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June, 1988

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THE IMPACT OF THE DELEGATION DOCTRINE ON PRISON PRIVATIZATION

Ira P. Robbins*

INTRODUCTION

Few people would argue that the state of our nation's prisons and jails is ideal. Apart from whatever other ills plague these institutions, overcrowding is pervasive. Populations have doubled in a decade, and with preventive detention, mandatory minimum sentences, habitual offender statutes, and the abolition of parole in some jurisdictions, there is no relief in sight. Some states are even leasing or purchasing prison space in other states. And it is costing the taxpayers more than seventeen million dollars a day to operate the facilities, with estimates ranging up to sixty dollars a day per inmate. Several commentators have not so face-

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The reader should be aware that I served as the Reporter on Legal Issues for the National Institute of Justice's National Forum on "Corrections and the Private Sector" (Feb. 1985). I also authored the report on prison privatization that accompanied a Resolution presented by the American Bar Association Criminal Justice Section to the ABA House of Delegates, 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." The Resolution was passed by the House of Delegates at its February, 1986 meeting. I am currently serving as Reporter for the ABA Criminal Justice Section's study on the privatization of corrections, under grants from the John D. and Catherine T. MacArthur Foundation and the National Institute of Justice. That project, which will include as one of its sections a modified version of this Article, will culminate in late 1988 in the publication of a monograph on the legal aspects of prison privatization. Of course, the analyses, conclusions, and points of view expressed in this Article do not necessarily represent the positions of the American Bar Association, the MacArthur Foundation, or the National Institute of Justice.

Finally, I am grateful to Wayne Ault and Anne Palmer for their assistance in the preparation of this Article.

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tiously noted that we could finance college educations at less cost for all of the inmates in the country.[1]

To reduce some of this stress on the system, a new concept has emerged: the privatization of corrections facilities, occasionally known as "prisons for profit."[2] The idea is to remove the operation (and sometimes the ownership) of an institution from the local, state, or federal government and turn it over to a private corporation.

At the outset, it should be emphasized that private prisons are different from private *industries* in prison. The latter concept refers to Retired Chief Justice Burger's "factories with fences" proposal, which seeks to turn prisoners into productive members of society by having them work at a decent wage and produce or perform services that can be sold in the marketplace.[3] In the process, the prisoners would be able to pay off some of the costs of their incarceration and, we would hope, gain some self-esteem.

Privatization is also different from the situation in which *some* of the services of a facility—such as medical, food, educational, or vocational services—are contracted out to private industry. Rather, the developing idea, which may turn out to be a lasting force or just a passing fancy, is to have the government contract with a private company to run the *total* institution.

The privatization concept has sparked a major debate. Its proponents, who include not only some corrections professionals, but also major financial brokers who advise investors to consider putting their money into private prisons, argue that the government has been doing a dismal job of administering its correctional institutions and detention facilities. Costs have soared, prisoners are coming out worse off than when they went in, and while they are in they are kept in conditions that shock the conscience, if not the stomach.

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1. *See, e.g.*, Burger, *The High Cost of Prison Tuition*, 40 U. MIAMI L. REV. 903, 909 (1986) (article by Retired Chief Justice Warren E. Burger).

2. *See, e.g.*, Bacas, *When Prisons and Profits Go Together*, NATION'S BUS., Oct. 1984, at 62; Castro, *Public Service, Private Profits*, TIME, Feb. 10, 1986, at 64; Kroll, *Prisons for Profit*, THE PROGRESSIVE, Sept. 1984, at 18; Logan & Rausch, *Punish and Profit: The Emergence of Private Enterprise Prisons*, 2 JUST. Q. 303 (1985).

3. Keynote address by Warren E. Burger, National Conference on "Factories with Fences": The Prison Industries Approach to Correctional Dilemmas (June 18, 1984), *reprinted in* PRISONERS AND THE LAW ch. 21 (I. Robbins ed. 1985).

The private sector, advocates claim, can save the taxpayers money. It can build facilities faster and cheaper, and it can operate them more economically and more efficiently. With maximum flexibility and little or no bureaucracy, new ideas (like testing new philosophies) and routine matters (like hiring new staff) can be implemented quickly. Overcrowding—perhaps the major systemic problem facing corrections today—can be reduced. A further anticipated benefit of privatization is decreased liability of the government in suits that are brought by inmates and prison employees.

The critics respond on many fronts. They claim, for example, that it is inappropriate to operate prisons with a profit motive, which provides no incentive to reduce prison populations (especially if the company is paid on a per-prisoner basis), nor to consider alternatives to incarceration, nor to deal with the broader problems of criminal justice. On the contrary, critics claim that the incentive would be to build more prisons and jails. And if they are built, we will fill them. This is a fact of correctional life: the number of incarcerated criminals has always risen to fill whatever space is available.

Moreover, opponents argue that private prison corporations will be drawn to cost-cutting measures that will have adverse effects on the prison system. As a reporter for *Barron's* has written, "the brokers, architects, builders and banks . . . will make out like bandits."[4] But questions concerning people's freedom should not be contracted out to the lowest bidder. In short, the private sector is more interested in doing well than in doing good.[5]

Prison privatization also raises concerns about the state action liability of the private contractor as well as the routine, quasi-judicial decisions, such as recommendations to parole boards and use of force, that affect the legal status and well-being of the inmates.[6]

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4. Duffy, *Breaking Into Jail*, BARRON'S, May 14, 1984, at 20, 22.

5. This idea was succinctly expressed by the director of program development of Triad America Corporation, a multimillion-dollar Utah-based company that was considering proposing a privately run county jail in Missoula, Montana: "We'll hopefully make a buck at it. I'm not going to kid any of you and say we are in this for humanitarian reasons." Deseret News, June 20–21, 1985, at B7 (statement of Jack Lyman).

6. *See, e.g.*, *infra* note 111.

All of the above issues and concerns are important. Before any of these questions come into play, however, one threshold question must first be addressed: Is it constitutional, under both federal and state constitutions, to delegate the incarceration function to private corporations? This question alone is the subject of this Article.

Since prison privatization is an issue at both the federal and state levels, it is necessary to discuss the development of the delegation doctrine at both levels. This discussion, however, necessarily involves different approaches because development of the doctrine itself has differed markedly in federal and state courts. The doctrine has suffered from lack of attention and use at the federal level, while state courts continue actively to review private delegation. At the federal level, the Supreme Court has not invalidated legislation on delegation grounds since 1936, in *Carter v. Carter Coal Co.*[7] Federal courts have accepted, often without comment, delegation of federal power to private actors.[8] In 1974, Justice Marshall wrote that the doctrine "has been virtually abandoned by the Court for all practical purposes."[9] Although several recent concurring and dissenting opinions may prove this comment to have been a bit premature, it is clear that doctrinal development at the federal level has been hampered by disuse.

In addition, fundamental differences between federal and state due process approaches, the constitutional source for limitations on private delegation, account for differences in the development and application of the doctrine. Federal courts face considerations of judicial economy, federalism, and institutional constraints that do not present particular concern to many state courts.[10]

Part I of this Article discusses the likely impact that the federal delegation doctrine would have on an attempt to privatize federal prisons. Part II discusses similar issues with regard to state delegation doctrines. These sections explain the oversight and review functions that the governmental

7. 298 U.S. 238 (1936).

8. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 648 (1986).

9. FPC v. New England Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring).

10. *See* Lawrence, *supra* note 8, at 672–75.

entity must perform over private prison companies. Additionally, they note the activities that the government cannot delegate to the private prison and conclude that the principles announced in current delegation law may allow government to delegate prison management to a private company if the government properly oversees, reviews, and circumscribes the private company's authority. The Article notes, however, that, because incarceration of prisoners implicates the life and liberty interests of the persons who are detained, courts might not apply the delegation principles announced in extant delegation cases, since only property interests generally were at issue in those cases. Thus, the question is an extremely close one, and it would not be surprising if a court were to rule against constitutionality.

I. FEDERAL DELEGATION

A. *Brief History*

Although the Constitution does not explicitly state that Congress may not delegate its powers to others, the Supreme Court has asserted the principle that Congress may not delegate its powers to other branches of the government[11] or to private parties.[12] Roots of the doctrine are found both in article I of the Constitution, which states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,"[13] and the due process clauses of the fifth and fourteenth amendments.[14] As Justice Brandeis pointed out, the two concepts are related: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."[15] The constitutional limits on executive power serve to prevent arbitrary executive action under the conviction that the people must look to representative bodies and courts to protect their liberties. Protection of the individual from the arbitrary and capricious exercise of power, by an official body or a private party

11. Field v. Clark, 143 U.S. 649, 692 (1892) (dictum).
12. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).
13. U.S. CONST. art. I, § 1.
14. *See* Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902) (rejecting argument that state government improperly delegated judicial power to executive parole board and upholding delegation on fourteenth amendment due process grounds).
15. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

acting under delegated authority, is an essential element of free government. Thus, the underlying purpose of the delegation doctrine should be to provide needed protection against uncontrolled discretionary power.[16] The Supreme Court generally has used an article I separation of powers argument when considering delegation to an agency or other public body. When considering delegations to private parties, however, the Court has employed a due process analysis.

1. Delegation to Public Bodies

Although it frequently asserts the nondelegation principle, the Supreme Court almost always sustains the constitutionality of challenged delegations.[17] In doing so, the Court has taken various approaches to accommodate increasingly broad congressional delegations.[18] Although in its early stages the delegation doctrine required Congress to legislate "as far as was reasonably practicable,"[19] the doctrine now requires only that Congress state an "intelligible principle"[20] when it delegates legislative power.

Field v. Clark[21] was one of the early Supreme Court cases to discuss the delegation doctrine. Congress had empowered the President to raise tariff schedules and suspend trade with a foreign country if he determined that a duty imposed by the foreign country on American products was "reciprocally unequal and unreasonable."[22] This delegation was challenged on the ground that it delegated the power to tax; it was upheld, however, on the theory that the President "was the mere agent of the law-making department" and his only role was to ascertain a fact.[23]

The principle announced in *Field*, that Congress constitutionally may delegate a fact-finding function, was reiter-

16. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.2, at 150 (2d ed. 1978).

17. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 307 (1976).

18. Comment, *The Fourth Branch: Reviving the Nondelegation Doctrine*, 1984 B.Y.U. L. REV. 619, 621-30.

19. Buttfield v. Stranahan, 192 U.S. 470, 496 (1904).

20. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

21. 143 U.S. 649 (1892).

22. *Id.* at 693.

23. *Id.*

ated in *Buttfield v. Stranahan*.[24] In *Buttfield*, Congress delegated authority to the Secretary of the Treasury to prohibit the importation of impure and unwholesome tea.[25] The Supreme Court observed that the duty of the government experts who examined the tea was to ascertain whether such conditions existed that conferred a right to import.[26] Citing *Field*, the Court held that the statute did not confer legislative power on administrative officials, and added that "Congress legislated on the subject as far as was reasonably practicable."[27]

Within twenty years, the Court retreated to a less stringent standard. In *United States v. Grimaud*,[28] the Court cited*Field*'s prohibitory language against delegation, but deflated its meaning by stating that "the authority to make administrative rules is not a delegation of legislative power."[29] A further retreat in the *Grimaud* case involved the shift to permitting delegation if it was accompanied by an "adequate standard."[30]

In *J. W. Hampton, Jr. & Co. v. United States*,[31] the Supreme Court changed its "adequate standard" test to require Congress to establish "intelligible principles."[32] The Court upheld delegation of authority to the President to audit tariffs to equalize differences between costs of goods produced domestically and those produced by foreign competitors.[33] The Act also established certain guidelines for determining trade imbalances and fixing limits of exchange, and made investigation by the Tariff Commission a prerequisite to changing duties.[34] The Court stated that, "[i]f Congress

24. 192 U.S. 470 (1904).
25. *Id.* at 471–72 n.1.
26. *Id.* at 497.
27. *Id.* at 496.
28. 220 U.S. 506 (1911).
29. *Id.* at 521.
30. *Id.* at 515–16; *see also* Union Bridge Co. v. United States, 204 U.S. 364, 384–85 (1907) (holding that Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard); *cf.* United States v. Chicago, M., St. P. & Pac. R.R., 282 U.S. 311, 324 (1931) (asserting that an Interstate Commerce Commission rule was a proper exercise of delegated authority only if it was warranted by statutory standards that defined the delegated authority).
31. 276 U.S. 394 (1928).
32. *Id.* at 409.
33. *Id.*
34. *Id.* at 400–02.

shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."[35]

The Supreme Court has invalidated Congress's delegation of authority on article I grounds on only two occasions, both occurring during the New Deal era of the 1930s. Although the Court has never expressly overruled either case, the cases are probably aberrations, because the Court has never relied seriously on either case to analyze delegation issues. In *A.L.A. Schechter Poultry Corp. v. United States*,[36] the Court struck down a section of the National Industrial Recovery Act (NIRA) authorizing the President to establish "codes of fair competition" for a virtually unlimited number of industries and trades.[37] Section 3 of the Act gave the President power to approve detailed codes on his own initiative or on application by the industries or trade associations that were affected.[38] The Court focused on the absence of standards or restrictions as well as on the scope of the delegated powers and the discretion granted to the President. Justice Cardozo termed the statute "delegation running riot," amounting to a complete transfer of Congress's power under the Commerce Clause.[39]

In contrast, the Court in *Panama Refining Co. v. Ryan*[40] dealt with a different section of the NIRA that seemed more

35. *Id.* at 409; *see also* Yakus v. United States, 321 U.S. 414, 426 (1944) (applying intelligible principle test to uphold constitutionality of Emergency Price Control Act of 1942); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 745–46 (D.D.C. 1971) (upholding Economic Stabilization Act of 1971 against delegation challenge) (citing *Yakus*, 321 U.S. at 424).

36. 295 U.S. 495 (1935).

37. *Id.* at 521–22.

38. *Id.* at 521–23. The Court summarized its discussion of Section 3 by stating:

> It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one.

Id. at 541.

39. *Id.* at 553 (Cardozo, J., concurring).

40. 293 U.S. 388 (1935).

in line with legislation that the Court had previously upheld. It authorized the President to restrict the interstate transportation of petroleum produced in excess of the amount permitted by state law.[41] The Court found no adequate criteria to control the President's authority. General policy statements admonishing the President "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof," "eliminate unfair competitive practices," and "conserve natural resources" were declared to be inadequate principles.[42]

2. Delegation to Private Parties

Although the Supreme Court has held delegations to private parties to be unconstitutional on delegation grounds several times during this century,[43] the vast majority of Court cases have upheld such delegations as constitutionally valid.[44] In fact, the Supreme Court has not invalidated a private delegation since the New Deal era case of *Carter v. Carter*

41. *Id.* at 406–07.

42. *Id.* at 417.

43. *See* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928) (invalidating ordinance that prohibited philanthropic home for the aged in zoning district without consent of designated portion of neighbors); Eubank v. City of Richmond, 226 U.S. 137, 144 (1912) (invalidating statute that delegated the power to determine how far buildings were to be set back from the street to two-thirds of certain property owners).

44. *See, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397–98 (1940) (holding that Bituminous Coal Act did not unconstitutionally delegate to National Bituminous Coal Commission the power to fix prices because statutory standard that guided Commission was sufficiently specific); United States v. Rock Royal Coop., 307 U.S. 533, 577–78 (1939) (upholding against delegation challenge statute providing that administrative determination concerning milk price was not effective unless two-thirds of area milk producers approved price); Currin v. Wallace, 306 U.S. 1, 15–16 (1939) (reasoning that statute conditioning tobacco inspection requirements on votes of two-thirds of affected tobacco producers did not unlawfully delegate legislative power to those producers, but rather was a condition that Congress permissibly could place on operation of its own statute); Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 193–94 (1936) (holding that Illinois fair trade law forbidding retailers to sell product below resale price, fixed in contract with other producers, did not unconstitutionally delegate legislative power to those other retailers because producer's interest in protecting value of its goodwill in trademark or brand name was itself a property interest that the state could legitimately protect); Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917) (reasoning that statute permitting one-half of property owners to remove zoning restriction on property was not unconstitutional delegation because statute merely allowed property owners to *remove* existing restrictions rather than impose new ones); Butte City Water Co. v. Baker, 196 U.S. 119, 126–27 (1905) (upholding against delegation challenge statute giv-

Coal Co.,[45] in which a federal statute making maximum hours and minimum wages agreed on by a majority of miners and producers binding on the remainder was held invalid. The Court in *Carter Coal* stated:

> This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.[46]

The ban on delegation was based on fifth amendment due process grounds. The choice of due process rather than separation of powers doctrine might suggest that article I imposes no per se ban on federal delegations to private parties[47] and that they are to be judged by more flexible due process criteria. *Carter* also may suggest that whatever constitutional restrictions do exist may apply equally to the states by virtue of the fourteenth amendment, a result that would not be reached if the prohibition found its source in article I.[48] (It is important to note, however, that, whatever the federal practice, state courts continue to actively review private delegations.[49]) The delegation cases that followed

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ing legal effect to rules that miners had developed concerning whether, and in what circumstances, property rights in mining claim vest).

45. 298 U.S. 238 (1936).

46. *Id.* at 311.

47. *See* Lawrence, *supra* note 8, at 665–66. Lawrence explained that

> [s]eparation of powers may have some relevance to delegations of legislative power to executive agencies, in that one department might then in fact be exercising the power of another, but a private delegation does not cross the lines between departments. It has been argued that the purpose of the separation-of-powers requirement is to protect individual liberty, in that dispersing power among several agents prevents a liberty-endangering concentration of power in one or a few hands. If that view is correct, then private delegations serve the same goal because power is spread still further. One need not carry the argument that far, however, to see that the separation-of-powers principle is a weak foundation for limiting private delegations.

Id. (footnote omitted).

48. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 664 (1975).

49. *See* Lawrence, *supra* note 8, at 675. Lawrence stated that

> the doctrinal development of federal due process may be affected by considerations of judicial economy, federalism, and institutional

Carter all upheld increasingly broad private delegations without ever questioning *Carter*'s holding that Congress could not delegate legislative power to private parties.[50]

Commentators generally agree that the Supreme Court has not stated a satisfactory theory of the principles governing the delegation doctrine and has failed to articulate a precise test to distinguish between statutes that properly delegate and those that do not.[51] Although there is some indication of renewed interest in the doctrine in dissenting and concurring opinions,[52] not since 1948 has any opinion for the Court's majority even attempted to deal in a substantial manner with the delegation doctrine. Consequently, it is difficult to predict how the Court would treat delegation in the private prison context. The Supreme Court has often decided cases that could have turned on delegation issues on other grounds and avoided the issue altogether, or has treated it only in passing.[53] For example, the Court chose to decide several cases on state action grounds even though it could have ruled on delegation grounds.[54]

> constraints that do not so strongly affect the state courts. In addition, the election of state courts, the nature of state constitutions, and the methods of state legislatures combine to make it more tenable for a state court to overturn legislative decisions.

Id.

50. *See supra* note 44 (listing, *inter alia*, post-*Carter* delegation cases upheld by the Supreme Court).

51. For commentary criticizing the Court's failure to develop and consistently apply rational principles to delegation cases, see, *e.g.*, 1 K. DAVIS, *supra* note 16, § 3.12, at 193; Liebmann, *supra* note 48, at 664; Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1289 (1985); Comment, *supra* note 18, at 620.

52. *See infra* notes 85–100 and accompanying text.

53. *See* Schoenbrod, *supra* note 51, at 1232–33 (arguing that recent Supreme Court cases that have narrowed or invalidated statutes on vagueness or due process grounds have avoided explication of delegation doctrine); *cf.* Liebmann, *supra* note 48, at 653–54 (observing that the distinction between deprivation of due process and equal protection, on the one hand, and unlawful delegation, on the other hand, is often obscure).

54. *See* Liebmann, *supra* note 48, at 654 n.16 (citing Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969)). Liebmann argued that

> if courts are willing to find state action under such circumstances, definite parallels to the former abuses of the delegation doctrine exist. It may not be too much to say that the due process and equal protection clauses have in recent years been doing some of the work formerly done by the delegation doctrine.

Id. But see Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150, 1152 (1985) (observing

B. *Current Federal Law*

While there are no recent Supreme Court cases that have turned on the delegation doctrine, current federal law that is most analogous to the private prison context is found in opinions upholding the Maloney Act,[55] which authorizes self-regulation of the securities industry against challenges that the Act unconstitutionally delegates legislative power to a private institution. The Act provides for promulgation of rules by a dealer association and disciplinary proceedings against its members.[56] Under the statute, disciplinary rules must require specific charges, a hearing of record, and a statement of the findings.[57] In addition, if an association member is disciplined, it has the right to appeal to the Securities and Exchange Commission (SEC), which in turn decides whether the petitioner committed the charged acts and whether those acts violated the association's rules.[58] The SEC may then reduce, cancel, or leave undisturbed the penalty that was imposed.[59]

In *R.H. Johnson & Co. v. SEC*,[60] the United States Court of Appeals for the Second Circuit found no merit in a constitutional challenge to the delegation. The court summarily dismissed the challenge, noting that the SEC, a fully public body, has the power, according to reasonably fixed statutory standards, to approve or disapprove of the association's rules and to review any disciplinary action.[61]

1. The *Todd* Test

The test for measuring the constitutionality of the delegation was stated more specifically in *Todd and Co. v. SEC*.[62] The United States Court of Appeals for the Third Circuit held that the Maloney Act did not unconstitutionally dele-

that in recent years the Supreme Court has been moving toward a restrictive state action doctrine). *See generally infra* note 111 (discussing state action doctrine in the private prison context).

55. 15 U.S.C. § 78o-3 (1982).
56. *Id.* § 78o-3(b).
57. *Id.* § 78o-3(h).
58. *Id.* § 78o-3(h)(3).
59. *Id.*
60. 198 F.2d 690 (2d Cir. 1952).
61. *Id.* at 695.
62. 557 F.2d 1008 (3d Cir. 1977).

gate governmental power to private securities associations.[63] In so holding, the court articulated a three-pronged test.[64] First, following *R.H. Johnson & Co.*, the SEC must have the power to approve or disapprove of the association's rules.[65] Second, in any disciplinary proceeding, the SEC must make de novo findings aided by additional evidence, if necessary.[66] Third, the SEC must make an independent decision on the violation and the penalty.[67] Another part of the *Todd* opinion held that the Board of Governors of the National Association of Securities Dealers (N.A.S.D.) erred in reinstating a dropped charge without notice of its intention to do so.[68] The court chastised the SEC for failing to insist on meticulous compliance with N.A.S.D. appellate procedure.[69] As a consequence, the SEC order was vacated and remanded with instructions that the proper procedure be followed.[70] The decision thus emphasized the close link between the delegation doctrine and due process concerns.[71]

The *Todd* test suggests that the constitutionality of the delegation in the private prison context would turn on the structure under which the delegation occurred. If a corrections agency promulgated rules of prison administration in the first instance, then the delegation would satisfy the first prong of the *Todd* test because the public body, not the private party, is responsible for the rule-making process. If the

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63. *Id.* at 1012.

64. *Id.*

65. *Id.*

66. *Id. But cf.* First Jersey Sec. v. Bergen, 605 F.2d 690, 697 (3d Cir. 1979) (holding that amendment to Maloney Act was constitutional even though it restricted the SEC's ability to receive additional evidence), *cert. denied*, 444 U.S. 1074 (1980).

67. 557 F.2d at 1012.

68. *Id.* at 1014.

69. *Id.*

70. *Id.* at 1015.

71. The court reasoned that, because the SEC was

> [c]harged with making independent decisions and its own interpretations of the N.A.S.D.'s rules, the Commission must insure fair treatment of those disciplined by the Association. . . . Since it is a departure from the traditional governmental exercise of enforcement power in the first instance, confidence in the impartiality and fairness of the Association's procedures must be maintained. The S.E.C., therefore, should not cavalierly dismiss procedural errors affecting the rights of those subjected to sanctions but should insist upon meticulous compliance by the private organization.

Id. at 1014.

private company had rule-making power, however, then the corrections agency, an independent public body, must have authority to approve or disapprove of those rules according to reasonably fixed standards. The second and third prongs of the *Todd* test concern disciplinary proceedings. This aspect is of particular concern in the private prison context because these proceedings may affect the length of a prisoner's confinement, his eligibility for parole, or his loss of good-time credits. Under the second prong of the test, the corrections agency must make de novo findings. Under the third prong, the agency must make an independent decision on the violation and the penalty. Whether a delegation would satisfy the second and third prongs depends initially on who has control over disciplinary proceedings. If the private company maintained control over such proceedings, then the corrections agency must make de novo findings and an independent decision on the violation and the penalty.

A recent article suggests that, to avoid legal challenge, it might be preferable for the state to maintain control over all disciplinary proceedings.[72] In this situation, where the private company is confined to a primarily administrative role, the United States Court of Appeals for the Ninth Circuit, in *Crain v. First National Bank*,[73] suggested a minimal delegation problem. *Crain* dealt with provisions of the Klamath Termination Act, which provides that Indians who are determined to be in need of assistance may place their funds in private trusts.[74] Pursuant to provisions of the Act, the Secretary of the Interior made individual determinations that certain members of the Klamath Indian tribe were in need of assistance in conducting their affairs and placed appellants' funds in private trusts that the bank administered. The court held that the Act did not unconstitutionally delegate legislative power to a private corporation. In support of its holding, the court cited *Berman v. Parker*,[75] a 1954 Supreme Court case that distinguished between the power to enact laws and authority or discretion concerning their execution.[76] The

72. Mayer, *Legal Issues Surrounding Private Operation of Prisons*, 22 CRIM. L. BULL. 309, 320 (1986).

73. 324 F.2d 532 (9th Cir. 1963).

74. *Id.* at 533.

75. 348 U.S. 26 (1954).

76. *Crain*, 324 F.2d at 537.

court stated: "While Congress cannot delegate to private corporations or anyone else the power to enact laws, it may employ them in an administrative capacity to carry them into effect."[77] Additionally, the court observed that Congress had detailed the proper objectives, goals, and methods of carrying out such management.[78]

Again, when applied in the private prison context, *Berman* suggests that courts would uphold delegations to private prison companies because the private corporation was employed not to enact laws but to carry them into effect in an administrative capacity. The extent to which this case is fully analogous to the private prison context, however, depends on who makes the initial determination to discipline the prisoner. In *Crain*, the Secretary of the Interior had made the initial determination. An employee of the private company, however, might make the initial determination to discipline a prisoner.

2. Possible Inapplicability of the *Todd* Test

It is important to note that all of the aforementioned cases dealt with *property* interests. Therefore, courts might not apply the reasoning of these cases to the private prison context because a private prison affects the prisoner's *liberty* interests. In *Kent v. Dulles*,[79] the Supreme Court suggested that it would apply a more stringent standard when it analyzed the constitutionality of delegations in cases affecting a liberty interest.[80] The Court in *Kent* construed a statute that granted broad discretion to deny passports.[81] The Court held that, if "activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them."[82] The opinion did not

77. *Id.*

78. *Id. But see* Republic Indus., Inc. v. Central Pa. Teamsters Pension Fund, 693 F.2d 290 (3d Cir. 1982) (striking down a delegation to a private arbitrator of power to adjudicate rights of employers in multi-employer pension fund).

79. 357 U.S. 116 (1958).

80. *Id.* at 129.

81. *Id.*

82. *Id.*; *cf.* United States v. Robel, 389 U.S. 258, 275 (1967) (Brennan, J., concurring) (asserting that "numerous deficiencies connected with vague legislative directives . . . are far more serious when liberty and the exercise of fundamental rights are at stake").

identify these rights, but commentators generally have understood these standards to apply to statutes involving "protected freedoms," as opposed to statutes that regulate property.[83]

C. *Possible Trend to Revive the Delegation Doctrine*

As stated earlier, no Supreme Court majority opinion since 1948 has even attempted to deal in a substantial manner with the delegation doctrine.[84] A number of dissents and concurrences, however, have argued forcefully for one side or the other.[85] Moreover, two opinions by Justice Rehnquist may signify that the doctrine is not entirely dead, although their line of reasoning is not directly applicable to private delegations.[86]

Justice Brennan wrote a well-considered analysis of the delegation doctrine in a dissenting opinion in the 1971 case, *McGautha v. California*,[87] which upheld a California statute allowing the jury to fix the death penalty without guidelines. Three Justices would have invalidated the statute on delegation grounds. After sketching the history of the delegation doctrine, Justice Brennan outlined three legislative techniques that Congress has used to "assure that policy is set in accordance with congressional desires and that individuals are treated according to uniform principles rather than administrative whim."[88] He noted, first, that Congress has undertaken to regulate even rather complex questions by the prescription of relatively specific standards.[89] Second, Justice Brennan noted that Congress has at times granted to others the power to prescribe fixed rules to govern future activity and adjudication.[90] Third, he noted that the most common legislative technique for dealing with complex

83. Schoenbrod, *supra* note 51, at 1232.

84. *See* FPC v. New England Power Co., 415 U.S. 345, 352–53 (1974) (Marshall, J., concurring) (the delegation doctrine "has been virtually abandoned by the Court for all practical purposes" except where personal liberties are involved).

85. Schoenbrod, *supra* note 51, at 1233.

86. *See infra* notes 93–100 and accompanying text (discussing recent Supreme Court opinions in which Justice Rehnquist wrote separately on delegation grounds).

87. 402 U.S. 183 (1971).

88. *Id.* at 275 (Brennan, J., dissenting).

89. *Id.*

90. *Id.* at 276.

questions has been delegation to another group of lawmaking power that the group may exercise either through rulemaking or the adjudication of individual cases, with a choice between the two methods left to the agency's judgment.[91] Justice Brennan then concluded that there was nothing inherent in the nature of capital punishment that made impossible the application of any or all of these means to check arbitrary action, but that the two state procedures under review failed to provide the necessary safeguards.[92]

Justice Brennan's opinion in *McGautha* involved a delegation of judicial sentencing power to a private group, the jury. A 1980 opinion by Justice Rehnquist, however, discussed the delegation doctrine in a case involving a delegation to a governmental agency. In *Industrial Union Department v. American Petroleum Institute* (the *Benzene* case),[93] five Justices voted to overturn an action taken under the Occupational Safety and Health Act. Four Justices reached this result by narrowly construing the Act to avoid an unconstitutionally broad delegation.[94] Justice Rehnquist, the fifth vote, asserted that the congressional delegation itself was unconstitutional because it was ambiguous and violated the delegation doctrine.[95] He argued that the delegation doctrine serves three important functions.[96] First, "it ensures to the extent consistent with orderly governmental administration that important [social policy choices] are made by Congress."[97] Second, it guarantees that the recipient of the

91. *Id.* at 278.

92. *Id.* at 280, 287. For other cases that discussed the delegation doctrine, see National Cable Television Ass'n v. United States, 415 U.S. 336, 340–42 (1974) (construing narrowly a statute that authorized the FCC to set licensing fees to avoid the possibility that the statute unconstitutionally delegated the power to tax); Arizona v. California, 373 U.S. 546, 625–26 (1963) (Harlan, J., dissenting in part) (arguing that a statute that delegated power to the Secretary of Interior to allocate waters from the Colorado River system was unconstitutional because the statute lacked standards to guide the Secretary's discretion).

Justice Harlan's dissent in *Arizona* discussed two purposes for the delegation doctrine that he believed were not furthered by the statute at issue. First, he stated that the delegation doctrine ensures that the elected body that is immediately responsible to the people will make fundamental policy decisions. *Id.* at 626. Second, Justice Harlan asserted that the delegation doctrine provides a statutory standard against which the courts can review a challenged official action. *Id.*

93. 448 U.S. 607 (1980).

94. *Id.* at 607–71 (Stevens, J., joined by Burger, C.J., Stewart & Powell, JJ.).

95. *Id.* at 685–86 (Rehnquist, J., concurring).

96. *Id.*

97. *Id.* at 685.

authority is provided "with an 'intelligible principle' to guide the exercise of the delegated discretion."[98] Third, the doctrine enables "courts charged with reviewing the exercise of delegated legislative discretion . . . to test that exercise against ascertainable standards."[99] Justice Rehnquist believed that the legislation at issue failed on all three counts.[100]

Justice Rehnquist's logic in the *Benzene* case is not directly applicable to the private prison context, because the case dealt with a congressional delegation to a public agency rather than to a private party. Justice Rehnquist's concern centered on delegation of congressional responsibility for deciding major social policy. A delegation to a private prison company that had adequate statutory guidelines does not involve the same issues.

At least one commentator[101] has viewed Justice Rehnquist's opinion in *Benzene* as consistent with the Court's decision in *Immigration and Naturalization Service v. Chadha*.[102] The Court in *Chadha* invalidated the legislative veto provision in an immigration statute on the theory that the provision improperly delegated legislative power because it violated article I separation of powers requirements.[103] The Court approved the delegation to the Attorney General of authority to waive deportation because the Attorney General was bound by an articulated principle that could be applied in a consistent manner.[104] The Court, however, rejected the further delegation of uncontrolled decision-making discretion to one house of the legislature.[105]

The Supreme Court used a formalistic and structural argument, turning on express constitutional requirements of bicameral passage and congressional presentment of the

98. *Id.* at 685–86.

99. *Id.* at 686.

100. *Id.*; *see also* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543, 547–48 (1981) (Rehnquist, J., dissenting) (arguing that Occupational Safety and Health Act of 1970 at issue in *Industrial Union Department*, unconstitutionally delegated to Secretary of Labor the policy choice of whether, and to what extent, cost-benefit analysis should determine industrial safety standards) (citing *Industrial Union Dep't*, 448 U.S. at 671 (Rehnquist, J., concurring)).

101. *See* Schoenbrod, *supra* note 51, at 1235.

102. 462 U.S. 919 (1983).

103. *Id.* at 954.

104. *Id.*

105. *Id.* at 958–59.

legislation to the President for signature into law. In striking down the legislation, the Court demanded that each branch of government exercise its constitutional responsibilities. The Court's focus, however, was abdication of constitutional functions to another branch of government, and not to a private party.

Justice White's dissent suggested that delegation to a private group, contingent on some fixed statutory standard, was not overruled and that the previous doctrine survived.[106] But commentators have suggested that *Chadha* will effect "a significant judicial tightening of the limits within which Congress may entrust *anyone* with lawmaking power,"[107] and that *Chadha* will encourage Congress to delegate less with better policy standards when it does delegate.[108] Thus, although the analysis in *Chadha* does not apply directly to delegations to private prison companies, *Chadha* may encourage Congress to make delegations under stricter statutory standards.

In summary, although no Supreme Court majority has attempted to deal in a substantial manner with the delegation doctrine since 1948, there have been several important dissenting and concurring opinions. A consideration of these opinions leads one to conclude that courts might apply a more stringent standard of review to delegations that affect liberty interests than they do to those that affect property interests.

II. STATE DELEGATION OF THE INCARCERATION FUNCTION

Although some commentators regard state delegation cases as unprincipled,[109] for the purpose of analysis, this sec-

106. *Id.* at 967–1013 (White, J., dissenting); *see also supra* note 44.

107. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 17 (1984) (emphasis in original).

108. Comment, *supra* note 18, at 621.

109. *See, e.g.*, 1 K. DAVIS, *supra* note 16, § 3.12, at 196 ("The first edition of the Treatise and the 1970 Supplement elaborately presented the state law concerning delegation to private parties, but retention of that material in the present edition, along with the updating of it, seems undesirable, because identifiable principles do not emerge."); Lawrence, *supra* note 8, at 647 (noting that cases on delegation are inconsistent both within and among the states); *see also* D. MANDELKER, D. NETSCH & P. SALSICH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 598 (2d ed. 1983). Mandelker, Netsch, and Salsich concluded that

> [t]he nondelegation doctrine is alive and well in the state courts. Delegation of power objections are frequently made to state and lo-

tion of the Article divides state delegation cases into three categories. Subsection A discusses cases upholding statutes that delegate the management of government programs to private persons. The private parties in these cases had neither rule-making nor adjudicative powers, but merely managed government programs within the parameters established by either the legislature or an administrative agency. Subsection B discusses the issue of whether, and in what circumstances, states may delegate rule-making functions to private parties. Subsection C discusses the circumstances in which a state may allow a private party to adjudicate the rights of others and whether judicial review of private adjudication is necessary.

As each of these classes of cases is discussed, this section compares the factual differences between the cases discussed and the private prison context. This section then explores the issue of whether a court would actually apply the principles announced in these cases to the private prison context. The section concludes that the principles announced in existing case law may permit states to contract with private companies for the incarceration of its prisoners. The state, though, must retain certain rule-making and adjudicative functions.

It is crucial to note, however, that the factual and philosophical differences between the private prison context and the cases discussed may well motivate a court to hold that a statute authorizing a state to contract with a private company to incarcerate its prisoners is unconstitutional.

A. *Delegation of Management Functions*

The constitutionality of privatization focuses, in the first instance, on whether a particular activity in which the government is involved is a governmental power, rather than a governmental function. If the privatization at issue involves

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> cal legislation, although a review of the state cases indicates that most delegations are upheld. State delegation cases are common but the decisions are unprincipled. Except for the conclusion that some state courts more frequently invalidate delegations of power than others, a principled basis for the application of the delegation of power doctrine is difficult to find.

Id.

the former, a delegation issue arises.[110] A private entity exercises governmental power when it deprives a person of life, liberty, or property at the behest of government.[111]

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110. *See* Lawrence, *supra* note 8, at 647. Professor Lawrence stated:

> Much of the debate over privatization has been political in nature, rather than legal; and indeed when privatization involves governmental *functions*, the legal issues are largely secondary, involving only details. But if privatization proposals should involve governmental *powers*, the legal problems become considerably more formidable. The transfer of governmental powers raises the issue of to what extent it is constitutionally permissible to delegate those powers to private actors.

Id. (emphasis in original). An early New York Court of Appeals case explained differently this distinction between governmental functions and powers. In Fox v. Mohawk & Hudson River Humane Soc'y, 165 N.Y. 517, 59 N.E. 353 (1901), Judge Cullen wrote:

> I certainly should deny the right of the legislature to vest in private associations or corporations authority and power affecting the life, liberty, and property of the citizens .... Of course, the state ... may employ individuals or corporations to do work or render service for it, but the distinction between a public officer and a public employee or contractor is plain and well recognized.

Id. at 525, 59 N.E. at 355. Thus, if the government gives a private party power to affect a person's life, liberty, or property interest, it is delegating governmental power. If, however, the government merely contracts with a private party to confer a benefit on members of the public that does not affect any person's existing life, liberty, or property interest, it has not delegated its governmental power. Therefore, a contract to provide food or medical care to prisoners in an institution that the state owns and controls does not in itself raise a constitutional issue. A prisoner has no interest in receiving his food or medical care directly from the government rather than from an independent contractor. If, however, the government leaves the entire operation of the prison in private hands, it is the private company, and not the government, that is immediately responsible for the prisoner's day-to-day deprivation of liberty.

For a critique of the "government functions" approach in a different context, see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 538-47 (1985) (holding that transit authority was not immune from minimum wage and overtime requirements of the Fair Labor Standards Act).

111. If the government gives a private party the authority to deprive another of life, liberty, or property, the issue of state action arises. If a private actor exercises governmental power, the state nevertheless retains the responsibility to protect the constitutional rights of those persons over whom the private company exercises control. Schneider, *supra* note 54, at 1169–70. Thus, "[a]lthough the state may have a private actor performing the service . . . , the nondelegable nature of the service means that the state must remain responsible for the performance of that service." *Id.* at 1170. Stated another way, the government can delegate the function, but not the duty to perform that function. *Compare* Ancata v. Prison Health Servs., 769 F.2d 700, 703 (11th Cir. 1985) ("Although Prison Health Services and its employees are not strictly speaking public employees, state action is clearly present. Where a function which is traditionally the exclusive prerogative of the state . . . is performed by a private entity, state action is present.") *with* West v. Atkins, 815 F.2d 993, 994–96 (4th Cir. 1987) (en banc) (7-3 vote) (declin-

Thus, a delegation can occur even though the private party exercises neither rule-making nor adjudicative powers but merely manages a government program that is already in place.

The first category of delegations, therefore, is the delegation of the management of government property and programs. In *People v. Chicago Railroad Terminal Authority*,[112] for example, the validity of a statute permitting railroad terminal authorities to contract with private companies to maintain and operate the authorities' terminals was attacked on delegation grounds.[113] The statute reserved ultimate power over the terminal's management to the Authority,[114] and authorized the railroad terminal authorities to delegate administrative duties to railroad companies.[115] The court held that this delegation was constitutional.[116]

Chicago Railroad established the proposition that, under the Illinois Constitution, a governmental body can constitutionally delegate the management of a government enterprise to a private company if the governmental body retains ultimate control over the program. Significantly, the statute

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ing to overrule Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985), in which the court held that a physician who had contracted with the state to furnish medical services in prison was not acting under color of state law when he allegedly provided inadequate medical treatment to prisoner), *cert. granted*, 108 S. Ct. 256 (1987). Noting the overlap between the state action and delegation analyses, the court in *Ancata* stated:

> The federal courts have consistently ruled that governments, state and local, have an obligation to provide medical care to incarcerated individuals. . . . This duty is not absolved by contracting with an entity such as Prison Health Services. Although Prison Health Services has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by the policies or customs of the Health Service. In that sense, the county's duty is non-delegable.

769 F.2d at 705 (footnote omitted).

Even if a state action problem does not exist under current law, the validity of the delegation still depends, in part, on whether the private actor performs its duty in a constitutional manner. *See* Lawrence, *supra* note 8, at 693 (even if state action is not present, if the private party makes decisions regarding the life, liberty, or property of citizens at the behest of the government, courts may find delegation improper unless the private actor creates and follows a program that satisfies principles of procedural due process).

112. 14 Ill. 2d 230, 151 N.E.2d 311 (1958).

113. *Id.* at 238–40, 151 N.E.2d at 316–17.

114. *Id.*

115. *Id.* at 239–40, 151 N.E.2d at 317.

116. *Id.* at 242, 151 N.E.2d at 318.

challenged in *Chicago Railroad* did not permit private railroad companies to choose the terminal sites or acquire the land for the terminals.[117] Thus, the Terminal Authority, not the railroad company, made the policy decision concerning terminal location and design, including the issue of whether, and how many, shops to construct and lease. The statute at issue permitted the Terminal Authority to vest the power to supervise and control the construction, maintenance, and operation of the terminal in a committee that was composed, in part, of railroad company officials.[118] Noting that the Terminal Authority retained ultimate control over the terminal, the court held that the statute did not unconstitutionally allow the Authority to delegate its powers to private parties.[119]

The statute did not, however, permit the Terminal Authority to delegate either rule-making or adjudicative powers to private railroad companies. Rather, it reserved the adjudicative power of condemning land for terminal use to the Terminal Authority itself. Although the statute permitted the prerogative to delegate the authority to establish terminal management policy to a board consisting of private company appointees, the Authority retained ultimate control over the board. Thus, because the Authority could accept, reject, or modify the rules that the management committee established, the rules were advisory. The board, therefore, did not have rule-making power. Instead, the statute limited the private delegate's power to the function of administering a program that a governmental body established.

Nevertheless, because the statute permitted the Terminal Authority to yield physical control of terminal property to a private company, a private delegate potentially could affect the property rights of terminal lessees. Therefore, the statute in fact permitted a true delegation of governmental power to affect private property interests for a public purpose.

Statutes that permit private security guards to detain suspected shoplifters present another example of administrative delegation. Although the statutes and relevant cases

117. *See id.* at 234, 240–41, 151 N.E.2d at 314, 317 (noting that the statute required the Authority to select, and the city council to approve, the terminal site and, once approved, the Authority had the power to acquire designated land).

118. *Id.* at 239–40, 151 N.E.2d at 316.

119. *Id.* at 238–40, 151 N.E.2d at 316-17.

do not expressly discuss the delegation doctrine, they effectively authorize private persons to deprive people of their liberty for the public purpose of enforcing criminal laws. An Indiana statute, for example, authorizes private security guards to detain suspected shoplifters if the guards have probable cause to believe that the detainee has stolen any item belonging to the store.[120] But this statute does not authorize store security guards to make arrests;[121] their power is investigatory only.

Humane society officers perform law enforcement functions analogous to those of store security guards. In *ASPCA v. City of New York*,[122] for example, a Humane Society officer directed a police officer to a person whom the Society suspected had been cruel to a horse.[123] The police officer, however, actually arrested the suspect and prosecuted him before a magistrate.[124] The Humane Society officers wore special uniforms, patrolled the streets, and reported any suspected violations of the state's humane laws.[125] The New York Appellate Court characterized the Humane Society's law enforcement activities as "purely administrative,"[126] and held that the state government constitutionally could delegate the law enforcement functions at issue to the Humane Society.[127]

In both the store security guard and Humane Society examples, the private officers had no authority either to arrest suspects or to adjudicate crimes. The private officers' only authority was to identify suspected lawbreakers and facilitate their ultimate arrest and prosecution by govern-

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120. *See* IND. CODE ANN. §§ 35-33-6-1 to -5 (Burns 1985) (outlining circumstances in which store employee may detain suspected shoplifter). An Indiana appellate court has upheld the constitutionality of the predecessor statute sub silentio. Crase v. Highland Village Value Plus Pharmacy, 176 Ind. App. 47, 52, 374 N.E.2d 58, 62 (1978) (remanding case to determine whether "statutory defense" to false imprisonment action applied, without discussing Act's constitutionality).

121. *See* IND. CODE ANN. § 35-33-6-2(b) (Burns 1985) (limiting store security guards' authority to detain suspected shoplifter temporarily until police can come to make arrest).

122. 205 A.D. 335, 199 N.Y.S. 728 (1923).

123. *Id.* at 336, 199 N.Y.S. at 729.

124. *Id.*

125. *Id.* at 338, 199 N.Y.S. at 730.

126. *Id.* at 341, 199 N.Y.S. at 733.

127. *Id.* (citing Fox v. Mohawk & Hudson River Humane Soc'y, 165 N.Y. 517, 59 N.E. 353 (1901)).

ment officials. In both instances, independent, governmental decision-makers ultimately decided whether to arrest, prosecute, and sentence the wrongdoer. Thus, the private companies performed only administrative, not adjudicative functions.[128]

Moreover, in each of these examples of administrative delegation, the private party had neither rule-making nor adjudicative powers and could merely assist a government agency in implementing its policy decisions. The principles announced in these cases, therefore, might allow private prison management under rules that the state established. A state agency with authority to accept, reject, or modify administrative rules that the private prison company proposed, however, would have to review any proposed rule that would affect the prisoners. Additionally, a state judicial or administrative officer would have to determine whether an individual prisoner had violated an administrative rule. This would be necessary if the prisoner's incarceration were prolonged as a result of such a determination.[129]

Courts might not apply the principles established in the cases discussed in this section to the private prison context, however. The private delegates in these cases performed functions that states commonly permit private parties to perform. Private citizens typically have the right to identify and even arrest[130] suspected lawbreakers. Private railroads certainly may construct and operate railroad terminals without first seeking state approval. Hence, none of the delegates in the cases discussed performed functions that were unique to government.

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128. *See also* Hogan v. State Bar, 36 Cal. 2d 807, 811, 228 P.2d 554, 556 (1951) (rejecting challenge on delegation grounds to state bar association's authority to recommend disciplinary action against attorney because recommendation was advisory and subject to de novo review in state supreme court).

129. This would occur, for example, if an administrative infraction resulted in a loss of the prisoner's good-time credits or affected his chance for parole. Mayer, *supra* note 72, at 320–21 (arguing that the state should maintain ultimate control over disciplinary proceedings because they potentially could increase the length of a prisoner's incarceration by reducing his chance for parole or good-time credits). Similar to store security guards or humane society officers, however, the private prison company could perform an accusatory function in which its agents acted as complaining witnesses at disciplinary proceedings. *See id.* at 320 (suggesting this role for private prison company).

130. *See id.* at 317–19 (discussing private citizens' common law right to arrest felons).

Incarcerating prisoners, however, unlike identifying lawbreakers or managing railroad terminals, is a power that the states traditionally have had to themselves. Thus, because this function is "intrinsically governmental in nature," the courts may distinguish the administrative delegation cases and enjoin private prison operations on delegation grounds.[131]

B. *Delegation of Rule-Making Authority*

Administrative delegations raise the policy concern of whether government should allow a private company to manage a program rather than have the government manage the program itself. A related concern is whether routine administrative decisions would contravene the goals of the program. These concerns become more pronounced when the legislature grants power to a private company to make administrative rules that are binding on private persons.

The problem with this practice is that a private company can exercise governmental power affecting a citizen's liberty or property interests outside of any legislative or administrative control. This practice is constitutionally suspect for two reasons: first, only the legislature has express constitutional authority to exercise coercive governmental power in the public interest; and second, a private company might make rules that are repugnant to the public interest for its own pecuniary or political gain.

Two common types of rule-making delegations are prevailing wage laws and statutes that adopt technical codes not yet in existence. The prevailing wage laws typically provide that private contractors who perform municipal contracts must pay the prevailing wage established by a labor commissioner. They also typically provide that the labor commissioner must adopt a union wage rate established by collective bargaining.

131. *See* Melcher v. Federal Open Mkt. Comm'n, No. 84-1335, slip op. at 16 (D.D.C. Sept. 25, 1986) (dictum) (noting, in case upholding private delegation, that "many responsibilities may be so intrinsically governmental in nature that they may not be entrusted to a non-governmental entity"). The court suggested "the powers to conduct foreign affairs or to establish military and naval forces" as examples of nondelegable powers that are intrinsically governmental. *Id.* at n.24; *cf.* Brief for Appellee at 32, Bowsher v. Synar, 478 U.S. 714 (1986) (arguing that Congress's power to spend government revenues was nondelegable because it was Congress's core function).

Industrial Commission v. C & D Pipeline[132] is representative of the cases holding prevailing wage laws unconstitutional on delegation grounds.[133] The Arizona Court of Appeals noted that the statute granted no discretion "to the Commission to do anything other than ascertain and record the union rate."[134] Accordingly, the court held, under the Arizona Constitution, that the prevailing wage law unconstitu-

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132. 125 Ariz. 64, 607 P.2d 383 (Ct. App. 1979).

133. The statute provided:

> For the purpose of determining the general prevailing rate of per diem wages, the industrial commission of Arizona shall ascertain and keep on record the rates or scale of per diem wages required to be paid to each craft or type of workman belonging to or affiliated with the American Federation of Labor, the Arizona State Federation of Labor, or any other state or national labor organization similarly constituted, prevailing in the locality in which the public work is to be performed. If such method of arriving at the general prevailing rate of per diem wages cannot reasonably and fairly be applied in any political subdivision of the state for the reason that no such organization is maintained in the political subdivision, the industrial commission *shall* determine the prevailing rate to be the rate required to be paid to each craft or type of workman of the same or most similar class, working in the same or most similar employment in the nearest and most similar neighboring locality, and affiliated with any such labor organization.

ARIZ. REV. STAT. ANN. § 34-324(A) (1974) (emphasis omitted in part); *see* 125 Ariz. at 65–66, 607 P.2d at 384–85.

134. 125 Ariz. at 67, 607 P.2d at 386. The court distinguished Baughn v. Gorell & Riley, 311 Ky. 537, 224 S.W.2d 436 (1949), a case cited by the Industrial Commission that upheld a prevailing wage law. 125 Ariz. at 66, 607 P.2d at 385–86. The statute challenged in *Baughn* provided:

> The wages paid for a legal day's work to laborers, workmen, mechanics, helpers, assistants and apprentices upon public works shall not be less than the prevailing wages paid in the same trade or occupation in the locality. The public authority shall establish prevailing wages at the same rate that prevails in the locality under collective agreements or understandings between bona fide organizations of labor and their employers at the date the contract for public works is made if there are such agreements or understandings in the locality applying to a sufficient number of employees to furnish a reasonable basis for considering those rates to be the prevailing rates in the locality.

311 Ky. at 540, 224 S.W.2d at 438 (emphasis omitted). The court in *Industrial Commission* noted that, unlike the statute in *Baughn*, the Arizona statute granted no discretion to the Commission to consider factors other than the union wage rate to determine the prevailing wage rate. 125 Ariz. at 67, 607 P.2d at 385–86. The court concluded that the Arizona statute was unconstitutional because it did not grant any discretion to the Commission to question the union rate. *Id.* at 68, 607 P.2d at 386.

tionally granted the power to determine the prevailing wage to private unions and management.[135]

Statutes adopting technical codes that a private trade association drafts and periodically revises raise delegation issues that are similar to those found in the prevailing wage cases. If a state legislature were to adopt prospectively an extant technical code, no delegation problem would exist. In such a case, the legislature would merely be exercising its right to adopt one political option over another.[136] A delegation problem would arise, however, if a statute were to adopt prospectively any changes that the technical trade association might make in the future. This type of statute would grant the trade association power to make legally binding rules that affect the property interests of private tradesmen.

Hillman v. Northern Wasco County People's Utility District[137] is typical of the cases that hold such statutes unconstitutional. In *Hillman*, a contractor injured himself after receiving an electrical shock from exposed wiring in an old building while he was removing some beams.[138] Hillman fell from the wall after his shoe brushed against the exposed wire.[139] He later brought a tort action against the electric company that had originally installed the wiring.[140]

In his complaint, Hillman alleged that the Northern Wasco County People's Utility District had violated the National Electric Code.[141] Oregon's adoption of the Code included revisions and additions "as they are published from time to time."[142] After the trial court instructed the jurors that violation of the Code would be negligence per se,[143] the jury returned a verdict for the plaintiff.[144] Both plaintiff and defendant cross-appealed from the trial court's order grant-

135. 125 Ariz. at 68, 607 P.2d at 386. For another case that held a prevailing wage law unconstitutional, see Schryver v. Schirmer, 84 S.D. 352, 357–58, 171 N.W.2d 634, 637 (1969).

136. Liebmann, *supra* note 48, at 680.

137. 213 Or. 264, 323 P.2d 664 (1958), *overruled on other grounds*, Maulding v. Clackamas County, 278 Or. 359, 563 P.2d 731 (1977).

138. *Id.* at 273–74, 323 P.2d at 669.

139. *Id.*

140. *Id.* at 270–72, 323 P.2d at 668.

141. *Id.* at 275–76, 323 P.2d at 670.

142. *Id.*

143. *Id.*

144. *Id.* at 270–71, 323 P.2d at 668.

ing the defendant's motion for a new trial but denying its motion for a judgment n.o.v.[145]

The issue that the defendant raised in support of its motion for a new trial was whether the statute that adopted the Code, including revisions and additions not yet in existence, unconstitutionally delegated legislative rule-making power to the American Standards Association, the private party that had drafted the Code.[146] The court stated that the Oregon Constitution vested lawmaking power exclusively in the legislature[147] and noted that neither the legislature nor any other department of government had any control over the Association.[148] As a result, the court held that the Oregon statute unconstitutionally delegated legislative rule-making power to the Association.[149]

Hillman also involved a similar private delegation issue concerning the National Electric Safety Code, issued and periodically revised by the Bureau of Standards of the Department of Commerce.[150] The court pointed out that the Bureau adopted some of the Safety Code's provisions even though it did not agree with them.[151] These provisions were proposed by private committees composed of representatives of various private groups that the Safety Code affected.[152] The Bureau followed this procedure because it

145. *Id.* The Oregon Supreme Court affirmed the trial court's decision. *Id.* at 314–15, 323 P.2d at 688.

146. *Id.* at 275–83, 323 P.2d at 670–73.

147. *Id.* at 277–78, 323 P.2d at 671.

148. *Id.* at 278–81, 323 P.2d at 671–72.

149. *Id.* at 281, 323 P.2d at 673. Because the statute adopting the Code was unconstitutional, any Code provision adopted pursuant to the statute did not have any legal effect. Thus, the defendant achieved its objective of overcoming a finding of negligence per se solely because it did not comply with the Code. For other cases that held statutes that adopted future technical codes unconstitutional on delegation grounds, see, *e.g.*, Agnew v. City of Culver City, 147 Cal. App. 2d 144, 156–57, 304 P.2d 788, 797 (1956); State v. Crawford, 104 Kan. 141, 143, 177 P. 360, 361 (1919).

150. 213 Or. at 281–87, 323 P.2d at 673–75.

151. *Id.* at 284–85, 323 P.2d at 674.

152. *Id.* In support of its observation, the court quoted the following passage from the preface of the Bureau's handbook:

> In preparation of the first few editions of the code, the Bureau held meetings in many parts of the country and welcomed suggestions from everyone concerned. It, however, reserved to itself the final decision on all contested points. The procedure followed in later revisions subsequent to the establishment of the American Standards Association differs essentially from the former practice in that

placed a higher priority on promoting broad-based acceptance of the Safety Code in the private sector than on agreeing with all of its provisions.[153]

Oregon's Public Service Commission was statutorily authorized to make safety rules for employers and common carriers concerning the use of electrical equipment.[154] The Commission, in turn, adopted the Safety Code as it existed at the time of its order, as well as all of the Bureau's subsequent revisions and additions to the Safety Code.[155]

The court distinguished the enabling statute from the Commission's order that adopted the Safety Code. The enabling statute was constitutional, the court noted, because an administrative agency such as the Commission may adopt an *extant* edition of the Code after a hearing and a proper exercise of its discretion.[156] If the Commission did not do so, the court observed, it would not perform its duty to determine whether the Safety Code provisions that the Bureau adopted were "necessary and proper for the protection of the health and safety of the citizens of this state."[157] The court asserted, however, that the Commission abdicated its legislative power when it adopted *future* Safety Code provisions without further consideration.[158]

The court in *Hillman*, like most state courts, spoke in conclusory terms about the unconstitutionality of private delegations, without specifically indicating the policy con-

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> final decisions as to all details are made by the sectional committees formally approved by the American Standards Association and operating under their rules of procedure. The Bureau, as sponsor for the work under this procedure, has given up its prerogative of determining details in return for the implied understanding that the many parties concerned will accept such a code as they can agree upon among themselves. All such codes of practice necessarily include compromises between conflicting aims. The Bureau has felt that decisions made by practically unanimous agreement among the interests affected would, in general, be wiser than those at which it might arrive after weighing the arguments of advocates for different views. It has, therefore, welcomed this procedure in spite of the fact that this involves the acceptance of some details of which it might not itself approve.

Id.

153. *Id.*
154. *Id.* at 281–83, 323 P.2d at 673.
155. *Id.* at 282–85, 323 P.2d at 673–74.
156. *Id.* at 284–85, 323 P.2d at 674.
157. *Id.* at 285–86, 323 P.2d at 674–75.
158. *Id.* at 286–87, 323 P.2d at 675.

cerns that inspired the doctrine. But it did make three assertions that evinced its real policy concerns. First, the court explained that no department of government had any control over a private organization.[159] Second, the court stated that, through the Constitution, the people vested the lawmaking power in the legislature.[160] Thus, the people effectively prohibited any group except the legislature from exercising lawmaking powers.[161] Third, the court noted that when private parties adopt rules that further their own interests, the rules may not reflect the best judgment of an agency that is concerned only with the public interest.[162] Thus, the court's underlying policy concern apparently was that a private party, not subject to any political control, could impose rules to further its own interest at the expense of the public interest.[163]

Industrial Commission and *Hillman* are examples of the state courts' almost uniform condemnation of statutes delegating rule-making power to private parties. Both cases addressed similar concerns about whether private organizations would make rules that placed personal gain ahead of public welfare and whether the absence of neutral administrative agency review of the private parties' determination would encourage self-serving policies. This latter aspect was particularly troublesome, the cases noted, because the private parties themselves were not subject to any political control. Both cases indicated, however, that a rule that a private party proposes is not constitutionally suspect if it is adopted by an administrative agency that has power to accept, reject, or modify the rule.[164]

In the private prison context, the principles that these cases establish would not permit a legislature to authorize a private prison company to make rules governing the conduct of the prisoners who are committed to its care. The prison

159. *Id.* at 277–79, 323 P.2d at 671.

160. *Id.* at 279–80, 323 P.2d at 671 (quoting Marr v. Fisher, 182 Or. 383, 187 P.2d 966 (1947)).

161. *Id.*

162. *Id.* at 285–86, 323 P.2d at 674–75.

163. *But see* Liebmann, *supra* note 48, at 682–84 (arguing that, because private rule-making affects the community at large, any abuses are visible and likely to be corrected by the political process).

164. *Cf. id.* at 680 (noting that the Supreme Court has held that "freedom for private groups to seek their legislative ends is itself constitutionally protected").

company could propose rules to an administrative agency, however, if the agency had authority to accept, reject, or modify them. The agency would then have a constitutional duty to exercise discretion concerning whether and in what form it should adopt the rules.

It must be emphasized that the rules at issue in *Industrial Commission* and *Hillman* only affected the property interests of private tradesmen. Any rules governing a private prison, however, likely would affect the prisoners' life and liberty interests as well as other fundamental constitutional rights. Because of these differences in the constitutional importance of the interests affected, a court might require the legislature or an administrative agency to take a more active role in determining the rules by which private prisons governed the prisoners under the company's control. A court might hold, for example, that a statute authorizing a private prison is unconstitutional on delegation grounds unless it specifies in detail the rules governing the relationship between the private prison company and the prisoners under the company's control.[165] Alternatively, a court might require an administrative agency to create the necessary rules. Neither of these holdings would prevent private prison companies from proposing their own rules. The legislature or administrative agency merely would draft the rules itself, instead of passively reviewing the private party's proposals. Because of the life and liberty interests involved, however, a court might bar the delegation altogether.

C. *Delegation of Adjudicative Powers*

When a private party exercises delegated *administrative* and *rule-making* power, its actions generally affect a large number of persons and entities. If a private party exercises delegated *adjudicative* power, however, its actions usually affect a single person or entity. Because of the disproportionate effect of an exercise of adjudicative power, an arbitrary or unreasonable exercise of such power is not as easily corrected through the political process. Therefore, courts

165. Of course, a rule itself may be unconstitutional on other grounds, even though the delegation is proper.

should scrutinize delegations of such power more carefully.[166]

State courts generally invalidate statutes and administrative regulations that delegate adjudicative power to private parties when there is no provision for judicial review of the private adjudications. When there is provision for such review, however, the delegation generally is upheld. *DiLoreto v. Fireman's Fund Insurance Co.*[167] is an example of the latter type of case. At issue in *DiLoreto* was a private insurer's authority pursuant to a Massachusetts statute implementing regulations of the Board of Appeal on Motor Vehicle Liability Policies and Bonds.[168] The statute allowed a private insurer to determine, in the first instance, whether an insured was at fault in an accident, in order to assess a premium surcharge.[169] The insured retained the right, however, to both administrative[170] and judicial[171] review.

DiLoreto argued that the delegation of adjudicative authority to a private insurer violated the Massachusetts Constitution.[172] The Massachusetts Supreme Judicial Court first

166. Liebmann, *supra* note 48, at 682–83. Liebmann explained several differences between rule-making and adjudicative power that suggest a greater need for judicial scrutiny of the latter type of power. He noted that "abuses of rule making power are more visible, fall on and thus give rise to reaction by the community at large, and may more readily be redressed after the event." *Id.* at 682. Liebmann contrasted this with adjudicative powers because they "bear more heavily on individuals, while abuses of them are less likely to be brought to public view or be susceptible of easy correction." *Id.* at 682–83. Liebmann concluded that courts should scrutinize carefully and, in most cases, invalidate delegations of adjudicative power. *Id.*

167. 383 Mass. 243, 418 N.E.2d 612 (1981).

168. *Id.* at 244, 418 N.E.2d at 613.

169. *Id.* at 245–46, 418 N.E.2d at 614. The insurer's determination is binding on the insured unless the insured appeals the insurer's decision to the Board of Appeal on Motor Vehicle Liability Policies and Bonds. *See* MASS. ANN. LAWS ch. 175, § 113P (Law. Co-op. 1977) (insured may appeal any determination of insurer within 30 days). Thus, the insurer's authority in this situation is greater than the authority granted to store security guards, because the insurer's decision is a binding, albeit appealable, determination of the insured's rights and the onus of challenging that decision is on the insured. *See supra* notes 120–21 and accompanying text (noting that store security guards in Indiana have no authority to arrest or charge suspected shoplifters but rather have authority only to hold suspected shoplifters until police can come to make arrest).

170. *See* MASS. ANN. LAWS ch. 175, § 113P (Law. Co-op. 1977) (insured may appeal insurer's determination to Board within 30 days of adverse decision).

171. *See id.* (insured may appeal Board's decision to superior court).

172. 383 Mass. at 245, 418 N.E.2d at 614. The stipulated facts on which the insurer based its decision to surcharge were as follows. DiLoreto parked his automobile along the right hand side of a street and opened the left front door to exit

explained that the merit-rating program was based on a detailed and comprehensive plan established by the Board pursuant to statutory mandate.[173] It then noted that Board regulations narrowly channeled the insurer's determination.[174] Additionally, the insurer's determination was subject to administrative and judicial review.[175] Thus, the court asserted that the statutory scheme prevented the insurer from benefiting from its decision to assess a surcharge in a particular case.[176] The court concluded, therefore, that the statute did not unconstitutionally delegate adjudicative power to private insurers.[177]

In upholding the *DiLoreto* statute, the court distinguished its earlier holding in *Corning Glass Works v. Ann & Hope, Inc.*[178] The nonsigner provision of the fair trade law[179] in *Corning Glass* was constitutionally defective because there was no standard to limit the contracting parties' discretion to set the retail price that others must charge.[180] Further-

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his automobile. After opening the door and starting to get out of the automobile, DiLoreto noticed another automobile headed toward his vehicle at an unsafe speed of approximately 30 miles an hour. The driver was not paying attention to her driving, but instead was talking to a passenger. After observing the approaching vehicle, DiLoreto got back into his automobile. At that point, the vehicle struck his door. The insurer assessed a surcharge on DiLoreto pursuant to a regulatory presumption that a person whose doors are opened at the time of a collision is at fault in excess of 50%. *Id.* at 244 & n.3, 418 N.E.2d at 613–14 & n.3.

173. *Id.* at 246–47, 418 N.E.2d at 614–15.

174. *Id.* at 247, 418 N.E.2d at 615.

175. *Id.*

176. *Id.* The statute created a system by which the insurer must offset all of its surcharges with good-driver credits in an amount equal to its income from the surcharges, including the insurer's income from investing the proceeds of the surcharge prior to distribution. MASS. ANN. LAWS ch. 175, § 113P (Law. Co-op. 1977).

177. 383 Mass. at 247–48, 418 N.E.2d at 615.

178. 363 Mass. 409, 294 N.E.2d 354 (1973).

179. *See* 1 K. DAVIS, *supra* note 16, § 3.12, at 196. Davis explained the history and effect of nonsigner provisions of fair trade laws as follows:

> The history of non-signer provisions of the so-called fair trade laws may have some value. Such laws were enacted by 46 states. A nonsigner provision of such a law provides that a minimum resale price fixed in an agreement between a manufacturer (or other distributor) and a retailer is binding upon other retailers. The effect is that parties to such an agreement have the legislative power to fix the minimum resale price at which nonparties may sell; any seller who sells at a price lower than the price fixed in such an agreement is subject to suit by any person damaged.

Id.

180. *DiLoreto*, 383 Mass. at 246–47, 418 N.E.2d at 615.

more, the statute at issue in *Corning Glass* did not provide for administrative or judicial review of the private decision.[181] Therefore, the *DiLoreto* court concluded that, because the insurance statute provided an effective standard to channel the private insurer's discretion and adequate review of private party determinations, the delegation was constitutional.[182]

The court in *DiLoreto* upheld a delegation of adjudicative power because of the availability of judicial review. If review of a private adjudication is not available, however, state courts generally invalidate such delegations. *International Service Agencies v. O'Shea*[183] is typical of those cases. International Service Agencies (ISA) had requested the right to participate in the annual solicitation of charitable contributions from New York state employees through the State Employees Federated Appeals (SEFA).[184] The statute in question provided that the Commissioner of General Services must select one "federated community campaign"[185] for each county or area in which a solicitation took place.[186] The Commissioner, in turn, delegated to the United Way and the National Health Agencies his authority to select the charitable nonprofit organization that would have the right to participate in a local campaign.[187] ISA had applied to both the Commissioner and the United Way for permission to participate in a local charitable drive.[188] Both entities rejected ISA's applications.[189]

ISA argued that the Commissioner unconstitutionally delegated the power to select local federated community

181. *Id.*

182. *Id.*

183. 104 Misc. 2d 1071, 430 N.Y.S.2d 224 (Sup. Ct. 1980).

184. *Id.* at 1072, 430 N.Y.S.2d at 225.

185. *See id.* at 1073, 430 N.Y.S.2d at 226. The statute defined a federated community campaign as "a charitable non-profit organization which solicits funds for distribution among a substantial number of charitable non-profit organizations, which has been approved as such by the Commissioner of General Services." *Id.* ISA solicited funds for seven different charities. *Id.* at 1072, 430 N.Y.S.2d at 225. Thus, ISA would have qualified under the statutory definition if the Commissioner of General Services had approved its program.

186. *Id.* at 1073, 430 N.Y.S.2d at 226.

187. *Id.* at 1074, 430 N.Y.S.2d at 226–27.

188. *Id.* at 1076–77, 430 N.Y.S.2d at 228. The Commissioner referred ISA to the United Way which, in turn, referred ISA back to the Commissioner. The court described this process as a "Ring around the Rosey." *Id.*

189. *Id.*

campaigns to private charities.[190] The New York Supreme Court observed that the Commissioner admitted that he had no role in the decision concerning ISA's participation in the federated campaign.[191] The court charged that, although the Commissioner was empowered to do so, he failed to promulgate regulations establishing a procedure to determine inclusion in a SEFA.[192] As a result, the statutory delegation unconstitutionally deprived ISA of a valuable interest in soliciting funds directly from state employees' paychecks.[193]

The court's primary policy concern became apparent when it noted three times in the opinion the likelihood that the United Way's self-interest motivated ISA's exclusion from participating in a SEFA.[194] On one such occasion, for example, the court observed that "[o]ne can readily understand the reluctance of United Way to permit ISA to join in. Their own self-interest would dictate a policy of exclusion in order to maximize the amount of their own contributions."[195]

A case that raised similar issues was *Group Health Insurance v. Howell*.[196] In that case, Group Health Insurance of New Jersey (GHI), a nonprofit corporation, proposed to offer a medical services plan[197] similar to the then-existing

190. *Id.* at 1073, 430 N.Y.S.2d at 226.

191. *Id.* at 1074, 430 N.Y.S.2d at 226.

192. *Id.*

193. *Id.* at 1076–78, 430 N.Y.S.2d at 228–29. In so holding, the court rejected the argument that state employees remained free to make donations to ISA if they chose to do so. *Id.* at 1076, 430 N.Y.S.2d at 228. Instead, the court held that ISA had a due process interest in a fair opportunity for inclusion in a SEFA. *Id.* at 1077, 430 N.Y.S.2d at 228.

194. *Id.* at 1074, 430 N.Y.S.2d at 227 ("It is clear that delegations of public authority must be carefully circumscribed to insure that self-interest does not become the overriding consideration."); *id.* at 1077, 430 N.Y.S.2d at 228 ("Fortunately, the reins of government cannot be turned over to private interest groups to be utilized to preserve self-interests."); *see infra* text accompanying note 195 (noting United Way's pecuniary interest in excluding ISA).

195. *Id.* at 1076–77, 430 N.Y.S.2d at 228.

196. 40 N.J. 436, 193 A.2d 103 (1963).

197. *See id.* at 439–41, 193 A.2d at 105–06. The statute at issue defined a medical services plan as

> any plan or arrangement operated by such a corporation under the provisions of the Law whereby the expense of medical services to subscribers and covered dependents is paid in whole or in part by such corporation to participating physicians of such plans or arrangements and to others as provided in the Law. A subscriber is

plan that Blue Shield offered.[198] A New Jersey statute provided, however, that before a company could offer such a program it had to obtain prior approval from the Medical Society.[199] The Commissioner of Banking and Insurance was powerless under the statute to certify a corporation's proposed medical services plan without the approval of Blue Shield.[200] Because the statute in effect delegated to Blue Shield the power to deny licenses to corporations proposing medical service plans,[201] the court held that the delegation violated the New Jersey Constitution.[202]

The New Jersey Supreme Court specifically noted two policy concerns with the delegation at issue. First, the statute contained no standards or safeguards to guide Blue

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> one to whom a subscription certificate is issued by the corporation which sets forth the kinds and extent of the medical services for which the corporation is liable to make payment. A participating physician is any physician licensed to practice medicine and surgery in New Jersey, who agrees in writing with the corporation to perform the medical services specified in the subscription certificates issued by the corporation, at such rates of compensation as shall be determined by its board of trustees, and who agrees to abide by the corporation's rules. Medical service includes all general and special medical and surgical services ordinarily provided by such licensed physicians in accordance with accepted practices in the community. No subscriber or his covered dependents shall be liable for any payment to any participating physician for medical services specified in the subscriber's certificate to be paid to the participating physician by the corporation.

Id. at 441–42, 193 A.2d at 106 (quoting N.J. STAT. ANN. § 17:48A-1 (West 1939 & Supp. 1962)).

198. *Id.* at 443, 193 A.2d at 107.

199. *Id.* at 444–45, 193 A.2d at 108. The statute did not, in so many words, require Blue Shield's approval. Instead, it required approval of a recognized medical society with at least 2,000 members that was incorporated for at least 10 years. The court noted, however, that the parties did not dispute that Blue Shield, a private organization, was the only organization that met the statutory requirements. Thus, although the statute did not provide expressly that Blue Shield's approval was a necessary prerequisite to having the state license a medical services plan, its effect was identical. *Id.*

200. *Id.* at 446, 193 A.2d at 109. Technically, the organization from which approval was necessary was the "Medical Society." Although legally separate from Blue Shield, the Medical Society formed Blue Shield, had four interlocking directors, and approved nominees to Blue Shield's board of directors before they were elected. Thus, the court noted that, in practical effect, the Medical Society represented Blue Shield's interests in licensing matters. *Id.* at 445, 193 A.2d at 107. Therefore, the terms "Medical Society" and "Blue Shield" are interchangeable when discussing this case.

201. *Id.* at 446–47, 193 A.2d at 109.

202. *Id.* at 447, 193 A.2d at 109.

Shield's discretion.[203] Second, the court declared that this deficiency was exacerbated because "the Medical Society's self-interest might tend to color its determination whether to approve . . . an applicant which may become a competitor of Blue Shield."[204]

The state cases discussing delegation of adjudicative power to private parties have established several principles. If judicial review of a private adjudication is available, as in *DiLoreto*, courts are more likely to uphold the delegation even though the private determination is binding until reversed on appeal, and the onus of appealing the action is on the affected party. Such a result is still more likely if, as in *DiLoreto*, the statute limits the delegate's discretion so as to preclude any pecuniary interest in adjudicative outcomes. If judicial review were not available, however, state courts would not uphold the delegation.

D. *Application of State Law to Private Prisons*

Because prison privatization is in its infancy, no reported cases have ruled on a delegation challenge to a private prison's operations. Therefore, the courts have not explicated the standards that they would use to judge the

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203. *Id.*

204. *Id.* As in *International Service Agencies*, the court in *Howell* noted its concern about the self-interest of the licensor, Blue Shield, on several different occasions. *See id.* at 445, 193 A.2d at 108 (legislature may not empower private party to determine who has a right to engage in an otherwise lawful enterprise if "exercise of such power is not accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action on the part of such private body"); *id.* at 447, 193 A.2d at 109 (the "Medical Society . . . has an interest in promoting the welfare of the only existing medical service corporation in this State"). For other cases that held delegations of licensing power unconstitutional, see, *e.g.*, Gumbhir v. Kansas State Bd. of Pharmacy, 228 Kan. 579, 588, 618 P.2d 837, 842 (1980) (invalidating a statute that excluded graduates of pharmacy schools not approved by private accrediting agency from taking the entrance examination necessary to register as a pharmacist); Fink v. Cole, 302 N.Y. 216, 225, 97 N.E.2d 873, 876 (1951) (holding unconstitutional an act that allowed a private jockey club to license participants in horse races); Farias v. City of New York, 101 Misc. 2d 598, 604–05, 421 N.Y.S.2d 753, 757 (Sup. Ct. 1979) (invalidating statutory requirement that private Society for Prevention of Cruelty to Children must approve any permit allowing children to perform); Union Trust Co. v. Simmons, 116 Utah 422, 429–30, 211 P.2d 190, 192–93 (1949) (charging that a statute requiring approval of existing banks in a community before a new branch bank could operate unconstitutionally delegated power to a competitor whose private interest in excluding competition may not coincide with the public interest).

constitutionality of such a delegation. The principles announced in delegation cases in other contexts, however, provide some evidence of the delegation standards that courts might apply.

First, the courts might uphold the constitutionality of delegations of management functions to private prison companies. Management functions would include activities such as cell assignment, scheduling, record-keeping, and counting the prisoners. The courts might uphold such activities even though they incidentally affected the liberty of the prisoners. To avoid constitutional defect, however, the management activities at the least would have to apply uniformly to all prisoners and could not unreasonably restrict constitutional freedoms—for example, religious freedoms—of any inmate.

Second, the courts might uphold the right of private prison companies to propose internal disciplinary rules. The rules could not form the basis for disciplining inmates, however, unless they were adopted by the state legislature or an administrative agency with authority to accept, reject, or modify the proposed rules. The rules would also be unconstitutional if they were so vague that they granted too much power to the private companies to single out arbitrarily an inmate for punishment.

Finally, the courts would not allow a private prison company to make a binding factual determination that an inmate had violated a prison rule and was therefore subject to discipline. This is true because the private prison company is not a neutral decision-maker. If the prison company's compensation were based on the number of inmates it housed each day, for example, a decision to revoke an inmate's good-time credits would inure to the company's financial benefit. Even if the private prison's compensation were based on a flat rate or were otherwise unrelated to the length of an inmate's incarceration, however, the company nevertheless would have an institutional bias toward disciplining prisoners. A decision to deny certain privileges or services, for example, would reduce the operating costs of the company and would promote its administrative convenience. Thus, a private prison company may decide to discipline a prisoner to further its own interests at the expense of the interests of both

the inmate and the public.[205] Moreover, any exercise of nonreviewable discretion by the company would be cheaper than complying with due process constraints. Therefore, the only input that a private prison company constitutionally might have concerning the decision whether a prisoner had violated a disciplinary rule is that of a complaining witness before a judicial officer.[206]

CONCLUSION

The delegation doctrine has developed differently at the federal and state levels. At the federal level, the constitutionality of a delegation to a private prison company would likely turn on the structure under which the delegation occurred. If the corrections agency both formulated disciplinary procedures and maintained control of disciplinary proceedings, the courts might uphold the delegation on the theory that the private corporation was employed in an administrative capacity to carry the law into effect. If a private prison company formulated disciplinary rules, however, or if it had control over disciplinary proceedings, the courts might then apply the three-pronged *Todd* test to determine whether or not the delegation was constitutional. But, even if the delegation were held to be constitutional, the principles announced in *Todd* would require the private company to comply meticulously with appellate procedure in all of its disciplinary proceedings. Finally, federal courts nevertheless might not apply the reasoning in these cases to the pri-

205. In DiLoreto v. Fireman's Fund Ins. Co., 383 Mass. 243, 418 N.E.2d 612 (1981), the insurer was required to offset totally any income from surcharges it had assessed with good-driving credits to other customers that it insured. Thus, the insurer had no financial incentive to assess a surcharge in any particular case. Indeed, the regulation requiring the insurer to assess a surcharge was necessary, as the court pointed out, because the absence of any financial incentive to do so created a natural bias against assessing surcharges due to the insurer's desire to promote good customer relations. *Id.* at 247–48, 418 N.E.2d at 615. In the private prison context, contrastingly, there is a natural bias *in favor* of disciplining inmates. Thus, the opinion in *DiLoreto* does not support the proposition that a private prison company can constitutionally perform the adjudicative function of determining whether an inmate has violated a rule.

206. In practice, the system could operate in much the same manner as the mental commitment process in Fairfax County, Virginia. There, private mental hospitals contract to detain temporarily persons alleged to be dangerous to themselves or others as a result of mental illness. The private hospital's only role in the actual commitment, however, is that of a complaining witness before a judicial officer who travels to the hospital to conduct the commitment hearing.

vate prison context because the courts have indicated that a different analysis may apply to delegations affecting liberty, rather than property, interests.

At the state level, legislatures constitutionally might adopt an extant disciplinary code proposed by a private company. If the private party regularly amended the code, however, those amendments could not constitutionally bind prisoners until the legislature or an administrative agency specifically adopted them.

State courts generally invalidate statutes and administrative regulations that delegate adjudicative power to private parties when there is no provision for judicial review of the private determinations. When there is provision for such review, however, the delegation generally is upheld.

If a private prison contract were structured so that the company did not financially benefit from its decision to revoke a prisoner's good-time credits, the principles announced in *DiLoreto* might permit the prison company to adjudicate the prisoner's rights in the first instance if judicial review were available. Even in such a case, however, statutory or administrative rules would have to channel the prison's discretion concerning its procedure for adjudicating a prisoner's rights. However, because any adjudication by a private prison company would directly affect a prisoner's liberty rather than merely his property, courts may distinguish cases such as *DiLoreto* and hold that a private prison company is not empowered to decide whether a prisoner has violated a disciplinary rule.

Finally, any prison privatization plan must take special account of the policy concern that the delegate's private interests will prevail over the interests of both the affected party and the public. When such a conflict of interests exists, the courts may invalidate the delegations whether or not judicial review is available.

Absent clear precedent, of course, good predictions about the direction and application of the law are difficult to make. There are no clear precedents regarding delegation of the incarceration function to private corporations. In an important sense, though, the delegation question is also a question of symbolism.

The American Correctional Association began its 1985 policy statement on prison privatization: "Government has

the ultimate authority and responsibility for corrections."[207] This should be undeniable. When a court enters a judgment of conviction and imposes a sentence, it 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 sees an emblem that reads "Acme Corrections Company," for example, instead of "Federal Bureau of Prisons," or "State Department of Corrections"?

In other words, apart from questions of cost, apart from questions of efficiency, apart from questions of liability, and assuming that inmates will retain no fewer rights and privileges than they had before the transfer to private management, who *should* operate our nation's prisons and jails? It could certainly be argued that virtually anything that is done in a total, secure institution by the government or its designee is an important expression of government policy, and therefore should not be delegated. Just as we would not likely privatize our criminal courts, perhaps we should not privatize our prisons. And just as the inmate should perhaps be obliged to know—day by day, minute by minute—that he is in the custody of the government, perhaps too the government should be obliged to know—also day by day, minute by minute—that it is its brother's keeper, even with all of its flaws. I cannot help but wonder what Dostoevsky—who wrote that "[t]he degree of civilization in a society is revealed by entering its prisons"[208]—would have thought about privatization of corrections.

But, while prison privatization arguably may not be wise as a matter of public policy, this does not mean that delegating the incarceration function to a private company would necessarily be unconstitutional. In deciding the constitutional question, therefore, the courts ultimately will be determining how we wish to be perceived as a civilization.

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207. AMERICAN CORRECTIONAL ASSOCIATION, NATIONAL CORRECTIONAL POLICY ON PRIVATE SECTOR INVOLVEMENT IN CORRECTIONS 1 (1985).

208. F. DOSTOEVSKY, THE HOUSE OF THE DEAD 76 (C. Garnett trans. 1957).