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April 1, 1987

Should Prisons Be Privately Run?: No Quick Fixes

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SHOULD PRISONS BE PRIVATELY RUN?

Privatization has become a buzzword for getting government out of losing propositions. Its proponents claim that the private sector can get things done more cheaply and effectively than an unwieldy bureaucracy.

Chief among them is Richard Crane, general counsel for the Nashville-based Corrections Corporations of America, who believes that private management of prisons is compatible with prison reform.

But Ira P. Robbins, a professor of law at American University and author of the ABA's report on privatization, argues that privatizing prisons presents serious constitutional problems.

He concurs with the ABA position that the privatization of prisons be suspended until constitutional, statutory and contractual issues are fully developed and resolved.

Here is their debate.

NO QUICK FIXES

BY IRA P. ROBBINS

Something must be done about the sordid state of our nation's prisons and jails. The urgency of this need, however, should not cause us to accept the quick fix of privatization—in the name of convenience—at the expense of addressing more general, and more difficult, problems of criminal justice.

Prison privatization—taking over the management of an entire institution—is not a simple matter of cost and efficiency. Questions regarding people's liberty should not be contracted out to the lowest bidder.

It may be inappropriate, for example, to operate prisons with a profit motive, which provides no incentive to consider alternatives to incarceration or to deal with the broader problems of criminal justice.

Nor is it likely to reduce overcrowding, especially if the company is paid on a per-prisoner basis or if staff members are given stock options as a fringe benefit.

PRIORITIES

Cost-cutting measures may run rampant at the expense of humane treatment, with conditions of confinement likely to be kept only to the minimum standard required by law.

As one private-company official

said, "We'll hopefully make a buck at it. I'm not going to kid any of you and say that we're in this for humanitarian reasons."

Traditionally, corrections facilities have been financed through tax-exempt general-obligation bonds that require voter approval. Some of the financing arrangements for constructing private facilities may eliminate the public from the decision-making process.

Privatization provides an end run around the taxpayers when the company builds the institution and leases it to the government. The cost of the facility then comes out of the government's regular appropriation, avoiding the politically difficult step of raising debt ceilings.

One example of the potentially egregious effects of reducing accountability and regulation is a proposal by a private firm in Pennsylvania to build an interstate protective-custody facility on a toxic waste site.

Many difficult legal questions (including standards implementation, use of force, strikes and bankruptcy) can be answered in a meticulously drafted contract. State and federal constitutional problems, however, cannot be contracted away so easily.

Contrary to the assertions of some private-prison proponents, privatization will not minimize the state-action liability of governmental entities under the Civil Rights Act (42

U.S.C. § 1983), under which most prison-conditions litigation is brought.

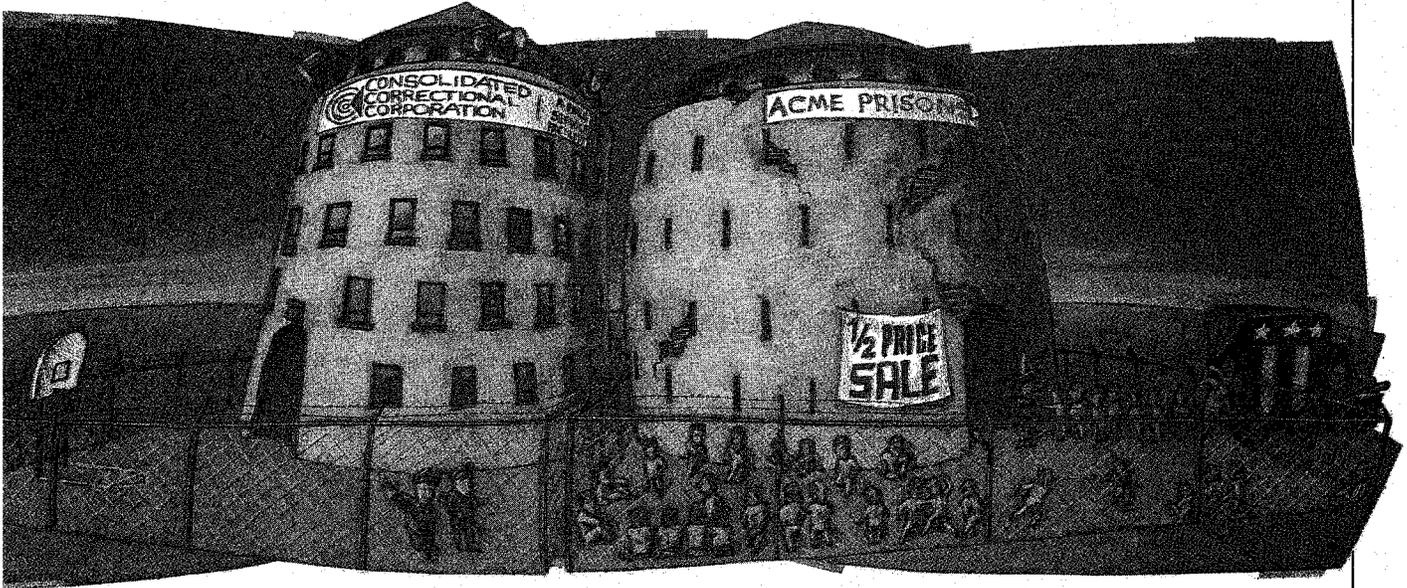
If this were so, a state could avoid its constitutional obligations simply by transferring governmental functions to private entities. Indeed, by delegating the incarceration function a state's liability may actually increase, because the state may be waiving the defense of sovereign immunity in ordinary negligence actions.

THE NONDELEGATION DOCTRINE

A more extensive question, and one that will provide the major legal challenge for prison privatization, is whether the delegation itself would be unconstitutional, for not all governmental functions can be delegated.

It is true that the nondelegation doctrine has not been employed to invalidate a federal delegation in more than 50 years (with similar experience in many states). Nevertheless, there comes a point at which concerns about the fairness of decision-making that affects the interests of individuals in a traditionally exclusive governmental function must outweigh the need for claims of efficiency and reduced cost.

I cannot help but wonder what Dostoevsky—who wrote that "the degree of civilization in a society can be judged by entering its prisons"—would have thought about privatization. ■



A BUSINESS LIKE ANY OTHER

BY RICHARD CRANE

Perhaps the most common legal concern about private operation of jails and prisons is whether government can delegate its authority to incarcerate to a private company.

While there have been no direct court decisions on this, at least two federal courts have impliedly endorsed the concept by vaulting over it entirely and focusing only on whether the government was liable for the actions of the contractor. *Medina v. O'Neill*, 589 F.Supp. 1028 (S.D. Tex. 1984) and *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985).

There is a long-standing presumption in favor of the power of government to contract to carry out its duties. "The capacity of the United States to contract . . . is co-extensive with the duties and powers of government. Every contract which subserves to the performance of a duty may be rightfully made. . . ." *United States v. Maurice*, 26 F.Cas. 1211, 1217 (C.C.D. Va. 1823).

But, as in any legal fracas, the procedural questions often hide the substantive issues. What do critics of privatization really fear?

One fear is surely that the quest

for profits will lead to a frenzy of cost-cutting that is detrimental to the inmates. Assuming that some companies might be motivated solely by the profit monster, there are many ways to hold them in check.

A well-drafted contract will reflect what the government expects the contractor to do for the money paid. The contractor should be required to abide by a set of corrections standards. This locks in a level of performance from which the contractor cannot backslide when the spirit or money moves him.

SAFEGUARDS

To make contractual obligations stick, the government should appoint a contract monitor with access, at all times, to the facility, inmates, employees and records. At larger institutions, this should be a full-time or even a round-the-clock position.

Naturally, the contract also should contain termination provisions in case of default by the contractor.

Competition also keeps greedy impulses in check and improves the level of services. No legitimate company wants to be labeled a rip-off artist, or find itself in court answering civil rights claims and contract fraud allegations.

Not only is this likely to result in a cancelled contract, it will surely prove detrimental to the company's marketing efforts elsewhere.

Prison reformers who oppose privatization often forget the power inherent in a "pay as you go system." For instance, many privatization opponents take great delight in a May 1985 *New York Times* article reporting \$200,000 in cost overruns at a privately operated Tennessee jail.

ACTUAL COST

It should go without saying that when a county-run jail is budgeted for a certain number of inmates, say 150, the 151st inmate doesn't show up with a check in hand for the additional cost. Usually appropriated funds are spread a little thinner. As more and more inmates arrive, employee vacancies go unfilled and money for such "frills" as rehabilitation programs, employee training and facility maintenance must be shifted to cover basics like food and clothing.

But when a private contractor bills on the basis of the number of inmates housed, government comes face-to-face with the actual cost of incarceration and the impact of stiffer sentencing laws, harsher parole guidelines and the like.

When that bill comes due, there's no sweeping the problem under the rug until the next governor's term of office. This puts the incarceration question into sharper focus and should demonstrate that prison privatization is not the antithesis of prison reform. ■