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# PRIVATIZATION OF THE AMERICAN PRISON SYSTEM: AN IDEA WHOSE TIME HAS COME?

WARREN I. CIKINS\*

## I. EVOLUTION OF PRIVATIZATION

The possibility of privatizing the American prison system has commanded a growing national attention. This great surge of interest is attributable to many sources. A major factor has been the substantial increase in the number of persons incarcerated in the past decade, even though the Federal Bureau of Investigation (FBI) reports a drop-off in the crime rate in most categories during this same period.<sup>1</sup> The United States reportedly has the dubious distinction of being the third-highest incarcerator nation in the world per-capita, behind only the Soviet Union and South Africa.<sup>2</sup> The figures vary on the exact number of persons incarcerated, but it is probably fair to say that nearly 450,000 are in state penitentiaries, almost 40,000 in federal prisons, and over 200,000 in local jails.<sup>3</sup> Add to that number (already totalling almost 700,000 persons) the number of persons on parole, probation, pre-trial diversion, and numerous other relevant categories, and one can readily see that those involved with the prison system over a one- or two-year period will amount to millions.

Simultaneously, the cost of building prisons and maintaining inmates has soared. While the figures vary regionally and depend on the classification of inmate housed, a reasonable average cost of construction per inmate today is \$60,000-80,000, and an average annual cost of maintenance ranges from \$12,500-18,000.<sup>4</sup>

The American people tend to assume a hard-line position on the issue of crime. Nonetheless, there is also considerable resistance to the expenditure of additional billions of taxpayer dollars to build facilities to maintain these wrongdo-

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1. U.S. DEP'T OF JUSTICE, CRIME IN THE U.S., 1984 (1985).

2. Nagel, *Prisonia*, in NAT'L INST. OF CORRECTIONS, U.S. DEP'T OF JUSTICE (Sept. 18-20, 1979).

3. Review of data provided by U.S. Department of Justice, Bureau of Justice Statistics, 1984.

4. *Id.*

ers.<sup>5</sup> The inevitable result, of course, is prison overcrowding, deteriorating conditions, and many lawsuits alleging cruel and inhumane treatment.

In a climate of governmental expenditure cut-backs, it is quite logical that the private sector would explore the opportunities created by this governmental impasse. Even if governmental entities were prepared to finance the construction of additional facilities, the process is often a long, tedious, and uncertain one. It is understandable, therefore, and very much a part of the new movement toward closer governmental-private sector cooperation, to have both existing and newly created corporations exploring and even already engaging in private sector construction and management of prisons and jails.

The third major force that has been at work in recent years has been the strong commitment of Chief Justice Warren Earl Burger to improve the conditions of prison life. This commitment stems from his childhood in Minnesota, when he visited the Stillwater Minnesota prison and vowed to promote major reforms. As he stated in an historic speech to the Lincoln, Nebraska Bar Association on December 16, 1981, "when society places a person behind walls and bars it has an obligation—a moral obligation—to do whatever can reasonably be done to change that person before he or she goes back into the stream of society."<sup>6</sup> He urged, as he had been doing for years, that high priority be given to meaningful literacy and job training for inmates. Too many prisons, he bemoaned, serve only as human "warehouses" which make a high rate of recidivism inevitable.

While he commended the Federal Bureau of Prisons for its innovative efforts despite "statutory restraints on production of goods in prisons—and archaic public attitudes," the Chief Justice recognized that the states were generally far behind in remedial actions. He endorsed national legislation to provide \$6.5 billion for improved prison facilities but worried about the money being made available or the states taking appropriate action to utilize such sums in a constructive manner. In that regard, he spelled out a four-point program:

- (a) conversion of prisons into places of education and

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5. Much remains to be done, however, to explore meaningful alternatives to imprisonment as punishment for many offenders, especially the non-violent.

6. *More Warehouses, or Factories with Fences?*, address by Warren E. Burger at the University of Nebraska (Dec. 16, 1981).

- training and into factories and shops for production;
- (b) a repeal of statutes which limit prison industry production;
  - (c) an affirmative limitation against any form of discrimination against prison made goods;
  - (d) a change in attitudes of organized labor and in the leaders of business toward the use of prison inmates to produce goods or machine parts.<sup>7</sup>

It is important to understand the crucial significance of this Burger initiative. A mixture of commitment to rehabilitation and dedication to the Protestant work ethic had led the Chief Justice to put the prestige of his office behind a national priority for prison reform. Since most of those in elective office feared to take the initiative, he moved to make the nation more sensitive to this urgent situation. He forced business and labor to re-evaluate their positions on prisoner employment and production. The momentum created by the Chief Justice has not only led business to take seriously the concept of prison industries, but has also stimulated the thought that business might go further and consider the construction and operation of prisons.<sup>8</sup>

#### A. "Privatization" Defined

The term "privatization" means many things to many people. For purposes of this article, the term will *not* mean the role of the private sector in operating prison industries, although references will be made to the commonalities and the general range of approaches to improving the status of prisoners. Rather, privatization *will* mean the construction of new facilities by the private sector as an alternative to public bond issues or outright tax expenditures. The techniques that have been employed are straight lease arrangements and

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7. *Id.*

8. I do not intend to duplicate the work on the privatization of prison industries; see Haller, *Prison Industries: A Case for Partial Privatization*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479 (1986). I would like to emphasize, however, that the gradual growth of consideration of privatization of construction and operation of prisons has been an almost concurrent development. I do not intend to state that this was the intent of Chief Justice Burger but rather a logical consequence of exposing the private sector to their responsibilities and opportunities. Again, this does not mean that there were not some private sector involvements in prisons before the Burger initiative, but only that the Chief Justice has increased the volume of such outreaches and magnified the intensity of the public dialogue on their feasibility and validity.

variations of lease/purchasing. Privatization will also include public contracting with private vendors for actual operation of facilities (primarily state facilities and primarily those for adults); only slight attention will be given to contracting for specific correctional services.

### B. Available Research

While the field of privatization is still in its very early stages of development, I would like to commend the National Institute of Justice (NIJ) and its Director, James Stewart, for commissioning a study of the privatization of corrections which was released in February of 1985.<sup>9</sup> This document was released in conjunction with a National Forum on "Corrections and the Private Sector," held by the NIJ on February 20-22, 1985. This Forum represented the most complete review of all the issues involved in privatization to date.<sup>10</sup>

The topics that were discussed and debated at the Forum included facility management, construction financing, purchase of service, cost issues, legal issues, employee relations issues, security and discipline issues, solicitation and preparation, accountability and monitoring, standards and facility management, and public opinion. Many of the same topics will be summarized in this paper.

One of the authors of *The Privatization of Corrections*, Joan Mullen, has also prepared an NIJ *Research in Brief* which covers *Corrections and the Private Sector*.<sup>11</sup> This document represents, primarily, a summary of an earlier version of the NIJ major study which was released in May, 1984. The Mullen Brief also incorporates many of the findings of the report of the National Institute of Corrections, entitled *Private Sector Involvement in Prison Services and Operations*, published in February of 1984.<sup>12</sup>

The analyses and materials presented in these three documents represent much of the "state of the art" of the debate about the virtues and weaknesses of privatization. This

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9. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *THE PRIVATIZATION OF CORRECTIONS* (1985) [hereinafter cited as *THE PRIVATIZATION OF CORRECTIONS*].

10. While I have factored prison industries out of my presentation, this topic was also given full attention at the Forum.

11. Mullen, *Corrections and the Private Sector*, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE (1985).

12. Camp & Camp, *Private Sector Involvement in Prison Services and Operations*, CRIMINAL JUSTICE INST. (1984).

paper will therefore summarize and up-date the findings of these three documents.<sup>13</sup>

## II. ELEMENTS OF PRIVATIZATION

The remainder of this article moves from the examination of the state of the art on privatization to an evaluation of the advantages and disadvantages of this recent phenomenon. This country will probably not see the issues clearly resolved in the near future; nonetheless, it is important that the participants in the debate avoid irrelevant arguments. Relevant to the discussion, however, must be the question of the need for more prisons, the opportunities for alternatives to incarceration, and the options available to reduce the rising number of persons imprisoned. Privatization cannot be judged without reviewing both its impact on public willingness to explore these options and the public commitment to utilizing punishment as a means of rehabilitation.

### A. Lease/Purchase Financing

In recent years, the private sector has been offering state and local governments methods of financing prison and jail construction that avoid citizen approval of bond issues or jurisdictional debt limits. The most popular method is the lease/purchase agreement, which involves "buying on the installment plan." A range of benefits are available to private investors that make such a plan competitive with conventional financing.<sup>14</sup> A number of states are considering enabling legislation, several already have it, and local governments in numerous areas of the country have been deeply involved, according to investment houses such as Merrill Lynch, E.F. Hutton, and Shearson Lehman.<sup>15</sup>

According to NIJ, "This area of privatization is no more or less than a straightforward market opportunity for the private sector that may allow the government to move more certainly or rapidly than it might by following traditional public sector financing routes."<sup>16</sup> Such a method may be more or less expensive than a public bond issue, depending on individual circumstances.

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13. I urge the reader to turn to these documents for a more thorough explanation of the issues.

14. THE PRIVATIZATION OF CORRECTIONS, *supra* note 9, at 4.

15. *Id.*

16. *Id.*

B. *Contracting for Governmental Facility Management (for Sentenced Adults)*

The use of confinement service contracts has had some modest success in helping various governmental entities expand corrections capacity without assuming ownership of the acquired facilities.<sup>17</sup> In this type of arrangement, the vendor locates the site, leases or contracts an appropriate building, and provides all the staff and services necessary to operate the facility. The vendor usually charges the government a daily rate per inmate to cover investment, operating costs and profit. At the federal level, this concept has come into vogue as a means of dealing with illegal alien populations. The Immigration and Naturalization Service, the U.S. Marshals Service, and the Federal Bureau of Prisons have entered into such contracts, mostly in the Southwest and Far West. These facilities are intended only to provide decent warehousing for aliens whose terms of confinement are relatively short and for whom security requirements are minimal.

No significant trend has developed in the contracting practices of state adult corrections agencies. According to the NIJ report, "although new corporate providers had entered the field more aggressively than ever before, their most immediate prospects appeared to be confined to contracts for community-based facilities, closely resembling the halfway house or pre-release model that has been a standard feature of state corrections for many years."<sup>18</sup> Such an approach has been employed by twenty-two states. If there has been any shift at all, it has resulted from the pressures of prison population increases requiring larger facilities, thus necessitating a move from voluntary groups to corporate providers. The question of the use of this contracting procedure for the management of more secure adult facilities remains unanswered. Preliminary contracting efforts are underway but have not yet come to fruition.

Local government officials are more sympathetic to the idea of private contracting, primarily because of their more limited fiscal and management capabilities. There are a range of pending proposals, especially in the West and South, even though the National Sheriffs Association has registered formal opposition. There is special interest in arrangements that will enable several jurisdictions to share the costs of construc-

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17. *Id.*

18. *Id.* at 6.

tion and management.<sup>19</sup>

With regard to contracting for correctional services, arguments have been made that private operators provide specific services less expensively than the government, that it makes more sense to contract for services needed on an intermittent basis only, and that a higher quality service can be delivered, especially important in such areas as medical care.<sup>20</sup> As would be expected, the use of such contracting varies significantly from state to state, but at least forty-one states utilize some form of service contracting.<sup>21</sup> The most commonly used contracts are for medical/psychiatric and food services.

### C. State Adult Facility Proposals

While it is too soon to evaluate the extent of the trend, a number of corporate providers have entered the field and are pursuing contracts to operate adult facilities.<sup>22</sup> One of the best known is the Corrections Corporation of America (CCA), a profit-making organization based in Nashville, Tennessee and capitalized at \$35 million.<sup>23</sup> While CCA has ambitious plans for state adult facilities, its best prospects to date seem to have been related to local facilities or state-sponsored community-based facilities.<sup>24</sup> CCA currently has contracts to manage seven facilities, mostly local minimum security sites, with only two that are federal.

### D. Federal Facility Experience

In late 1983 and into 1984, the Federal Bureau of Prisons (FBP) attempted to have the private sector build and operate a 400-600 bed adult facility in the Southwest to house immigration law violators. Four firms, including CCA, responded; two proposed to renovate and two others to activate existing facilities.<sup>25</sup> After a site was selected, the program was

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19. *Id.* at 7.

20. *Id.* at 55.

21. *Id.*

22. *Id.* at 59.

23. The founder of the company is Thomas Beasley, a Tennessee businessman with real estate and insurance interests. He is former chairman of the Tennessee Republican Party and a friend of Republican Governor Lamar Alexander. He is backed by Massy Birch Investment Group, the same investment group that started the Hospital Corporation of America.

24. THE PRIVATIZATION OF CORRECTIONS, *supra* note 9, at 59.

25. *Id.* at 60.



cancelled, primarily because of local opposition. The FBP has continued to solicit bids for another site in the San Diego area. It does have a contract with Eclectic Communications, Inc. (ECI) in La Honda, California to house federal prisoners who are sentenced under the Youth Corrections Act and who have low security needs.

#### E. *Local Facility Experience and Proposals*

Because of its great fiscal restraints, the local level of government "may prove to be the most fertile ground for facility management contracting."<sup>26</sup> Other than the CCA's ambitious outreach, one of the most active market entrants has been the profit-making National Corrections Corporation (NCC), which has been involved in jail construction since 1972.<sup>27</sup> Based in Denver, Colorado, NCC has primarily constructed jail facilities for lease to local governments, but recently has expanded its interests to cover jail operations as well. Enabling legislation is needed in many states to permit NCC to conduct such private operations. One novel approach is the provision and operation of regional jail facilities shared by two to four counties, already approved by the New Mexico legislature.

#### E. *Regional Approach*

Following up on this concept, Buckingham Security Ltd., based in Lewisburg, Pennsylvania, is attempting to construct and operate maximum security prisons for adult offenders, specializing in protective custody prisoners drawn from the populations of a number of state prisons.<sup>28</sup> The company acquired a former industrial plant in Beaver County, Pennsylvania, to be converted into a 716-bed facility. Construction costs were projected at \$20 million. A second facility was planned in Idaho, on a site originally used as a hospital, but ran into financing difficulty. These developments also hinged on the passage of enabling state legislation. Almost twenty states expressed a willingness to participate in the utilization of the Beaver County facility and might be interested in other sites obtained by Buckingham.

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26. *Id.*

27. *Id.*

28. *Id.* at 61. Buckingham Security is run by Charles Fenton, a former federal prisons warden.

### III. SUPPORT FOR PRIVATIZATION

"Politicians and bureaucrats, troubled by escalating costs of providing such services, are increasingly supportive of efforts by the private sector to take on tasks historically performed by government . . . Jurisdictions where voters are reluctant to finance replacement of archaic prisons are prime targets of the corporate jailers."<sup>29</sup> So state those who believe that the private sector has a role to play in prison construction and operation; they view it as analogous to the planning undertaken for hospital management in the 1970's. Nearly forty states and 155 counties are operating prisons and jails under scrutiny of the federal courts because of overcrowding.<sup>30</sup> More than \$5 billion in new prison construction is on the drawing boards, with \$1 billion per year already being spent.<sup>31</sup> Since the public is ambivalent about concerns of public safety requiring this huge expenditure (coupled with possible public debt limitations), the situation is well suited to exploring private sector alternatives.

In 1984, Hamilton County, Tennessee, which includes Chattanooga, became the nation's first county to contract with a private firm to run its jail. CCA began operation of a work farm facility for 300 male and female offenders, under a four-year management contract. This facility contains a mix of inmates, including local, state, and federal prisoners. While most inmates are short-termers, some persons are serving six-year sentences. The facility does not provide medical or psychiatric treatment. The CCA contract incorporates a Statement of Work which includes clauses requiring CCA to meet or exceed American Corrections Association Standards for Prisons and Jails within two years. It also contains minimum procedural requirements related to staffing, food services, financial affairs, and other areas.<sup>32</sup>

In Kentucky, after the legislature turned down prison construction in three consecutive sessions, state corrections officials invited vendors to bid on building a 200-bed minimum security facility. The outcome remains uncertain.

Governor Mark White of Texas, faced with \$870 million construction in the next decade to comply with court ordered standards, calls privatization "a very viable alternative."<sup>33</sup>

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29. Hagerstown Evening J., Aug. 7, 1985, at C8, col. 1.

30. *Id.* at C8, col. 2.

31. *Id.*

32. THE PRIVATIZATION OF CORRECTIONS, *supra* note 9, at 61.

33. Wash. Post, May 7, 1985, at A15, col. 3.

Unable to gain approval for massive state-funded construction programs, Governor White welcomes private construction money. As evidence of what might be achieved, the CCA has built the Houston Detention Center for illegal aliens for the Immigration and Naturalization Service (INS). CCA not only built the facility but financed it and operates it. The corporation receives \$25.74 daily for each inmate from its client, the INS, and handles up to 350 illegal aliens awaiting deportation hearings.<sup>34</sup> "They are absolutely fantastic," said INS Houston District Director, Paul O'Neill, "It's a pleasure to do business with people who know what they're doing."<sup>35</sup> O'Neill said that CCA used its own equity to build the \$4.3 million minimum security facility, faster than the INS could have done (by about two years), and that its daily fee is lower than general INS costs, possibly by as much as twenty percent.<sup>36</sup>

"When you need something, you can look for your best price and buy it tomorrow. You don't have to spend a month filling out forms" said John Robinson, warden of CCA's facility, who worked for eleven years in Virginia's prison system.<sup>37</sup> The facility is designed for a ratio of only one guard for fifty inmates. All the guards are bilingual, and their starting salaries slightly higher than those of their state system counterparts. There is some evidence that the facility does not meet the highest standards of safety and efficiency. Even supporters agree that private enterprise will make mistakes. Ted Nissen, a former California prison administrator who owns Behavioral Systems of Pasadena, admits that "a lot of people are going to come in who don't know the first thing about prisons," but defends private enterprise as a valid option since "deep down this country is just plain tired of bureaucrats."<sup>38</sup>

#### IV. OPPOSITION TO PRIVATIZATION

"Public-employee unions, as well as some prison officials, contend that it is improper for entrepreneurs to operate prisons, arguing that only government should be permitted to

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34. *Id.* at A15, col. 1.

35. *Id.*

36. *Id.*

37. *Id.* at A15, col. 4.

38. *Id.* at A15, col. 6. Behavioral Systems of Pasadena grosses \$6 million annually, operating halfway houses and INS holding centers.

limit people's freedom."<sup>39</sup> "Labor leaders warn of union-busting. Some public officials fear they could be liable for prisoner abuse dealt out by private jailers."<sup>40</sup> The most controversial question involved in privatization, according to these people, is whether anyone other than the state has the right to keep people behind bars.

Perhaps the most formidable critic of prisons for profit is the American Federation of State, County and Municipal Employees—about 50,000 of its 1.1 million members are correctional employees. According to union president Gerald W. McEntee, "American business, with all the help the White House can give it, has invaded the corrections field."<sup>41</sup> He cited RCA, Control Data, and Wackenhut as being involved and added, "there's only one thing behind corporate America's sudden interest in prisons. Money. Profits. Suddenly corrections is not just part of the criminal justice system. It's a growth industry, a new profit center."<sup>42</sup> He maintained that private pay and training were worse than pay and training provided by the public sector. He warned of the corruption: "Who is responsible when something goes wrong. Prisons for profit are bad government and bad justice."<sup>43</sup> Evidence of professional reservations is found in the NIC study that shows seventy-five percent of state corrections directors would not consider contracting an entire prison to a private company.<sup>44</sup>

Similarly, a critic of the Houston CCA effort stated that "the temptation to maximize profits by cutting costs is just going to be too great."<sup>45</sup> Michael Waltzer agreed:

[I]t is crucial that the agents of punishment be agents of the laws and of people who make the laws . . . . Though it may sound paradoxical, the criminal is punished by his own agents — who are ours, too. That's why private punishment is ruled out . . . . It exposes the prisoners to private or corporate purposes, and it sets them at some distance from the law.<sup>46</sup>

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39. Hagerstown Evening J., *supra* note 30.

40. *Id.* at C8, col. 2.

41. *Id.* at C8, col. 3.

42. *Id.* at C8, col. 4.

43. *Id.*

44. Camp & Camp, *supra* note 12, at 33.

45. Taylor, *Should Private Firms Build, Run Prisons?*, Wash. Post, May 7, 1985, at A15, col. 1 (quoting Bruce Griffiths, counsel for the Houston chapter of the ACLU).

46. *Id.*

Waltzer feared that even the savings from a for-profit system would not be permanent. If a vendor becomes a sole source contractor in a given state, Waltzer argues, he "will run up costs and/or be exposed to the same types of lawsuits that have forced public prison systems to increase expenditures."<sup>47</sup> ACLU spokesmen indicate that such lawsuits will allege "mistreatment or substandard conditions, and that states ultimately will be liable for such suits."<sup>48</sup>

The Houston Chapter of the ACLU sued the INS for contracting with CCA in a matter not related to the CCA facility, and in May of 1984, a federal judge ruled in their favor. The case was brought on behalf of two Columbian stowaways, one of whom was fatally shot by Danner's Inc., a security service under contract to the INS. The decision is on appeal.<sup>49</sup>

This brief survey of the support and opposition to privatization is designed to reveal the growing confrontation concerning the increased private sector involvement in construction and operation of prisons and jails. Some sampling of the private companies involved demonstrates that they have been successful primarily in areas of more conventional local or federal, short-run, minimum security warehousing.

The remainder of this paper will explore the operational advantages and disadvantages of continuing the privatization effort and will then examine the political and legal issues involved in some greater depth. While other sources will be utilized, the NIC study of the privatization of prisons will again provide the basic core of data evaluated.

## V: OPERATIONAL ADVANTAGES AND DISADVANTAGES

Proponents and opponents cite approximately six key operational (and financial) arguments regarding the role of the private sector, as follows:

### *Advantages*

1. Costs of construction and operation by the private sector *may be* less, especially in the short run;
2. Straight leases and lease/purchase may provide benefits to investors (promoted by major investment houses). Straight leasing provides investors with capital apprecia-

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47. *Id.*

48. *Id.*

49. *Medina v. O'Neill*, 589 F. Supp. 1028 (S.D. Tex. 1984). *See* Wash. Post, Dec. 20, 1984, at E6, col. 3.

tion and non-cash losses with which to offset cash income for tax purposes, including depreciation and investment tax credits. Lease/purchasing allows investors to deduct from taxes the interest component associated with periodic lease payments. Both leasing arrangements provide investors with a steady cash flow and early return of investment;<sup>50</sup>

3. With a fixed per diem rate, the government faces little risk of cost overruns;
4. Staffing, including salaries, can be based on qualifications, without limitations of civil service. The state also saves pension and benefit costs;
5. Programs have great flexibility since they can be started more rapidly by private organizations and then resolved quickly since they are not bound by civil service and state procurement regulations; and
6. There is a great possibility of service improvements with the profit motive incentive.

*Disadvantages*

1. The lease-purchase arrangement has many drawbacks: the governmental entity assumes a long-term obligation without voter approval, overcoming legal barriers may involve complexities in many states, and the arrangement does not shift the risk of facility obsolescence;
2. While contractors will carry liability insurance, the state also retains liability;
3. The state has difficulty in determining and enforcing appropriate standards of operation;
4. Because of the time gap between annual contracts and facility leases and construction, if a contract is cancelled or shifted, there is some financial exposure on both sides;
5. A significant unevenness of prison population over time will cause difficulties in implementing the per diem reimbursement format; and
6. The private sector will have more difficulty in overcoming local opposition to facility siting through zoning challenges and other measures.

## VI. POLITICAL AND LEGAL ISSUES

The question of delegating to the private sector the states' responsibility to provide and operate facilities to incar-

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50. THE PRIVATIZATION OF CORRECTIONS, *supra* note 9, at 50.

cerate offenders remains at the heart of the privatization debate. When a democracy deprives its citizens of their liberty, it forcefully exercises state power. Major questions of legality and propriety are raised where the state delegates management responsibility to the private sector, especially the functions of classification and control of inmates. Can the police power be delegated to private individuals unless these individuals are clothed with state authority through some action such as being deputized? A corollary issue includes parole release judgments which cannot be clearly distinguished from classification actions and relates to questions of depriving persons of their freedom. As the NIJ assessment summarizes the issue, "is corrections one of the *raison d'être* of government?"<sup>51</sup>

A compounding problem concerns the possibility that the private sector might maneuver to continue unneeded or excessively costly programs. This problem relates to the question of whether the private sector can achieve profit maximization in a manner that is consistent with the public interest in sound corrections policy.

Opponents of privatization argue that the profit motive is destructive of legitimate corrections policy; these arguments, however, are rebuttable. First, to the charge that private contractors will "skim" the market by dealing with preferred inmates and leaving the "dregs" to the public corrections system, the response is that the state should establish careful admissions criteria which avoid private intake decisions and ensure that there is little private discretion in making transfer decisions. Second, to the charge that the private sector will maximize enrollment and thus sabotage state parole and pre-release programs, the response is that state contracts should provide incentives for achieving reduced costs and lowered occupancy. In any event, determinate sentencing will weaken the validity of this charge. Finally, to the charge that the profit motive will encourage overcrowding, the response is that the state can employ disincentives related to contractual minimum standards. In actuality, the public spotlight will encourage the private sector to set a good example, possibly an example that the public sector might be hard-pressed to match.

Much depends on the ability of state and local government to avoid situations that would encourage political corruption and private meddling with contracts and standards.

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51. *Id.* at 72.

Once again, the answer is careful monitoring of developments and the enactment of strong conflict of interest statutes.

The attitude of the corrections profession toward the privatization movement will also be a significant factor. To date, the readings are mixed. Many professionals fear the disruption of their long-term efforts to improve prison operations, and worry about the danger of staff raiding which will weaken the quality of public service. As previously mentioned, the public employee unions have, in some cases, spoken out against what they see as a movement with potential "union-busting" results.

Simultaneously, those who promote the virtue of civil service standards are alarmed by the efforts to subvert those standards in the name of mobility and salary flexibility. Coupled with this concern, however, is the worry of some in public corrections management that they will lose a considerable amount of their areas of jurisdiction, and they are simply anxious to protect the status quo. The argument rages as to whether the private sector quality of service is better because of competition and no civil service limitations; some maintain that any short-run improvement will deteriorate when the major private sector providers dominate the field.

Mark Cunniff, executive director of the National Association of Criminal Justice Planners, has been quoted as saying "there's a lot of snake oil out there, if you will. The problem right now is they have no track record."<sup>52</sup> On the other hand, Anthony Travisano, the executive director of the American Correctional Association (ACA) stated, "we ought to let business try. People are going to watch private industry very closely, probably more closely than they watch the public sector. The companies have a lot of incentive to do a good job, because they won't be rehired if they don't."<sup>53</sup> The ACA has issued a Policy Statement on Private Sector Involvement in Corrections which states:

Government has the ultimate authority and responsibility for corrections. For its most effective operation, corrections should use all appropriate resources, both public and private. When government considers the use of profit and non-profit private sector correction services, such programs must meet professional standards, provide necessary public

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52. Wash. Post, *supra* note 51, at E6, col. 3.

53. BUCKINGHAM TIMES, Winter 1985, at 1.



safety, provide services equal to or better than government, and be cost-effective compared to well-managed governmental operations.<sup>54</sup>

The legitimate objections to and perceived shortcomings of the private sector corrections effort by some in the public corrections community cannot and must not be ignored. Many dedicated professionals, who have been starved for resources for decades, must be persuaded that a public-private partnership will be beneficial to both, since private sector relief of public sector prison overpopulation should provide greater per-inmate public resources. Each sector has much to learn from the other, and the possible utilization of the much smaller private sector component as a yardstick for public performance should provide an incentive to both and, given appropriate safeguards, should enhance the public interest.

Turning to the most crucial and sensitive issue of the legal and moral authority of the state to contract with the private sector to build and, especially, to manage adult correctional facilities, there is, once again, a wide range of opinions. On the question of whether the government can delegate the authority to use force, the answer appears to be "yes," provided that the contractor can meet public standards. The issues related to liability are more complex, since it is somewhat unclear how private vendor and public institution liabilities mesh. Certainly, private contracting does not offer the state any new protections from suit.

One argument asserts that the contract should improve correctional standards. According to the NIJ study, there are at least six contractual issues involved: a) the duration of the contract; b) appropriate payment provisions; c) the establishment of standards of minimum and maximum occupancy levels; d) a review of the types of inmates involved; e) the establishment of standards of performance; and f) a determination of the value of performance incentives.<sup>55</sup> In response to this approach, the ACLU shows obvious skepticism:

Making money as a result of imprisoning people raises a number of legal and ethical questions. Who will monitor performance of the private company? Who will monitor and enforce regulations and standards? Of course all these items

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54. AMERICAN CORRECTIONAL ASSOCIATION, NATIONAL CORRECTIONS POLICY (ratified by American Correctional Association Delegate Assembly, at the Winter Conference, Orlando, Florida, January 20, 1985).

55. THE PRIVATIZATION OF CORRECTIONS, *supra* note 9, at 77.

can be written into the contract between the state or locality and the provider, but who can guarantee that they will be? And who will say that the conditions of the contract are satisfactory to those of us who are more concerned about prison conditions and the reduction of unnecessary confinement than in profits made on the backs of prisoners?<sup>56</sup>

A later issue of the *ACLU National Prison Project Journal* states that "it is difficult to imagine a situation in which a private prison owner or operator would not be held suable as acting under color of state law or as a state actor."<sup>57</sup> The ACLU emphasizes that government cannot contract away its duty to provide constitutional conditions of imprisonment for those it incarcerates. The private prison operator must, of necessity, stand in the role of state actor. Both the state and the private operator are considered liable. This entire line of argument, however, does not undermine the feasibility of private sector prison operations, since appropriate insurance would remedy the matter. The only question that remains unanswered is the ability of the state to prepare a sound contract covering all eventualities and its competence in monitoring that contract.

When all is said and done, the feasibility of private sector involvement in the building and operation of adult prison facilities depends on the state of public acceptance of such a move. Economic efficiency becomes secondary, because the debate on whether public or private construction or management is more economical can never be satisfactorily resolved. Even if one accepts the fact that a privately constructed prison can be erected more swiftly, that phenomenon avoids the question of whether the construction should have been undertaken in the first place. The battleground is the battleground of public opinion and perception.

With billions of dollars of additional prison construction and operations costs confronting the states, with a reluctant taxpaying public, and with a vigilant ACLU winning suits alleging cruel and inhumane prison conditions, privatization faces a difficult battle. Some additional alternatives must be explored if we are to ensure a nation-wide policy of incarcerating those who should be incarcerated, for punishment, incapacitation, deterrence, or rehabilitation reasons. While every state and every county must explore the whole range of

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56. J. NAT'L PRISON PROJECT, Fall 1984, at 6-7.

57. J. NAT'L PRISON PROJECT, Winter 1984, at 1-2.

alternatives to incarceration, it is clear that prison overcrowding will remain a serious problem for some time to come.

With regard to the morality or ethics of these new developments, it is difficult to defend the status quo. The ACLU has brought suit in the great majority of states for various state corrections inadequacies. Clearly, there is room for some experimentation. The federal system is justified as a superior governmental arrangement by providing fifty laboratories. Let these laboratories serve their constitutional role, with proper safeguards and "eternal vigilance." The private sector building and operating adult correctional facilities in several states, as a beginning, is certainly worth a full exploration.

## VII. THE FUTURE OF PRIVATIZATION

Norman Carlson, director of the Federal Bureau of Prisons, has indicated his willingness to carefully analyze the idea of privatization.<sup>58</sup> He calls for additional research and cites approvingly his experience with privately run youth facilities. He believes that the private sector has performed well in running halfway houses, community programs, and specialized institutions, but has doubts about whether private firms will ever run maximum security institutions. His reservations relate primarily to the matter of security and the ability of the private sector to run secure institutions.

Gerald Farkas, associate commissioner of Federal Prison Industries, Inc. (UNICOR), in a recent address to the American Correction Association, made the thoughtful observation that "privatization is not an issue where a position is needed - it is an alternative that is to be explored, used, and expanded where we identify a need. It is not a question of right or wrong. The key is having clear and measurable performance requirements for accountability at the same level as public agencies."<sup>59</sup> He urged the ACA Committee on Standards to present a final standard on privatization that would include monitoring and auditing of the private sector at the same level and intensity as programs and facilities in the public sector. Farkas further observed that, "by adopting this approach, we as a profession can monitor maximum flexibility in using private resources without compromising very impor-

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58. *THIRD BRANCH*, July 1985, at 1-4.

59. Address by Gerald M. Farkas, ACA Congress of Correction, New York (Aug. 14, 1985).

tant compliance issues.”<sup>60</sup> Carlson and Farkas have charted a course that would well serve federal, state and local governments.

In that context, the recent effort by the Corrections Corporation of America to receive Tennessee’s permission to operate the state’s entire prison system for the next ninety-nine years appears to be overly ambitious. According to the *Washington Post*, state government officials plan to consider the CCA proposal, which calls for hiring the state’s 4,500 corrections employees, during a special session of the state legislature in November.<sup>61</sup> On the theory that one needs to learn to crawl before one learns to walk, perhaps the CCA needs to demonstrate a greater capacity to perform beyond the local level and the federal immigration “warehousing” level before it reaches to this major level. Even if the strategy is to settle later for a lesser “piece of the pie,” it makes the corrections community needlessly suspicious of the motivations of the bidder.

Kenneth Schoen, who directs the justice program of the Edna McConnell Clark Foundation, is among those who express reservations about privatization. But in a recent *New York Times* article, he stated that “this debate on privatization is secondary to the question of whether we need more jail space.”<sup>62</sup> He worries about the fact that the prison population grows while the crime rate drops, and sees no clear relation between stiff sentences and a low crime rate. Schoen is concerned about the development of a private prison lobby that would push for harsh sentences to ensure sizeable prison populations. These are all legitimate concerns that must be addressed. A democracy can only achieve this in the battleground of public opinion.

Alternatives to incarceration and alternative sentencing must be made more attractive to the American people. Dr. Mark Cannon has reviewed many of the innovative methods of alternative sentencing that must receive widespread attention.<sup>63</sup> Chief Justice Burger’s primary objective is to assist those incarcerated to become literate and to be trained in meaningful jobs that will reduce recidivism:

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60. *Id.*

61. *Wash. Post*, Sept. 22, 1985, at F1, col. 5.

62. Schoen, *Private Prison Operators*, *N.Y. Times*, Mar. 28, 1985, at A31, col. 2.

63. Cannon, *Our Irrational Corrections System*, *JUDGES’ J.*, Summer 1984, at 9.

[T]here are several ways to approach the prison problem. First, much can be done by building new and renovating old facilities. Second, confinement can be made more humane and effective by enhancing the caliber and training of prison personnel from the lowest echelons on up. And third, programs that provide education, vocational training, and opportunities for work experience can be developed to give inmates marketable skills to use on their release.<sup>64</sup>

The Chief Justice has established a blue-ribbon commission to assist him in that goal. He has also been the inspiration for the creation of a National Center for Innovation in Corrections at George Washington University, directed by Dr. Judith Schloegel. This Center is reaching out to the private sector to motivate it to train inmates in useful occupations. However, much work remains. Before the private sector can expect acceptance as a significant player in prison management for those who are incarcerated for longer than short terms, it must demonstrate success in *job training* and *placement*. It cannot be identified with simply warehousing inmates. A number of useful experimental efforts are underway, but the private sector must still prove that it can do more than warehouse. A civilized society requires no less.

In conclusion, privatization should be permitted to proceed slowly and cautiously. The process is complicated, as many obstacles still exist. The private sector cannot expect to make gigantic strides in a short time; that the private sector senses this is evidenced by the small number of corporations who have entered the field to date. They must accept progress "with all deliberate speed," not "majestic instancy." The public will play a major role in the national debate as we attempt to achieve a new public-business coalition. Concerns about security as well as human rights will be continually explored. Applying eternal vigilance, the public can derive substantial benefit from privatization.

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64. Burger, *Ex-Prisoners Can Become Producers, Not Predators*, NATION'S BUS., Oct. 1983, at 38.