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THE PRIVATE PRISON INDUSTRY: DILEMMAS AND PROPOSALS

JEROME G. MILLER*

The introduction of the so-called "private prison industry" posits a new set of questions and concerns. Although private prisons and jails have previously existed in the United States, all such institutions were ultimately abandoned. The contemporary re-introduction of private prisons in American corrections has many more implications than any previous attempts. The multibillion dollar correctional industry, which houses three quarters of a million inmates in prisons and jails, is large enough to resemble an entire nation, a "nation of prisoners," which carries attributes and political implications similar to those of any nation. This nation of prisoners, however, is one in which the "citizens," by law, have no voice. That fact alone leads, at best, to stagnation, and, at worst, to repression. Hopefully, both critics and supporters of private prisons will ask hard questions before the new industry is fully embraced. I fear, however, that these questions will not be asked.

It is clear that in corrections, as in the field of mental health, any new methods of institutionalization will emerge only from practice, not from theory. We tend to cling to the belief that progress in providing human services has, for the most part, resulted from scientific research and theoretical models. Although such academic activities may have some effect in a field such as corrections, their effect is markedly limited by the practical technologies which precede them.

The introduction of rehabilitative models into the prison, for example, has failed for the most part—it is not that rehabilitation does not work, nor that rehabilitative models lack some humanizing effect upon the prison, but rather that the prison is rarely a fertile ground for any humanizing approach. The reality of prison existence will quickly challenge the theories of detached researchers.

The field of mental health provides an example of both theory catching up to innovative practice and of the inadequacies of a "deinstitutionalized" system. The so-called

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“community-based” movement emerged from innovative practice, with the theories supporting the movement developing after the fact. However, the institutional traditions of the mental health field and the psychiatric professions were so pervasive that “deinstitutionalization” had tragic results: formerly institutionalized patients were dumped on the streets to fend for themselves with minimal resources, without funds for survival, and without professional services. Mental health was trapped in an historic dilemma, not unlike the one currently faced by the correctional system. The mental health dilemma involved a tradition of institutionalization for the average, seriously disturbed patient (offender), a panoply of out-patient services available to those who could afford them, and inadequate, cursory, semi-professional programs for a small percentage of the mass of seriously disturbed patients who had been removed from hospitals.

David Rothman has commented that the failure of the mental health establishment to properly provide for those who were dumped from hospitals is not a failure of deinstitutionalization, but rather of institutionalization. In the field of mental health, as in that of corrections, the bulk of alternative programs are planned and implemented by present or former institutional administrators and staff—one of the best ways to insure failure of deinstitutionalization. The failure is not the result of malice or ill will; rather, it is attributable to the limited vision nurtured by institutions in affiliated administrators and their staffs.

Corrections has been similarly caught in its own self-created, self-fulfilling pattern. Imprisonment has been a “total” experience, with little evident gradation, even between so-called minimum, medium, and maximum security institutions. If potential means and models of correction are viewed along a spectrum, the imprisonment model generally lands at the extreme right of the spectrum. The remainder of the spectrum (at least insofar as any large percentage of sentenced offenders might be affected) is a vast wasteland, occasionally dotted with a model program, most of which come and go regardless of their potential or effectiveness. Although this latter part of the spectrum is the largest, it is so meagerly populated as to go unnoticed, in spite of the fact that corrections experts see great potential for development in this part of the spectrum. The far end of this potentially wide corrections spectrum contains parole and probation, and many of the problems also found in the field of mental health: overworked staff, large caseloads, and inadequate

methods of supervision, rehabilitation and surveillance. In light of these shortcomings, the system seems irrelevant to crime control.

I do not mean to disparage the work of parole and probation boards, as these agencies do benefit a number of people. Many people are inappropriately sent into the correctional system; thus, some success is anticipated with those at this "shallow" end of the correctional system. These people would probably "make it," with or without the touted services of the probation or parole agencies. These agencies, therefore, fulfill a need, but it is often indirectly related to the stated purposes of the agencies.

It is essential that the corrections spectrum be fleshed out in that wasteland between imprisonment and probation or parole. Without this action, it is unlikely that corrections will make progress in either control or rehabilitation of the individual offender. It would be quite inadequate medicine to offer all patients only one of two treatments, regardless of malady; corrections must thus begin to tailor its programs to the individual patterns, proclivities and needs of the individual offender. I do not mean to suggest that every offender needs rehabilitation. Rather, we must understand every offender as thoroughly as possible, if we are to control his or her aberrant behavior and if we are to begin to understand the etiology of criminal careers. Rehabilitative programs will surely follow from this understanding, but rehabilitation is neither the primary concern nor focus.

My experience with governmental agencies leads me to conclude that it is highly unlikely that they will soon begin to offer programs which fill in the spectrum of services. The traditions in the correctional field, the theories of management which have emerged from these traditions, and the political alliances which have grown around the traditional criminal justice programs leave one with little hope that change will come from within the existing criminal justice and correctional systems. Too many vested interests have allied themselves with either the prison industry, or the highly politicized probation/parole system, the two extreme ends of the corrections spectrum.

A properly fashioned "private" approach to corrections should focus on filling in that wide spectrum between imprisonment and probation/parole. Until 1978, my experience had been primarily in juvenile corrections. However, as I became more involved in the adult criminal justice system and in adult "corrections," it was clear that the models developed

for youthful offenders were, for the most part, even more appropriate for adult offenders. My colleagues and I devised a model called "Client-Specific Planning" (CSP). Initially funded by the Edna McConnell Clark Foundation, CSP has been one successful means of dealing with youthful offenders. CSP is the first highly individualized alternative sentencing model used successfully in all fifty states and in sixty-five federal jurisdictions. The model's effect extends far beyond the more than 4000 individual cases completed by the National Center on Institutions and Alternatives (NCIA) over the past five years. As our cases have become nationally known, alternative sentencing has become increasingly accepted. This CSP program was established with initial foundation support for development of the model, which lead to local community foundation support. More importantly, the CSP program has retained its commitment to indigent and needy clients; simultaneously, through a fee structure, the CSP program is basically self-sufficient.

The privately-run corrections model must be developed as a parallel to the governmentally sponsored program of probation/parole services. Therefore, the spectrum of services can be fully developed only from a combination of private and governmentally run programs that, at times, *compete* with one another. For the most part, the private sector can provide corrections services in more flexible and effective ways. However, the very success of private enterprise goads routine government services to be more accountable.

The privatization concept should not be limited to filling in the "wasteland" area of the corrections spectrum but should be extended to efforts in the far right of the spectrum, to privatization of prisons and jails. In the past year, citizens have shown unusual interest in privately-run prisons and jails, including contracts for private prisons and state legislation which allows private prisons. Despite a commitment to competitive services between and among private programs in corrections, I see certain ominous trends in the for-profit, private prison movement. My primary concern is that the profit, if there is to be such, is intimately tied to capital outlay for buildings and to the tax benefits which current tax laws allow for such expenditures. In the private prison business, entrepreneurs will find incentives to build more and more prisons and to keep them filled to capacity.

This sort of privatization is an expensive and wasteful way to use public resources in combating the very real problems of crime. However, the private prison movement is

not going to disappear. Rather, if it is to develop rationally and humanely, it should be forced to justify itself relative to other less expensive, more humane and more effective ways of maintaining control of sentenced offenders. Any private prison proposal should be truly competitive with private *alternative program* proposals. Probation and parole, as presently constructed and administered, lie at the extreme opposite end of the correctional spectrum and provide virtually no competition to the private prison industry. A new alternative program is needed which can truly compete with prisons and which can do more than a prison for the same clientele—as would a prison.

I propose an alternative system of control of *offenders who would otherwise be imprisoned or jailed*. This control would be as effective as prison, but less debilitating and less expensive. This system would adopt certain elements of current probation/parole practice, and would also introduce new alternatives to prison in an effort to offer less restrictive methods of control and surveillance of offenders. The private prison would, of course, be the more restrictive alternative.

Many new technologies, such as electronic bracelets, will appear in the system, to the chagrin of civil libertarians. The use of these devices must sensitively reflect a philosophy of sound correctional management consistent with the humane goals of a democratic society. The best way to accomplish this goal is to set the standards through actual use of the new technologies in several cases and particularly in high visibility cases. Early establishment of the ground rules regarding these new technologies will preclude undesirable rule making by agencies and businesses less concerned with these correctional issues than those who actually put the new correctional technology to practical use.

Unfortunately, much of the “alternative” movement has focused on the lesser offender who would not otherwise be in prison or jail. From a civil libertarian point of view, this practice spreads the net of social control; but from an entrepreneurial point of view, it flees from the possibility of true competition.

I propose a privately-run, privately-contracted project, for non-incarcerative control of a specific group of felony offenders who would otherwise be incarcerated. This latter proviso is crucial since it points to the Achilles Heel of the so-called “alternative” correctional movement. Unless the alternative is a legitimate and clear alternative to imprisonment or jailing, it is not an authentic alternative. All cases would ap-

ply the principle of the "least restrictive alternative" consistent with public safety. Upon entering this potentially disastrous ethical minefield, one would have to establish guidelines that are consistent with democratic ideals. It is difficult to judge which correctional alternatives are most consistent with public safety, therefore traditions, norms and values would enlighten reasoned application of new alternatives.

In addition to the counseling and supervision normally associated with probation/parole agencies that are run by the government, the private alternative program would offer a spectrum of other supervisory services ranging from case-management similar to the successful model used in Minnesota for the serious juvenile offender, to third-party monitoring such as that developed in the Client-Specific Planning model. The private program would include "tracking" programs used in the juvenile area in Massachusetts and Pennsylvania as well as more sophisticated monitoring systems presently in experimental stages, such as electronic handcuffs or "offender tag" systems. Forms of house arrest with neighborhood reporting systems would become more common as would person-to-person advocacy programs and community supervisory boards assigned to certain individual offenders. In summary, the private alternative program should offer several supervisory services ranging from minimal supervision, to systems of control which barely stop short of the jail-house door.

The private alternative model should be tested using funds from private (foundation) sources. This funding structure would allow flexibility in implementation, cash flow, and other program concerns which will be crucial to the proposal's success. Hopefully, as the private program developed a reputation, funding for the program would be forthcoming from state and local governments. By placing the functions outlined in the proposal within a private agency, other correctional agencies would be encouraged to follow the example and actively compete for governmental contracts and per diem arrangements for individual offender caseloads.

This proposed system is not designed to replace existing probation/parole systems. However, should the program prove successful, it will dramatically change the tasks and functions of the average probation or parole officer.

ETHICAL CONSIDERATIONS OF PRIVATE NON-INCARCERATIVE SUPERVISION

The guiding principle of this proposal for private alternatives must be that we use the "least restrictive alternative." This principle is so basic that it virtually overrides all other considerations in the use and application of the technologies which will be associated with "alternatives" to prison, such as electronic monitoring, "house arrest," third-party monitoring and other similar technologies.

The impulse behind the use of new technologies in corrections has been to expand control through them, to replace less restrictive alternatives with more control, and to simultaneously intensify the "lesser" restrictive alternatives. The current expansion of the prison and jail industry is an example of the intensification of control in corrections. Although a case might be made for more prisons and jails on the basis of rising crime rates, the argument is weak. Indeed, the few studies done on this pattern show little relationship between crime rates and imprisonment rates, in either direction—crime rates do not necessarily result in higher prison rates, and increased use of prison does not result in lower crime rates. There is some evidence, however, that higher prison rates might eventually cause higher crime rates.

Similarly, although probation and parole were ostensibly created to provide alternatives to prison, there is no evidence that fewer people were incarcerated either concurrent or concomitant with the introduction, in the early part of this century, of probation and parole services. More persons simply were brought under a net of increased social control—again, with little evidence of any effects on crime rates.

Likewise, the introduction of the juvenile court did not result in fewer youth in courts. Precisely the opposite occurred. The court's existence did not decrease the number of youth imprisoned; again, the opposite occurred. In some states, fewer juveniles may have been incarcerated in adult facilities, but more juveniles were sent to the newly created juvenile reform schools which were, in many ways, as coercive and destructive over the long term as were adult prisons.

The introduction of professional, specialized, trained personnel into prisons and parole did not lessen, but rather extended, the net of social control. There have been exceptions to this general rule, however, including the Massachusetts youth services experience, Utah's deinstitutionalization of juvenile reform schools, the Minnesota guidelines experi-

ment, and the Client Specific Planning model. In Massachusetts, after twelve years, there are fewer clients and fewer staff under less restrictive programs; other comparable neighboring states, such as Wisconsin and Illinois, have faced increases in prison populations. Utah's experience is similar to that of Massachusetts. In the private sector, the CSP model has demonstrated one means of decreasing the amount of social control, vis-à-vis prison.

What do these programs have in common? The first common element is "deep end" strategy. Because of these programs, the "deep end" approach is becoming acceptable. There is growing awareness of the need to establish new programs as true alternatives for those offenders who would otherwise be incarcerated.

High profile programs which have "symbolic" value is also a shared characteristic of successful programs. The focus on high profile individual cases alone would be symbolic, as the John Hinckley Jr. case demonstrated. This one incident and subsequent court finding resulted in a substantial and destructive undoing of the insanity defense in many jurisdictions. Similarly, the McNaghten incident in Queen Victoria's reign set the parameters of debate on the insanity defense for the next century.

Finally, these successful programs illustrate careful and dogged adherence to the principle of *least restrictive alternative* in each and every case. These programs withstand and resist pressures from courts, political coalitions, and peer professional groups which all too frequently have incentives to ignore this principle.

Traditions regarding new correctional technologies are established rather early and are disentranced only with great difficulty by those who advocate new methods of correction. Most existing correctional programs and technologies, including jails and prisons, were not initially subject to the arguments of the new correctional theorists. New technologies of control are usually implemented on "practical" bases if they seem to be generally within the law. It is true that theory quickly follows action, but this sequence is precisely the opposite of what we commonly envision as the theory-practice flow.

The law alone does not always provide the kinds of protections demanded for new technologies. The common considerations prior to the introduction of new technologies of control is administrative. Will the technology work? It does not necessarily need to decrease recidivism, but must simply

permit the "correctional" system to function within budget and without incident or complaint. Still, these criteria are no longer sufficient.

Most correctional theory, along with its corresponding ethical foundations, are management-oriented and often justified by prevailing political pressures. For example, one does not see opposition to the death penalty from within the American Correctional Association. The leaders of this organization see themselves as functionaries and managers for the system. If, however, the practitioners themselves—that is, those closest to the criminal and criminal institutions—were to pose some of the ethical problems introduced by certain correctional technologies, new traditions might arise. If the projects of practitioners could be so constructed as to make ethical questions paramount and obvious, new customs and practices might develop—if for no other reason than to avoid controversy, the bane of the correctional bureaucrat.

PRACTICAL ISSUES WITH ETHICAL CONSEQUENCES

The private, non-incarcerative model must be, in essence, a model of "unconditional care" which defies the common pattern of professional rejection of correctional alternatives. The model must undo much of the professional labelling which engenders such rejection by professionals in the correctional field. The model would propose that levels of supervision of offenders be decided relative to the seriousness of the crime, the likelihood of incarceration and the length of incarceration.

The model program should provide a full spectrum of correctional services in order to round out the possibility of unconditional care. These services, ranging from maximum to minimal control, would include offender tags, electronic bracelets, house arrest, case management, tracking, third-party (individual and group) monitoring, intensive counseling, as well as daily, weekly, and monthly reporting. The level of supervision should always be a less restrictive alternative than that which would ensue were the program not available.

One principle should be clear from the outset: to the degree that there is reporting or increased surveillance, there must also be increased services from the case manager in order to avoid the cat and mouse games which intrude on such relationships. To the degree that the manager expects the client to report, the manager must, to a similar degree, invest

himself or herself. To the degree that the manager is invested in the services given, he likewise has an interest in their success. Otherwise, the "services," such as reporting and tracking, are likely to tilt toward a one-sided, "authority vs. client" relationship which too often characterizes traditional probation services.

There must be incentives for the case manager's client *not* to fail. More importantly, the case manager must have equal incentives to accept and work with the most difficult cases—that is, with those more likely to fail. One option would be to insure that the more difficult the case, the more time, effort, dollars and services will be made available to the case manager. This is precisely the opposite of existing practice, where the most difficult cases are sent to the largest institutions with the worst staff ratios and the least individualization.

Parallel to the spectrum of control technologies must be an equally wide spectrum of available services, including counseling, vocational training, employment assistance, transportation assistance, and alcohol and drug treatment. The relationship between these spectrums should be: *The less control technology employed, the fewer services given. The greater the control, the more services made available.* If the manager increases his use of mechanisms of control such as electronic handcuffs, he must also increase his own investment in services and work toward decreasing the use of control technologies. Every step deeper into the use of control technologies should be viewed as a step backwards and as an indication of failure *not* on the part of the client, but on the part of the service giver.

How could a private, non-incarcerative program become self-sustaining as well as competitive with private prisons? The program would find jobs for its probationers, and collect fees from those jobs. The program would use insurance, where possible, for diagnostic and treatment services. The program would eventually seek contractual governmental funding much the same way as ASAP contracts are developed.

Initial funding would have to cover such costs as electronic handcuffs, and computers for case assignment and for daily (if not hourly) tracking. However, such costs would be miniscule compared to prison construction costs. All clients would be on the computer for the length of time that they would otherwise have been in prison. The clients will include only persons paroled early to the program, (and who would otherwise be in prison), certain violent offenders, and serious

repetitive property offenders who would otherwise be in prison or jail.

RESEARCH STRATAGEMS

The research efforts would have a matched control group of clients who have completed their sentences or who were placed on parole at normal, traditional time. The research must be longitudinal and extend over a minimum of four years.

The reason for using a control group of persons who have finished their sentences is that one must assume that few or no crimes will occur while a client is in prison, although other types of victimization may occur. However, for the years which follow completion of the prison sentence, the program will monitor the criminal activities of the formerly imprisoned offender. Empey's research indicates that, over time, there may be an escalation in criminal behavior, whereas among those placed in alternatives, there is a de-escalation in the seriousness of the crimes committed, although both groups do recidivate.

An accurate measure of the correctional program, using this model, cannot hinge upon the incidents which might occur during the experimental period. Unless the crime escalates in seriousness or numbers over previous patterns, the measures available in the alternative program must be used to control behavior rather than those measures available in prison. Prison will be used only with repeated or escalated crimes.

As a political stratagem, *before* anyone is placed in the experimental group, the program should have prepared a matched sample selected at random from the previous four years' control group. That is, a matched group of prison alumni should be used as a base, to demonstrate whether the new program is, in fact, creating more crime during the experimental period than a matched group of prison alumni would create, having completed their terms. If the new program has a higher rate, it should be terminated. Finally, the research should not be academic, but program oriented, allowing programs to shift directions as findings appear.

OTHER ISSUES

1. Violation of Probation

Will the private non-incarcerative program continue to

serve offenders who violate probation/parole? Or will probation violations be reported to the appropriate governmental agency? Probably the latter. As in CSP, the private group will provide the supervision. Reports will be filed with the court or with probation boards which may indicate the need for revocation; the decision will rest with the court. Preferably, however, *the private group will take an advocacy role for the client, arguing in court against incarceration and for inclusion in the alternative program in most cases. The private program, therefore, will make no arrests and will not grab parolees in the office.*

The problem is avoiding the creeping misuse of power which has characterized the history of probation and parole. Stratagems in this regard might include more involvement of the private program staff in each case, increased supervision not just at the less restrictive end of the control spectrum, to the more restrictive. One of the reasons probation has been forced to "either/or" sorts of decisions (either stay out of trouble with inadequate meetings with probation officer, or go to prison) is the lack of options. The institution of the prison is in a similar position since it is so constricted in the numbers of services that it can offer that it must fall back on threats and violence to obtain compliance. By providing a spectrum of possible services, this proposed program would have more options available and could move from more restrictive to less restrictive control technologies, all short of imprisonment.

Every failure in the new program, such as recidivism, must be viewed as a failure of the program, not of the client, and reflects on the staff assigned, the program arrangements, and the managers of the program. Just as the use of restraints or isolation in the institution is a failure of the institution, not of the client, each movement to a more restrictive technology reflects on the inadequacy of services available in the lesser restrictive ends of the service and control spectrum.

The program must stress staff training, constant change of the ground which defines problems, reconsideration of options and re-evaluation of client. It must maintain program tradition and staff accountability. There must be a regular professional staff as well as case manager meetings, with a sharing of cases and cross-critiques of case management. The program must develop a series of disincentives to assert authority and to prematurely introduce control technologies. Staff must have time available to work with the more difficult cases. If a client starts to disintegrate or commit crimes, staff must demonstrate that they have spent more time and effort

on the case during this period, before recommending a more restrictive technology.

2. Reporting of New Crimes

One possible strategy is for the private non-incarcerative program to refuse to report new crimes; rather, control will be increased if such behavior comes to their attention. New crimes which come to the attention of the authorities will be acknowledged. This approach has legal problems, however. It may be possible, though not probable, to have the new program covered by laws which protect clergy and psychiatrists from this requirement.

The rationale for this strategy would be that the private agency is hired by the court only for certain functions. Reporting crimes mentioned by the clientele is not one of these functions, expect where a crime may, or is about to occur. When a client reports a serious crime, the amount of supervision is increased, the person is immediately turned back to the court as unacceptable to the private program.

Because of liability problems inherent in the above strategy, a more acceptable alternative should be used. Cases of reported crime would be brought to the advisory board or to a special staff group. The program would then arbitrate with the prosecutor, police or court, similar to the way a middle-class citizen would arbitrate on behalf of a family member who was in trouble, "Tough Love" notwithstanding. The program would be an advocate for the client and would work with the defense attorney should the matter go to court. This approach differs considerably from the traditional approach of probation to recidivists. Ironically, this proposal is much closer to the stance advocated by John Augustus and the other creators of the concept of probation and parole. The program's policy regarding these kinds of cases would be made clear from the outset. The program would *always* advocate for the client and for services, and would never give up on a case. Where residential security is necessary, the program would attempt to find, create, and propose alternatives to the contemporary prison. This program, once in place, could effectively compete with the private prison industry. The number of individuals in prison would, in fact, drop dramatically. For most inmates, prison would not be a cost-effective approach.

