue private ends. The common ingredient is not private ownership, but public power. Corruption is not caused by private ownership of the means of public production. Nor would it prevent corruption, to declare that all state-mandated services must be produced directly by government through its own employees.

In the Soviet Union, for example, virtually all goods and services are supposed to be produced through state-owned means of

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[2]If it were, it would be a stronger argument against unions than against contracting. A Rand study of racketeering in New York garbage collection found that "unions have been essential to racketeer control. That is to say, only where a corrupt union has been available, or created, have racketeers been able to establish an industrywide influence." See Peter Reuter, The Value of a Bad Reputation: Cartels, Criminals, and Barriers to Entry [Report No.] P-6835 (Santa Monica: The Rand Corporation, December, 1982).

[3]Bernard J. McCarthy, "Keeping an Eye on the Keeper: Prison Corruption and Its Control" The Prison Journal 64(Fall/Winter 1984): 113-125.

production. Not coincidentally, corruption is pervasive. In this connection, it is ironic that some critics have been fond of quoting Dostoevsky--that the degree of a nation's civilization can be seen in the way it treats its prisoners--and wondering aloud what Dostoevsky would think of private prisons.[4]

If Dostoevsky were alive in the Soviet Union today, he would have lived through 70 years of the most brutal and lawless prison system of any industrialized country. He'd have seen political prisoners jammed shoulder to shoulder into airless cells and boxcars and shipped to punitive slave camps where they were worked, starved, and frozen to death. If he visited American prisons, including private prisons, Dostoevsky would marvel at the civil and human rights protections, the food and medical care, the standards of decency--even the space--he would generally find there.

Dostoevsky would be the first to understand that it is not State and Governmental control that gives a society good prisons. It is the Rule of Law, an institution that is strongest in western capitalist systems with their free markets, private property rights, and libertarian traditions, and weakest in socialist systems where the management of nearly everything is defined as the exclusive prerogative of the state.

The "Lessons" of History

Michael Keating is representative of other private prison opponents, in the picture he paints of correctional contracting during earlier times:[5]

> For much of the Nineteenth Century while correctional facilities, especially in England, were nominally in the hands of government, they were actually under the control of keepers or petty tradesmen, who were in effect private contractors rather than salaried employees. Although they were required to submit accounts to supervising courts, only mass escapes or gross corruption threatened their tenure. Having once obtained their appointments or "contracts" through judicial patronage, these early correctional entrepreneurs were able to settle down to a lifetime of profitable extortion. Everything in the facility was

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[4]Ira Robbins, "Privatization of Corrections: Defining the Issues" Judicature 69(1986): 331.

[5]J. Michael Keating, "Thoughts About Prisons for Profit" in American Federation of State, County, and Municipal Employees, Does Crime Pay? (Washington, DC: American Federation of State, County, and Municipal Employees, 1985), p. 17.

for sale; even release required the payment of a fee to your friendly keeper.

Although contracting for prison labor is quite different from contracting for institutional management, it is portrayed by critics as indicating something basic about the character of private enterprise involvement with prisons. Historically, contracting for prison labor--while found in all parts of the country--was most common in the South and is often associated with the culture of slavery and the economics of reconstruction. Some profess to see a continuation of this tradition in the fact that private prisons today are concentrated in the South.[6] Harold Wray sees in slavery, convict leasing systems, and chain gangs, the forerunners of contemporary private prison management and the employment of prisoners by modern private industry. He observes darkly: "Constitutionally, slavery is legal as punishment for crime, and our Southern prison populations are, of course, overwhelmingly poor and disproportionately black and Hispanic."[7]

John DiIulio, Jr. also describes a bleak history of for-profit corrections running from roughly 1850 to 1950. His summary judgment is measured but critical: "It is highly unlikely that the ugliest features of this history will repeat themselves. Increased external monitoring aside, the corrections profession has grown well beyond the days when such situations were tolerated or encouraged. But the record does teach that prisons and profits can be a most unhealthy mix."[8]

However, DiIulio himself does some unhealthy mixing in his historical review, because he lumps together three different types of profit-related activity: private management of institutions, leasing of convict labor, and profit-seeking behavior by

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[6]A more likely explanation of that distribution is the fact that union organization and opposition are weaker there.

[7]Harmon L. Wray, Jr., "Cells for Sale" Southern Changes 8(September, 1986): 5. Other critics manage to imply that privatization is both racist and a tool of class oppression: "Corporate America is upper-class white. Only a few of its hirelings are minority people. Privatization places in the hands of the haves a tool to exploit and further enrich themselves at the expense of the have-nots." Edward Sagarin and Jess Maghan, "Should States Opt for Private Prisons?" a debate with Charles Logan in The Hartford Courant, January 12, 1986.

[8]John DiIulio, Jr., "Prisons, Profits and the Public Good: The Privatization of Corrections." Research Bulletin No. 1. (Huntsville, TX: Sam Houston State University Criminal Justice Center, 1986), p. 3.

public prison officials. Corruption and abuses found in the latter two areas did not always involve the private sector. Many state-run prisons attempted either to turn a profit through their own activities or to profit by leasing involuntary convict labor to outside employers. These things were not done just by private prison managers. Thus it is not accurate to attribute them specifically to privatization, as though they were not also common in the absence of privatization.

Two of the earliest, and best known, observers of American penitentiaries, Alexis de Tocqueville and Gustave de Beaumont, present a more balanced picture. They were critical of the exploitation of prisoners' labor both by contractors and by governmental prison managers. They noted that this exploitation was minimized when there was a balance between governmental and private management.[9]

> It appeared to us, that the evil which we have thus pointed out, has been generally avoided in the new penitentiaries in the United States. In these establishments, neither the system of entire domestic [governmental] management, nor that by contract, have been exclusively adopted.

These scholars concluded that corruption and exploitation were equally possible under either private contracting or internal public management. The cause in both cases was some form of monopoly and the cure was some form of competition to avoid consolidation of power. For example, contracts were rotated among contractors. Also, different activities and industries were contracted to different parties so that none had too much power.

The history of private prison management, like the history of convict leasing, does contain many grim examples of corruption, profiteering, and inhuman abuse of prisoners. It must be remembered, however, that most of this took place at a time when corruption was also much more prevalent in government-run prisons and in the criminal justice system generally. Some states ran their prisons as profit-making enterprises with as much ruthlessness and exploitation without the aid of private contractors as others did with them. Wardens and sheriffs had much greater

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[9]Gustave de Beaumont and Alexis de Tocqueville, On the Penitentiary System in the United States and Its Application in France (Carbondale, IL: Southern Illinois University Press, 1964), p. 68.

discretion and autonomy, and ran their institutions like feudal fiefdoms, as illustrated by this example from the 1920's:[10]

> In one county the cost of feeding a prisoner was eight cents a day while the sheriff received forty-five. In many counties, the sheriff is permitted either directly or through concessionaires, to sell special articles of food, tobacco, or other so-called luxuries, to prisoners. He is thus permitted to starve them to the point where they or their friends purchase food to supplement the daily ration. He thus enjoys the extraordinary privilege of reaping a profit not only from starvation but from the relief of starvation.

Malcolm Braly, author of On the Yard, recalls in his memoirs a variation on this theme that he observed during a stint in the Nevada State Prison:[11]

> [E]verything in the kitchen was for sale and everyone who worked there sold food. The convict politicians bought control over most of the meat, butter, eggs, milk--the good stuff--and the mainline [most convicts] got whatever was left over.

Nearly all the abuses found by historians in private prisons also can be found in the history of governmental prisons--including abuses related directly to the profit motive.[12] Corrections Today recently reprinted an article first published in 1945 by E. R. Cass, a leading figure in correctional his-

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[10]D. Smith, Police Systems in the United States, 2nd ed. (New York: Harper & Row, 1960), p. 143. Cited in Gilbert Geis, "The Privatization of Prisons: Panacea or Placebo?" Pp. 76-97 in Barry J. Carroll, Ralph W. Conant, and Thomas A. Easton (eds.), Private Means -- Public Ends: Private Business in Social Service Delivery (New York: Praeger, 1987), at pp.81-82.

[11]Malcolm Braly, False Starts: A Memoir of San Quentin and Other Prisons (Boston: Little, Brown and Company, 1976).

[12]One possible exception to this generalization is that private contractors in the nineteenth century frequently went bankrupt. This could be seen as an abuse in itself (avoidance of responsibility), or it could be seen as the termination of other abuses. Unlike contractors, states that historically could not or would not raise the revenues necessary to run humane, or even viable, institutions did not go bankrupt. They merely reduced expenditures and worsened conditions further, or turned the problem over to private contractors. The issue of bankruptcy among contemporary contractors is discussed in the next chapter.

tory.[13] In it, Cass decried the exploitation and corruption of jails run for profit on the fee system. The most significant fact about the article, however, is that the jails decried by Cass were entirely governmental. The private sector played no part in them. What was most objectionable about them was not that they made a profit, but that the profit was based on abuse of power. The profit resulted not from competition but from monopoly and discretionary control of the means of coercion. Those who set the fees, imposed the fees, and enforced their collection, also kept them for themselves. Under the fee system, the sheriff was "a public official whose chief interest is to increase the population of the jail, and thus add to his fees."[14] Some of these sheriffs would release offenders early but continue to collect fees until the nominal expiration of the sentence.

Almost all the arguments from history presented by critics of private prisons suffer from an elementary fallacy: they fail to make historically contemporaneous comparisons. Instead, they compare historical examples of private prisons, selected for their negative content, against standards based implicitly on modern prisons. Of the four possible comparisons between historical, modern, public, and private prisons, they focus almost exclusively on the one cross-comparison that puts private prisons in the worst light.

Never do they compare modern private prisons with public prisons of earlier eras. That would be equally valid (or invalid) but unfortunately (from their perspective) it would make private prisons look far superior. It would also make more obvious the fallacy of non-contemporaneous comparison.

At a minimum, a valid historical analysis would have to compare private prisons to public prisons within the same political and legal jurisdictions at the same points in time.[15] Even if such proper comparisons, when they are done, still show private prisons to be worse than their public counterparts during some earlier era, it is questionable whether such differences would still obtain in the socially, politically, and (most important of all) legally different world that exists today.

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[13]E. R. Cass, "Jails for Profit," Corrections Today 50(October, 1988): 84, 86.

[14]Ibid., p. 86.

[15]Ideally, there would also be a random or broadly representative selection of time periods, jurisdictions, and prisons.

The Revolution in Prisoners' Rights

At a time when the prison environment was generally more corrupt, contracting was often an extension and application of that corruption but it was not the cause of it. In today's political and legal environment, especially with the firmly established revolution in prisoners' rights, such extreme and flagrant corruption and abuse are very unlikely. William C. Collins, formerly a Senior Assistant Attorney general for the State of Washington and a specialist in correctional law comments:[16]

> While the private operation of jails has some historic precedent, legal and management issues in jail operation have changed so dramatically in the last 10 to 20 years, especially with the growth of inmate rights and court involvement, that contracting issues or problems from the 19th century have little relevance in the waning decades of the 20th century.

Important as the prisoners' rights revolution and heightened judicial oversight of prison management have been, however, they do not mean that corruption is no longer a problem in corrections. The underlying condition remains: an extensive grant of broad discretionary power to officials and workers at all levels, with relatively low visibility.

Controlling Corruption through Law and the Market

Just as the private sector is not the source of all corruption, neither is state monopoly of service performance a solution to corruption. Abuses of inmates under the 19th century practice of leasing out their labor were as much abuses by the state as by private firms. It was not so much the state as the law that finally ended those abuses, and it is the law, not the state, that protects against abuses and violations of prisoners' rights in contemporary prisons. The way to further guarantee the rights of prisoners is not to insist that they remain in the hands of government employees, but to maintain the rule of law.

The independence of the judiciary allows it to oversee and regulate the government's prisons. Prisoners' rights are thus protected, and the power of their keepers constrained, by the checks and balances inherent in the distribution and separation of powers. Contracting, when it operates properly, extends the concept of separation, and constructive tension, between agents

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[16]William C. Collins, "Privatization: Some Legal Considerations from a Neutral Perspective." Pp 81-93 in Collins: Correctional Law, 1986 (Olympia, WA: William C. Collins), p 81.

of administration and agents of oversight. When there is corruption and collusion between contractors and government officials, this function of contracting breaks down, but it is the collusion, not the contracting, that is the problem.

Co-optation is a subtle form of collusion. In private prisons, it is possible that an on-site governmental monitor could become co-opted by the contractor, even if only through friendships. The Council of State Governments and the Urban Institute suggest that this possibility "can be alleviated by periodically changing monitors, by proper training, and by continued interaction between State home-office personnel and the monitor."[17]

The "revolving door" syndrome, in which government purchasers move directly into jobs with private vendors, can produce another subtle form of collusion, which could be called "anticipatory collusion." As Mullen points out, however, there are established methods of dealing with this problem, including "conflict-of-interest provisions attached to public employment, openly competitive procurement procedures, and broadly composed contractor selection committees."[18]

Problems of corruption in public-private contracting consist of departures from conditions of genuine competition. Government monopolization, by outlawing contracting, would not solve these problems. With honest government, by definition, there would be no corruption in the delivery of public services. But governments are not automatically honest; they must be kept that way. Open competition among contractual agents of government is one effective method of keeping them honest. "The answer," in the words of Robert W. Poole, Jr., "is to have rational, open bidding procedures and objective selection standards--and to make sure that they are adhered to. This can be done by requiring that all such rules, procedures and criteria be matters of public record and by holding bid openings and other important decision-making sessions in public."[19]

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[17]Judith C. Hackett, Harry P. Hatry, Robert B. Levinson, Joan Allen, Keon Chi, and Edward D. Feigenbaum, Issues in Contracting for the Private Operation of Prisons and Jails (Washington, DC: Department of Justice, October, 1987), p. 49.

[18]Joan Mullen, Kent John Chabotar, and Deborah M. Carrow, The Privatization of Corrections (Washington, DC: National Institute of Justice, February 1985), p. 73.

[19]Robert W. Poole, Jr., "Objections to Privatization," Policy Review 24(1983): 114.

13. ISSUES OF DEPENDENCE

Critics worry that contractors will engage in "lowballing," in which they obtain contracts by making unrealistically low bids. After the contract begins, the government will gradually lose much of its capacity to resume the operation itself. High capitalization costs will prevent new competitors from entering the field. Once government becomes dependent on the contractor, the contractor will be free to jack up prices. Worse yet, the contractor may go bankrupt, leaving the dependent government without any correctional capacity. Worst of all, contracting may devolve into exclusive franchises that simply replace public monopolies with private monopolies.

All of these fears are realistic possibilities against which we should seek positive safeguards. None of them, however, is a consequence so unavoidable as to justify a moratorium on private prisons.

Lowballing

A common objection to contracting of all sorts is the danger of "lowballing." In lowballing, an unrealistically low bid is used to win an initial contract. Losses are then recovered through cost overruns or inflated subsequent contracts. If competitors cannot quickly enter the market and if the government would incur high one-time costs in resuming the operation itself, the contractor can raise its price gradually but continuously.

A contractor's greatest leverage over the government may be as much psychological as financial. When a prison or jail is contracted out, it relieves public officials of many worries and headaches. To take back a facility, or even to re-contract it to a new firm would be a hassle. That hassle would be a cost borne personally by the responsible bureaucrats, whereas the cost of renegotiating the same contract at a higher price can be passed along to taxpayers.

The strategy for a contractor seeking to hook the government, then, would be to raise prices from the initial bid through a series of gradual increases, each one being too small to be worth the bother of a new bidding process. Obviously, there must be some limit, but it could well be higher than the price would have been under either fair competition (no lowballing) or continued government monopoly.

Is there a solution to this problem?

First it should be noted that taxpayers can be "lowballed" by public agencies as well as by private contractors. A public agency can start a program with a low budget or as a "pilot

project" and then increase the budget after the program is well-entrenched and a constituency strongly interested in its continuation has been established. Public agencies also produce "cost overruns" when they exceed their budgets or inflate the costs of construction and financing by dragging out the time to completion.

The objection that private companies may raise their rates in the future implies that public agencies, in contrast, will not. The fact is, however, that since WWII the price of goods and services has increased much more rapidly in the public sector than in the private sector.[1] Contractors, however, are often required to index their fee increases to the Consumer Price Index.

Experience in contracting for other public services has shown that while some lowballing probably does occur, it can be controlled. Moreover, it is not so extensive as to have made contracting more expensive, on average, than direct public delivery. A nationwide study of garbage collection sponsored by the National Science Foundation demonstrated significant savings through contracting. Costs of municipal collection were shown to be 29 to 37 percent greater than contractor prices.[2] Being comprehensive, this study presumably included some firms that had been lowballers and now were overchargers, if that practice really is endemic to private contracting. However, the subsequent overcharging by some contractors, if any, was not enough to outweigh the strong savings provided by contracting overall.

Recent experience with prison contracting also does not support the fears of lowballing. Joan Mullen reports that the INS, which has the most extensive experience in contracting for custodial confinement, has encountered increasing, not decreasing, competition for its business. INS contracts are renegotiated annually and must go to the lowest bidder. "This requirement, plus an INS history of early contracting with low-cost nonprofits, appears to provide little opportunity for the provider to include substantial cost increases in the contract".[3]

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[1]William D. Berry and David Lowery, "The Growing Cost of Government: A Test of Two Explanations" Social Science Quarterly 65(September 1984): 735-749.

[2]E. S. Savas, Privatizing the Public Sector; How to Shrink Government (Chatham NJ: Chatham House Publishers, 1982), p. 93.

[3]Joan Mullen, Kent John Chabotar, and Deborah M. Carrow, The Privatization of Corrections (Washington, DC: National Institute of Justice, February 1985), p. 68.

Financial reports by Corrections Corporation of America for its early years do show annual losses to the corporation overall, but these are not the result of lowballing. Each of CCA's facilities is profitable, and the company's total return from operations is positive.[4] Costs of developing a new market, however, have produced high central office costs, which can be expected to diminish, as a percentage of total costs, as the field matures. Now that Wackenhut, another corporation that is national in scope, has joined CCA in market development, those costs should spread more evenly and have less effect on particular contracts.

"Cost Overruns"

One alleged example of lowballing is an often-cited story in the New York Times that referred to what it called a $200,000 "cost overrun" at Silverdale.[5] Prior to the contract, the county ran the facility at a cost of $24 per inmate and an average population of 243. After the contract began, vigorous enforcement of laws against drunken driving boosted the average population to more than 300. The contractor did not charge any more than the $21 per inmate agreed to in the contract, but the county was sending to the facility far more prisoners than it had anticipated it would. While it is true that the county thus spent more money than it planned, it is very misleading to blame the contractor by calling it a "cost overrun." A more accurate term is suggested by Charles Ring, who referred to it as a "population overrun."[6]

Some county officials were upset because they had accepted a bid that turned out to have been higher than necessary. But this

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[4]Thomas E. Burke, "Research: Corrections Corporation of America Company Report" (Boston: Prudential-Bache Securities, April 3, 1987), p. 2. See also, Corrections Corporation of America quarterly and annual reports.

[5]Martin Tolchin, "Privately Operated Prison in Tennessee Reports $200,000 in Cost Overruns," New York Times, May 21, 1985, A14. See also: Russ Immarigeon, "Private Prisons, Private Programs, and their Implications for Reducing Reliance on Imprisonment in the United States" The Prison Journal 65(1985): 67; Charles Ring, Contracting for the Operation of Private Prisons: Pros and Cons (College Park, MD: American Correctional Association, 1987), pp. 33-34; John D. Donahue, Prisons for Profit: Public Justice, Private Interests (Washington, DC: Economic Policy Institute, 1988).

[6]Charles Ring, Contracting for the Operation of Private Prisons: Pros and Cons (College Park, MD: American Correctional Association, 1987), p. 34.

is not a valid criticism of private contracting generally, or even of this particular contract. After all, if the average population had unexpectedly declined, the county would have benefitted even more from its contract. Would the county then have volunteered to pay a fee higher than contracted, to compensate the company for its lower than projected revenues?

Contracts based on specific prison population predictions are inherently risky. This risk can be distributed by negotiating contracts that specify lower or higher fees depending on whether projected volume rises or falls. However, neither party to a contract can avoid all such risks without paying some sort of premium to the other party. To judge a contract only after-the--fact, without taking into account how events might easily have been different, is like pronouncing your insurance policy a waste of money because you did not have an accident. No one can predict the future perfectly, but competitive bidding and contractually set prices provide a motive for all parties to predict as well as they can. Bidding by private contractors will generally tend to keep prices both as low and as accurate as possible even though unanticipated events may later show the winning bid to have been, in retrospect, either too high or too low.

Those who cite the New York Times "$200,000 cost overrun" story generally miss the most significant part of the tale. When it was clear that the large number of drunk driving offenders was likely to be a permanent factor, CCA and the county worked out a new price agreement that provided for a much lower per diem payment for those offenders.[7] The cost of the contract is renegotiated annually in any case, but the Superintendent of Corrections arranged an informal adjustment even before the contract was changed.[8]

Defenses against Lowballing

As illustrated in the adjustment just discussed, contractors have a vested interest in accommodating, not exploiting, their governmental customers. Hard bargaining may be part of the contracting game, but so is flexibility. The best contracts are

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[7]National Criminal Justice Association, "Private Sector Involvement in Financing and Managing Correctional Facilities" (Washington, DC: National Criminal Justice Association, April 1987), p. 18; Judith C. Hackett, Harry P. Hatry, Robert B. Levinson, Joan Allen, Keon Chi, and Edward D. Feigenbaum, Issues in Contracting for the Private Operation of Prisons and Jails (Washington, DC: Department of Justice, October, 1987), p. 53.

[8]Telephone interview with Bill McGriff, Hamilton County Auditor, November 11, 1987.

those that are mutually beneficial. While one party may sometimes gain temporarily at the expense of the other, a lopsided contract is unstable and not in either party's long-term interest.

A contract with a sliding scale can protect the government against a population overrun, or even work in its favor. At the Bay County jail complex in 1988, CCA's contract was set at $31.01 per day for the first 300 inmates, about $10 lower for the next 20, and only $7.88 for every inmate over 320. When the population reached 400 (a bit over the designed capacity), both CCA and the county were surprised, but the county was delighted to be paying such a low fee for a fifth of its detainees.[9]

Public agencies can guard against lowballing by evaluating proposed budgets for their realism and reliability, rather than following a rigid rule specifying that contracts must go only to the lowest bidder. The lowest bid is not necessarily the best bid. Also, regular renegotiation or renewal of contracts, with at least the potential for competition through open bidding, can make lowballing a strategy too costly to pursue. No private company can raise its fees very high above a reasonable profit margin without inviting exposure and opposition by competitors. Competing contractors have the information, motivation, and organizational resources to control each others' prices to a much greater degree than the information, motivation, and resources of taxpayers to control government costs.

Consolidation and Market Entry

Ironically, one concern over privatization of corrections is that it will not be competitive enough. Capital costs are said to be so high as to restrict market entry; thus, early entrants will use their capital advantage to squeeze out would-be competitors with predatory pricing. Further, big corporations may use political power as well as economic power to control the market. Critics fear that the private sector in corrections will become "a privileged group of large, monolithic service providers concerned more about profit than performance, creativity and compassion."[10] They worry about "the small, independent social service agencies. Hundreds of them, particularly those supported by federal grants, have disappeared while the private sector's bigger corporations -- Eclectic, Magdala, the Volunteers of America and others -- survive and prosper".[11] Some critics even

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[9]Erik Larson, "Captive Company," Inc., June 1988, p. 90.

[10]Philip B. Taft, Jr., "Private Vendors, Part II: Survival of the Fittest," Corrections Magazine 9 (February 1983), p. 43.

[11]Ibid., p. 42.

foresee the possibility of dependence at a national level, with unsettling effects on prisoners: "An American gulag archipelago, in which the prisons are under the jurisdiction of private corporations working together, or a single corporation that has established a dominant if not monopolistic position, could easily result in the transfer of prisoners from one area of the country to another . . . ."[12]

Market dominance and consolidation are not bad in themselves; it depends on whether they result from economic, or from political, processes. Critics are right to be wary of political distortions of the contracting process. Even lobbying, a legal form of political influence, can be objectionable, but only if it departs from the model of open competition based on relevant criteria established by agencies accountable to the public. It is unfair competition, not successful competition, that must be avoided. It may be true that small, independent, nonprofit agencies supported by federal grants will not be able to survive in a competitive market. If so, it will not be because profit-making and competition are somehow incompatible with "performance, creativity and compassion." Instead, such shakeouts are likely to make the industry more stable, more reliable, and higher in quality.

Critics often cite the experience of defense contracting and predict that the Pentagon's $500 hammer will be matched by the Corrections Department's $500 million slammer. The analogy is not a very good one. Research, product development, and capitalization costs are not anywhere near as high for corrections as for the defense industry. Thus, the problem of potential dependence is not as great.

Nonetheless, the comparison to defense contracting might still be useful because the lessons that have been learned there in recent years may have application to contracting for prisons. The 1984 Competition in Contracting Act was partly a result of scandals in defense contracting and was designed to reduce expensive sole-source and cost-plus contracting. Success in achieving this goal has been reported as "substantial."[13] Some of the techniques used to keep defense contractors competitive would presumably work for prison contractors as well.

By the same token, lessons from defense contracting about the limits of competition may also apply to the prison industry.

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[12]Jess Maghan and Edward Sagarin, "The Privatization of Corrections: Seeking to Anticipate the Unanticipated Consequences," paper presented to American Society of Criminology (San Diego, CA: November, 1985), pp. 43-44.

[13]Insight, December 7, 1987, pp. 34-36.

These would include lessons about not pushing competition purely for the sake of competition; about limiting the number of contracts in order to maintain economies of scale and to avoid overcapacity; and about the shortsightedness of buying only from the lowest bidder.

There may be an analogy between developing and producing a small number of expensive weapons, such as Stealth bombers or MX missiles, and a state that decides to authorize the construction and operation of one, and only one, maximum security prison for just a few years, as an experiment. Such a state should not expect to be able to attract high competition and low prices with such a poor ratio of high investment and risk to low potential return.

Unlike some parts of the defense industry, however, capital costs for prison contractors are not necessarily so high as to restrict market entry; they will vary a great deal by size and type of facility and will depend on whether the contract calls for new construction, renovation or conversion of other property, or takeover of existing governmental facilities. Start-up costs for single, especially low-security, facilities are well within reach of small businesses or groups of investors. As a new corporation, CCA was able to site, finance, build, and open a 350 bed prison within 7 months, for $5 million. The U.S. Corrections Corporation, founded by two men with an initial investment of $1.9 million, opened its first facility at a seminary purchased for $695,000. If this is all it takes to enter the market, it is well within the resources of numerous potential competitors.

Market entry is likely to get easier, not harder. When corrections is no longer an exclusively government-operated monopoly; when enabling legislation has been passed and other legal uncertainties resolved; when jurisdictions have in place mechanisms for contracting and monitoring; when conventions and standards for prison contracts begin to develop; when investors gain confidence in the industry--as all these things occur, it will become progressively easier for new companies, including small ones, to enter the market and compete.

Facility Ownership and Government Dependency on Contractors

If a jurisdiction's prisons are not only managed, but also owned by a private corporation, will this make the government so dependent that it loses effective control over the company and the prison?

James Gentry suggests that the physical plant of prisons should be owned by the government, because that would allow for shorter contracts and for easier transfer to subsequent bid-

ders.[14] While he recognizes that private ownership facilitates speed, savings, and innovation in prison construction, Gentry thinks these could be achieved under state ownership by design competition and lease/purchase agreements separate from management contracts.

Separating management and ownership does have some advantages, but it also has disadvantages. One problem is that design and operation are intimately related. Efficiency may be lost if a management company is neither allowed nor given any incentive to invest in the design and construction of the facilities it will operate.

The anti-dependency argument against private ownership of prisons assumes that the physical capital assets of a prison are so expensive, specialized, and nonredeployable that the market will be resistant to new entrants and firms will require long contracts to recover their investments.[15] These long contracts will lock governments in to single suppliers.

An alternative to a long contract would be a periodically renewable contract with provisions specifying the terms for immediate government purchase of the facility if and when the contract is terminated. It might be objected that this would give the vendor something to hold over the government, to deter it from terminating the contract. However, if the government wishes to take over the facility itself, it will be no worse off than if it had built and financed the prison in the first place, and if it switches to a new contractor it can have the new contractor take over the same financing role as the previous contractor.

On the matter of dependency, it may well be asked: who has whom over the barrel? Even where a state or county contracts away most of its own correctional capacity to a single private vendor, does that put the government at the mercy of the vendor? Clearly, the dependence works both ways. There is only one customer, in a given jurisdiction, for correctional services. The vendor may own the buildings, but either they will be difficult to convert to other uses (which puts the government in a good bargaining position) or they will not (which means that the government could also acquire and convert other buildings). Either way, private ownership of the prison does not leave the government in an untenable position.

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[14]James T. Gentry, "The Panopticon Revisited: The Problem of Monitoring Private Prisons" The Yale Law Journal 96(1986): 370.

[15]Ibid., p. 369.

Further, the company does not "own" its human capital. By cancelling a contract, the government creates instantly a pool of surplus labor having just the characteristics now needed by the government, or another contractor, as the new employer.

The Threat of Bankruptcy or Default

It is not inevitable that government must become dependent on contractors, but it can happen. To the degree that government does become dependent on a contractor, it will have to worry about that contractor going bankrupt. If the contractor does go bankrupt, it can leave the government rather suddenly in a bad position. Even if the company never does go bankrupt, it can use the mere threat of bankruptcy to gain concessions from the government, at least to the extent that the government is in fact dependent on it.

Thomas Coughlin, Commissioner of the New York Department of Correctional Services, supports his concern on this issue by citing a case in a related area. In 1978, the New York Department of Mental Retardation contracted with a private, nonprofit agency, the United Cerebral Palsy Association of New York, to run a substantial part of a large facility in New York City. Three years later, the company was $17 million in debt and filed for bankruptcy.[16]

The most worrisome aspect of bankruptcy or default is the prospect that a jurisdiction might find itself suddenly without the capacity to hold and care for its prisoners. Until there are a number of regionally or nationally viable correctional contractors prepared to enter the market in a particular jurisdiction, it would be wise for the government to retain some capacity of its own. This is possible even in a jurisdiction so small that it has only one jail or prison. Such a jurisdiction would need to retain supervisory capacity for monitoring purposes, in any case.

What disappears when a contractor goes broke is the financial structure and highest level of management, both of which the government will still have. When a prison company goes bankrupt, it leaves its line staff and most of its middle management behind, ready for a new employer. The plant and equipment can be purchased from the failed company, or its creditors, at liquidation prices. The government could do this using money from insurance carried by the former provider as part of the contract. Or another company could step in and take over a failing com-

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[16]Thomas Coughlin, "The New York Experience" in American Federation of State, County, and Municipal Employees, Does Crime Pay? (Washington, DC: American Federation of State, County, and Municipal Employees, 1985), p. 32.

petitor, or purchase its assets at bankruptcy, and the government could switch the contract to the new company.

I do not mean to play down the fact that bankruptcy would certainly cause serious problems. However, it need not leave the government empty-handed, or force it to empty its prisons or jails.

Since bankruptcy is a worst-case scenario for private prisons, for the sake of perspective it ought to be compared to worst-case scenarios for government prisons. While government is unlikely to go bankrupt, some prison systems have experienced interruptions of services comparable to what might occur in a bankruptcy. Courts have ordered the immediate closure of public prisons and threatened to close down whole systems. Fiscally strapped and debt-ridden state and local governments have been forced to release prisoners for purely budgetary reasons. Frustrated sheriffs, transporting prisoners from overflowing jails, have left them shackled to the gates of overflowing prisons unwilling to accept them.[17] Convicts have been housed in warehouses, quonset huts, tents, gymnasiums, trailers, schools, boats, and other makeshift accommodations.

Clearly, many public prison systems are already in a state of crisis and disruption, for which private prison contracts offer some relief. In such systems, bankruptcy or other failures by a contractor would mean little more than a return to the status quo ante.

Some Recommendations

To protect against defaults or bankruptcies, the Council of State Governments and the Urban Institute make several recommendations to contracting jurisdictions. During bidding, and periodically throughout the contract, companies should be judged on financial soundness and stability. Contracts should specify who is to pay the costs created by termination (this could vary by whether termination is for cause or otherwise). Performance bonds (equal, for example, to the cost of one year's contract) should be considered. There should be a contingency plan to cover staffing, placement of inmates, and control of the facility during emergency transitions.[18] State officials in Kentucky required in their Requests For Proposals for prison contracts that contractors post a performance bond equal to 70 percent of the annual value of the contract.[19] In its Santa Fe contract,

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[17] U.S. News and World Report, December 23, 1985, p. 39.

[18] Hackett, et al., p. 40.

[19] Louisville Courier-Journal, March 19, 1985.

CCA posted a performance bond, with a $325,000 certificate of deposit as collateral.[20]

Contracts and the Expansion of Government

While the general concept of privatization is often attractive to conservatives and libertarians, because it implies a shrinking of government, the specific mechanism of contracting has received support from some liberals for just the opposite reason. By operating more efficiently, they hope to provide more government services in spite of limited tax revenues. Whether this is seen as a danger or an advantage, it must be recognized that contracting can be used to extend, as well as to reduce, the scope of government.

A major cause of government growth is the existence of special interest groups who encourage government spending in those areas that most directly benefit themselves. Paul Starr argues convincingly that "the most common privatization proposals, such as contracting out and vouchers, would hardly diminish the domain of 'special' interests."[21] He warns against the creation of "an enlarged class of private contractors and other providers dependent on public money."[22] Starr correctly notes that those who produce public services -- whether as public employees or as private contractors -- have a vested interest in increasing government expenditures on those services.

Liberals have been blamed by conservatives for promoting the growth of a parasitic "New Class" -- defined by its relationship to the means of public production -- that thrives on the growth of government. Now, conservatives themselves may be vulnerable to charges that they have simply added private contractors to the ranks of the New Class.

Contracting, by itself, is not going to limit the scope of government, but it can restrain the cost. It is not a way of limiting the demand for government service, but a method of controlling the price. To do so, however, contracting must be competitive. It does no good to substitute private monopolies for public ones. This is one danger of privatization to which even its advocates should be especially sensitive. While designed to inject characteristics of the private sector into operations of the public sector, contracting could have somewhat

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[20]Corrections Corporation of America, 1986 Annual Report, p. 24.

[21]Paul Starr, The Limits of Privatization (Washington, DC: Economic Policy Institute, 1987), p. 5.

[22]Ibid., p. 6.

the reverse effect. Characteristics of government could be extended through the use of private enterprise. We might end up with the worst, rather than the best, of both worlds.

Something akin to noncompetitive contracting occurs when a government agency takes on the administrative form of a private enterprise but retains a monopoly on the market for its activity. The effect is not to control the power or cost of the government agency, but to drive its activities underground and off the budget.

Hans Sennholz describes what happens when government agencies go "underground" by creating "off-budget enterprises" (OBEs).[23] OBEs are governmentally created and managed enterprises, whose spending and borrowing are not recorded on any budget. Familiar examples would be airport, housing, parking, sewer, water, and other authorities, but there are many other types as well. OBEs make it harder to control the growth and cost of government. Indeed, OBEs have arisen in response to attempts to statutorily or constitutionally restrict government spending and debt, which is why most of them are found at the state and local, rather than federal, level.[24] OBEs allow governments "to spend and borrow without constraint, to dispense patronage without civil service restrictions, and to bestow favors and benefits on special groups. An OBE is an anomaly of organization: a government entity unfettered by many of the statutory constraints applicable to government, a corporation without stockholders but with a board of directors consisting of politicians or their appointees, a non-profit business that competes with business or is protected from competition as an unregulated monopoly."[25]

There are important differences, however, between municipal authorities or other OBEs and private contractors supplying public services. Contracting reveals more expenses than it hides, and the fees paid to contractors are on-budget. Contractors are not independent authorities; they are accountable to their government monitors who are, in turn, accountable to the public. In contrast to contractors, "OBEs pay no taxes or license fees, post no performance bonds, face little paperwork and regulatory tape that strangle individual enterprise."[26]

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[23]Hans F. Sennholz, "Privatizing Federal Programs," The Freeman, June 1987, pp 223-228.

[24]Ibid., p. 405.

[25]Ibid., pp. 404-405.

[26]Ibid., p. 409.

Exclusive Franchises

While correctional contracting may not create an off-budget enterprise, it may in other ways contribute to what Sennholz is warning against: expansion of the power of government. In particular, a contract that took the form of an exclusive franchise would corrupt the process of competition into just another form of governmental monopoly. The State of Tennessee flirted briefly with this when it took seriously a bold proposal by the Corrections Corporation of America to lease the entire operation of the Tennessee Department of Correction.

The distinction between an exclusive franchise and market dominance is important. With an exclusive franchise, there is formal protection against competition; in market dominance, there is not. If one company runs all the prisons or jails for a single jurisdiction, that does not by itself create either a monopoly or a dependency situation. As long as there is no exclusive franchise, then the potential for competition will still exist.

Competition occurs through time as well as across space. Even with a long-term contract, a competitive environment can be maintained through provisions for periodic renewal, review, and possible termination. Nonetheless, wherever possible, it would be good strategy for government to preserve actual, as well as potential, competition. It could do this by continuing to run some facilities itself, thereby retaining some of its own capacity to compete. Or it could divide its facilities among different contractors and hold open the possibility of their redistribution at a later point. A classic example of competition between contractors and the government, over time, comes from a field other than corrections. In Phoenix, the city public works department, by outbidding private competitors, successfully regained one sector of the city's garbage collection that it had lost to a private contractor a few years earlier.

In correctional contracting, Texas, California, and the Immigration and Naturalization Service, as large systems, have had no trouble maintaining contracts for secure confinement across multiple providers. Competition that is preserved in large systems like these, or across jurisdictions nationwide, is competition that is available for smaller systems as well. Corrections Corporation of America and Wackenhut Services, Inc. currently operate facilities in only a handful of states. However, they are already large enough that they could provide competition in any state. The absence of private prisons and jails in most states is due to such factors as strong union opposition, absence of enabling legislation, and caution or lack of interest on the part of correctional and other governmental authorities. It is not because the nature of corrections makes

it impossible for competition to develop rapidly in response to real demand.

Dependence vs. Competition

Objections that government may become dependent on particular contractors, that capital costs will restrict market entry, that markets will be consolidated or distorted by a few powerful corporations, that corruption may undermine open competition, or that exclusive franchises may occur, raise a number of legitimate concerns. However, to present these objections, not as warnings of dangers to avoid, but as arguments against the very concept of privatization, is self-contradictory. The objections rest on an underlying recognition that competition is desirable. They thus implicitly reaffirm that which they seem to deny. With the market model accepted as a standard of judgment, an imperfect, distorted, or manipulated market is obviously undesirable, something to avoid. But preserving a nonmarket, government monopoly of services would not avoid or solve the problem of imperfect competition.

The AFSCME warns governments against becoming addicted to contractors, but what they offer in its place is mandated dependence on organized public employees. If dependence is a real problem, will that problem be solved if there are no private vendors? Is it not also a form of dependence when a service can be supplied only by government employees, especially when they are organized into unions that control the labor market? Private prison companies can help free some governments from dependence on public employees and their unions.

In sum, as an objection to private prisons, the forecast of government dependence on contractors has a self-defeating character. To object that the private supply of a public service may not be sufficiently competitive is not a very good argument for public monopoly. The more essential a service, the greater the need for a diversity of contingent sources of supply.

14. SUMMARY AND CONCLUSION

Many arguments could be presented in favor of the private management and operation of prisons and jails. Summarized here, in the briefest possible form, are ten.

In Support of Private Prisons

1. Contracting makes true costs highly visible, allowing them to be analyzed, compared, and minimized.

2. Contracting enables prisons to be financed, sited, and constructed more quickly and cheaply than government prisons; also, private firms are more apt to design for efficient operation.

3. Contracting allows greater flexibility, which promotes innovation, experimentation, and other changes in programs, including expansion, contraction, and termination.

4. Contracting adds new expertise and specialized skills.

5. Contracting reduces the tendency toward bureaucratic self-perpetuation and helps limit the size of government.

6. Contracting increases accountability because market mechanisms of control are added to those of the political process.

7. Contracting will make prisons highly visible and accountable, in contrast to state prisons which, at least historically, have been ignored by the public and given (until recently) "hands-off" treatment by the courts.

8. Contracting promotes the development and use of objective performance measures.

9. Contracting, by creating an alternative, encourages comparative evaluations; this raises standards for the government as well as for private contractors.

10. Contracting provides a surgical solution when bad management has become entrenched and resistant to reform.

Objections Raised and Examined

Against these and other arguments, critics of private prisons have advanced many objections. In the process, it is the critics who have defined most of the issues of the debate. Of these issues, the most significant are:

1. propriety
2. cost
3. quality
4. quantity
5. flexibility
6. security
7. liability
8. accountability
9. corruption
10. dependency

Each of these issues is briefly raised and examined below.

1. Propriety

Critics often ask, rhetorically, whether it is "proper" for anyone but the state to deprive people of their freedom.

That, however, is a loaded statement of the issue. Keepers do not take away anyone's freedom; catchers and convicters and sentencers do that. The operative issue is whether duly authorized punishment is any more or less legitimate when administered by government employees, as opposed to contracted agents.

First, it should be noted that the government does not own the authority to punish. That authority originates in The People and is delegated to government, which administers it in trust, on behalf of the people and under the rule of law. In a system characterized by rule of law, state agencies and private agencies alike are bound by the law. For actors within either type of agency, it is the law, not the civil status of the actor, that determines whether any particular exercise of force is legitimate. There is, in effect, an implicit contract between a state and those agents that makes the authority of the latter conditional on the proper performance of their roles. This conditional authority can be bestowed on contractual agents of the state just as it is on those who are salaried.

But won't a private prison be driven by the profit motive, rather than by the interests of prisoners or the public?

The problem with this question is that it implicitly puts too much faith in the motives of government actors. The truth is that both public and private actors are strongly affected by self-interest. We should not be impugning motives, but discussing how to structure incentives in ways that will promote the desired performance.

2. Cost

Critics doubt that private prisons will be cheaper. All other factors held constant, they assert, private prisons will be more expensive because of the added cost of administering contracts, monitoring performance, and, of course, the need to make a profit.

In real-life comparisons of government and private operations, however, important factors are not held constant. There are structural differences that affect efficiency and cost.

Contracting avoids cumbersome and rigid government procurement procedures; private vendors can purchase more quickly, maintain lower inventories, and negotiate better prices and values.

Contracting avoids civil service and other government (and sometimes union) restrictions that interfere with efficient personnel management (hiring, firing, promotion, and salary setting; assignment of duties, work schedules, vacations, and leaves; adequate staffing to avoid excessive overtime; etc.).

Finally, profit is not an added cost, but an incentive to reduce waste and increase productivity.

3. Quality

If private prisons are cheaper, say the critics, that can only come at the cost of quality. Corner cutting will occur--meaning poorer food and less of it, fewer services, and cheaper labor with lower professionalism and less training.

There is little evidence of this so far. The INS reports high satisfaction with its contracted detention facilities. The Council of State Governments and the Urban Institute, in a recent study of privately managed prisons and jails, concluded that these facilities "are perceived by government agency oversight officials as being quite satisfactory. We have seen no indication to date that a government agency has been dissatisfied to any significant extent with the quality of the service provided."[1]

Contracting should raise standards for the government as well as for private contractors. When they perceive an alternative, the public, the courts, and the government will be less tolerant

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[1]Judith C. Hackett, Harry P. Hatry, Robert B. Levinson, Joan Allen, Keon Chi, and Edward D. Feigenbaum, Issues in Contracting for the Private Operation of Prisons and Jails (Washington, DC: Department of Justice, October, 1987), p. 51.

of prisons that are crowded, dirty, unsafe, inhumane, ineffective, and prone to riots and lawsuits.

Private facilities are often required by contract to be certified as meeting the standards of the American Correctional Association. Except for the Bureau of Prisons and a few state systems, such as Florida, this is a rare condition among government facilities. Certification does not guarantee quality, but the requirement is evidence that private prisons are expected to meet high standards.

Government facilities vary greatly in their quality, but there are many that are in truly desperate condition. Where poor management has become entrenched and resistant to reform, contracting provides a surgical solution.

4. Quantity

Many critics, especially members of the ACLU, are opposed to private prisons largely because they are opposed to prisons generally. They fear that more efficient prisons will mean more imprisonment, of which they--unlike most of their fellow citizens--disapprove. If more prisons are built, argue the critics, they will be filled, because they are there.

For over two decades, prison reform groups have advocated a moratorium on all new prison construction, believing that capacity drives use, and hoping that lack of capacity would curtail use. That strategy has backfired, and increasing numbers of prisoners are paying the price in terms of overcrowding and deteriorating physical conditions.

Critics fear that private prison companies will become powerful lobbyists for harsher punishment, in an attempt to artificially stimulate demand for their product.

Lobbying, however, is an inevitable, and not necessarily undesirable, aspect of representative government. Prison reform groups have long been powerful and effective lobbyists on prison issues. Up to now, the only organized and influential interest groups forming a constituency for corrections have been correctional agencies, public employee unions, and reform groups.

Commercial enterprises survive and prosper in the long run not by artificially stimulating a spurious demand for their products, but by accurately anticipating and responding to shifts in real demand. Right now, there is a big overhang of genuine, unmet demand for imprisonment. However, if public or political opinion changes, and fosters a demand for alternatives to prison, commercial companies should be able to respond rapidly to such a shift.

5. Flexibility

Critics of contracting argue that it is impossible to write a contract that is as broad and flexible as the mission of a public agency needs to be. Contractors are understandably reluctant to depart from the provisions of their contracts. Renegotiating and changing contracts is time-consuming and terminating a contract is often very difficult. Thus, it is harder for the government, under contracting, to order and control marginal changes.

The AFSCME maintains a file of instances where it has been necessary to terminate contracts for various public services because they proved to be too costly or unsatisfactory.[2] These examples do support some of their criticisms of contracted services, but they also show something else. They indicate that it is feasible to terminate a private contract. In contrast, how feasible would it be to replace or halt the activities of a government agency, staffed by tenured and unionized civil servants, whose services were found to be unsatisfactory? It may not always be easy to terminate a contract, but experience has shown that it is nearly impossible to terminate a government agency, even one supposedly made mortal by a sunset law.[3]

As for marginal changes, it is one of the strengths of private prisons that their greater management flexibility and more rapid speed of response promote both minor innovations and major program changes, including initiation, expansion, contraction, or termination.

6. Security

What happens in the case of a riot, or a strike? Many times, critics of private prisons ask this question, then move on to other issues as if it were unanswerable, or required no answer. The answer, however, is about the same as for a government-run prison.

Prison contracts typically include contingency plans to deal with emergencies or disruptions, such as strikes, riots, or bankruptcy. It may be unclear whether or not contracted prison guards would have the right to strike, but the absence of such a right has not prevented public guards from engaging in strikes, sickouts, and other job actions.

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[2]American Federation of State, County, and Municipal Employees, "Contracting out in Local Government" (unpublished paper, March, 1984).

[3]Robert Behn, "The False Dawn of the Sunset Laws," The Public Interest 49 (Fall 1977): 103-118.

State police and the National Guard would be the ultimate recourse in a strike by private guards, as they are now for public employees. However, since a strike or other disruption would allow the government to terminate a contract, unemployment as the result of a strike may be a more credible threat to private than to public guards. Also, a performance bond can be used to defray the government's cost if it has to take control of a contracted facility.

It should be noted that it is common practice in many public prisons and jails that guards do not carry weapons inside. In the event of disturbances, force is deployed from outside. Major disturbances often require reinforcement from state police or national guard units. This practice would not be different in a privately run prison. However, the cost of such intervention could be negotiated and specified in the contract, so that it might or might not distribute differently from how it does now.

7. Liability

Critics warn that governments will not escape liability by contracting the administration of their prisons, as some advocates supposedly claim.

To some extent, this is a strawman argument, since vendors do not claim that contracting can immunize the government from legal liability. If anything, it is the opponents of private prisons who imply that government can escape liability (through sovereign immunity) if only it stays away from contracting.

Prisoners in private facilities have at least as many avenues of civil redress as do their fellows in government-run prisons. Total liability, in other words, is not decreased. Nor is government legally immunized; it retains its ultimate responsibility and liability.

However, it is possible that contracting could reduce government's actual liability exposure, as opposed to its legal liability potential. That is, the financial damages likely to be suffered by government as a result of its legal liabilities can be reduced. Liability exposure can be reduced in several ways:

1. by running prisons better, and thus avoiding lawsuits;
2. by achieving certification, which greatly enhances the defense against lawsuits;
3. by carrying adequate insurance;
4. by agreements in which the contractor defends the government in court and indemnifies it against legal damages;
5. by developing extensive legal expertise and resources, both for preventing and for fighting lawsuits; and
6. by settling quickly out of court, which is easier for private firms than for public agencies.

8. Accountability

Critics claim that contracting reduces accountability because private actors are insulated from the public and not subject to the same political controls as are government actors. Also, the critics charge, contracting diffuses responsibility; government and private actors can each blame the other when something goes wrong.

Proponents counter with the argument that properly written contracts identify goals, standards, and areas of responsibility, thereby increasing accountability both for the government and for the contractor. Contracting increases accountability because the government is more willing to monitor and control a contractor than it is to monitor and control itself.

Contractors -- just like their governmental counterparts-- are accountable to the law, to governmental supervisors, and ultimately, to the voting public, through the political system. In addition, they are accountable, through a competitive market, to certain forces not faced by government agencies. They are answerable to insurers, investors, stockholders, and competitors. As a mechanism of accountability and control, the force of market competition is unmatched.

The most obvious form of accountability in corrections, however, is legal accountability. If the Rule of Law can limit and constrain the power of the state, then surely it can hold a private firm at least equally accountable. Constitutional standards, for example, will apply equally to all prisons, whether run by government employees or by contractors.

9. Corruption

Critics contend that contracting invites corruption, in the form of favoritism, bid-rigging, conflict of interest, bribes, kickbacks, etc.. They point to contemporary examples in other areas of contracting, and to historical examples of corruption in contracting for inmate labor.

The historical abuses came at a time when corruption was much more prevalent in the criminal justice system generally. Wardens and sheriffs had much greater discretion and autonomy then. Contracting was often an extension and application of that corruption, but it was not a cause of it. For example, some states ran their prisons as profit-making enterprises just as ruthlessly and exploitatively without the aid of private contractors as others did with them. In today's political and legal environment, especially with the firmly established revolution in prisoners' rights, such extreme and flagrant corruption and abuse are very unlikely.

It must be recognized that large prison contracts, like any other contracting, could be attractive targets for political corruption. To use this as an argument against contracting, however, is illogical. Political corruption is a corollary of government, not just of government contracting. Payroll padding, nepotism, cronyism, patronage, bribery, payoffs, featherbedding, dishonest budget inflation, conflicts of interest, misuse of public funds, links to organized crime, and many other kinds of corruption also occur within public employee unions and within governmental units that provide services directly, rather than through contracts.

Prevention of corruption lies not in government monopoly, but in an open, public, and competitive contracting process.

10. Dependency

Critics worry that contractors will engage in "lowballing," in which they obtain contracts by making unrealistically low bids. After the contract begins, the government will gradually lose much of its capacity to resume the operation itself. High capitalization costs will prevent new competitors from entering the field. When government becomes dependent on the contractor, the contractor will be free to jack up prices. Worse yet, the contractor may go bankrupt, leaving the dependent government without any correctional capacity.

Public agencies can guard against lowballing by evaluating proposed budgets for their realism, rather than just looking for the lowest bidder. The lowest bid is not necessarily the best bid. Also, regular renegotiation or renewal of contracts, with at least the potential for competition through open bidding, can make lowballing a strategy too costly to pursue. No private company can raise its fees very high above a reasonable profit margin without inviting exposure and opposition by competitors.

Market entry costs for single, especially low-security, facilities are well within the reach of small businesses or groups of investors. As the number of private prison companies grows, the ability of a jurisdiction to replace a failing contractor with a competitor will increase. In any case, government always has the option of taking the operation back itself. The physical and most of the human capital are not likely to be going anywhere.

The issue of dependence, as an objection to private prisons, has a self-defeating character. If dependence is a real problem, will the problem be solved if there are no private vendors? If a public service can only be supplied by government employees, organized perhaps by AFSCME, is that not also a form of dependence? To argue that a private supplier of a public service will

not be sufficiently competitive is not a very good argument for public monopoly.

Conclusion

The future of private prisons seems fairly assured. Contracting of services and of nonsecure facilities is already a permanent feature of corrections. At this point, contracting of secure facility management is still unfamiliar and controversial, but it gives every indication of growing rapidly. The forces behind its emergence are still in place and growing stronger. Crowding is increasing, along with judicial pressure to do something about it. The judicial solution--closing institutions or capping them, and fining jurisdictions that do not respond to court orders--only serves to increase population pressures at other institutions and financial pressures on government. While crime rates have declined slightly in recent years, public demand for imprisonment has not. Polls show that the public believes in longer sentences than are now being served and is upset over early release as a response to crowding. At the same time, the public often rejects the issuance of bonds to build new prisons on governmentally borrowed money. Proprietary prisons are not an easy solution to this dilemma, but they do offer some relief at an affordable price.

Many criticisms of private prisons and jails have been raised and examined in this report. Virtually all potential problems facing private prisons have close counterparts among the problems troubling prisons run directly by the government.

All prisons, both public and private, face challenges in the areas of authority, legitimacy, procedural justice, accountability, liability, cost, security, safety, corruptibility, and so on. They face these challenges primarily because of the nature of their mission, not because of their incorporation as public or private entities.

A good case can be made that all organizations are public. They vary only in their mix of economic and political authority and in the degrees to which they both exercise and are constrained by each type of authority.[4] "Public" and "private" prisons are more alike than they are different.

Still, they are different, and these differences should be explored, experimented with, and exploited. The goal of running prisons that are safe, secure, humane, efficient, and just, is too important to reserve to the government by monopoly. If that

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[4]Barry Bozeman, All Organizations Are Public; Bridging Public and Private Organizational Theories (San Francisco: Jossey-Bass Publishers, 1987), Chapter 6.

goal can be better served by private companies, they should be allowed a chance to prove it. If it is best served by the government, then the government, too, should be required to demonstrate that fact empirically, not merely announce it by edict.