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ESTABLISHING THE FRAMEWORK
FOR
PRIVATE ENTERPRISE INVOLVEMENT IN CORRECTIONS

POLICY CHANGE PAPER

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DEFINITION OF THE PROBLEM

Before getting into the discussion of the problem that this paper will focus on a brief overview of some of the considerations that are faced when picking out "problems" in the corrections system seems in order.

Anyone who has been involved in the criminal justice system for even a short period of time quickly realizes that on one hand it is a system that resists change and on the other when it does change it is often "spastic" with the foundation for the change poorly established in many cases. The correctional system is the part of the overall criminal justice system that is under the most pressure from society and has an end product that is much more difficult to measure than those of the police or courts. Police provide service and catch criminals, the courts administer justice and turn the guilty over to corrections who, as cynics would indicate, turn the individuals back, more often than not, to the police. Even with this oversimplified concept of our criminal justice system it is easy to see that the correctional system presents itself in an entirely different light than the other two parts of the system.

Ideally we wish the corrections system would turn every client it encounters into a model citizen on the first try but in reality we aren't exactly sure what we should expect from it. It is precisely this difficulty in determining what corrections should be doing that makes it difficult to

formulate the problems facing the correctional system. Remembering that we are dealing with an entire system where conclusive empirical evidence is virtually impossible to obtain, we should realize that statements of problems such as, the criminal justice system is not reducing the crime rate, or, a particular program is not producing a low enough recidivism rate, may result in some agreement but would not enjoy that same level of agreement once the causes were added to the loop.

This "narrowing down" process of identifying a problem to focus on becomes more difficult because the perspective from which an individual views a situation tends to bias their opinion. In many cases it is much like the three blind men touching the different parts of the elephant and drawing extremely different conclusions as to what it is. Organizations as massive as the criminal justice system make it quite difficult for people to see the whole "elephant." Add to this the fact that a great number of people in organizations only identify sources of problems that serve to point the finger of blame away from them and one begins to see the magnitude of making changes in our correctional system. Not only does the solution have to please all parties, the problem is difficult to identify and worse yet there are few times the source of the problem can be agreed upon.

It is basically agreed that there are alot more questions

than answers in today's correctional system but it would be absurd and probably downright insulting to the thousands of dedicated professionals in the public sector to suggest that private enterprise is the long sought after solution to rehabilitation, recidivism, deterrence, and similar problems.

It is quite certain that there are no aces up the sleeves of either for profit or non-profit contractors who wish to be cut in on a piece of the corrections fiscal pie. While there are a great many situations where private enterprise has a decided advantage over public buracracies the issue to be examined here is not whether any of those situations can be compared to ones found in the correctional system but the setting up of a policy structure fair to both the public and private sector so that realistic comparisons can be made.

This leads us to the identification of the problem that will be the focus of this paper and a discussion of why this problem does have a significant impact on the correctional system and will continue to do so even if it is not addressed.

To state the situation in the simplest terms, the lack of enabling legislative policy governing the application of private enterprise to the correctional system is not preventing private enterprise from becoming involved in corrections but it is causing a hit-or-miss approach to privatization that may cause problems that result in abandonment of it as an option before it has developed to the point where it can be proven whether or not it has any value to the

system. In short, the problem that is the focus of this paper is the lack of any policy framework at all for the application of private enterprise to the correctional system.

As it stands right now there is no legislation that specifically prohibits corrections administrators from entering into private contracts for services but this lack of restrictions rather than the existence of enabling policy guidelines has set up the present situation where each administrator views his authority level differently. Those administrators who are a bit more bold or innovative and have no philosophical or ideological reasons to be against private enterprise involvement in the correctional system as well as those who may be "forced" to turn to private firms by unique circumstances are striking out onto new ground largely on their own initiative. There are certain risks inherent in the attitude that says "I know no one said I could but nobody said I couldn't." The lack of enabling legislation tends to put those who venture into the private market out on their own to some extent as far as legal/liability issues are concerned. Those who do not like taking risks or that are more traditional in their approach toward corrections and believe that it should be strictly public domain can successfully avoid private sector involvement, even in cases where it might have some benefits, by using the excuse that they have not been given permission.

One of the most compelling reasons to enact legislative

policy guidelines for private sector involvement in corrections is that it is already occurring at all levels of the correctional system in a wide variety of programs. It is easy to see from the previous discussion of administrative philosophies that without the overall policy umbrella guiding implementation of private enterprise endeavors in corrections serious inconsistencies may be developing that can jeopardize the effectiveness of the programs, result in premature abandonment, and make objective evaluations almost impossible.

The past history of the criminal justice system and especially the correctional system to quickly adopt new programs largely on face value and then drop them in favor of some newer plan is greatly attributable to the lack of policy guidelines being established prior to the programs, not to the quality of the program itself.

Along the same lines is the tendency of the correctional system to label every new program or plan as "reform." It is almost as if by using a term that brings to mind notions of great departure from previous methods that initiators and supporters of new programs believe they can add significance to an otherwise average plan. It also seems that in a system that can list more failures than successes there is a kind of starvation for anything that has promise and the need of critics to "reform" the old failing system with new and often overrated programs.

The focus of this paper, as stated earlier, is not to

propose changes to methods used in correctional programs nor is it to open the door to some new era in corrections that can be touted as "reform" by those who seem to enjoy that role. It is more of an effort to convince those who have the power to set policy to break the cycle of putting the "cart before the horse" and get them to consider the ramifications of private enterprise involvement in corrections before it has already died out from lack of structure or from problems that could have been prevented by legislative policy guidelines to keep it out of inappropriate areas. It is not only necessary for the system to get the most out of privatization but one could make an excellent argument that it is the responsibility of the policy makers in this case to properly set the stage in order to effect a thoughtful and gradual application of the private sector to the correctional system.

THE POLICY ARENA

In any discussion on the subject of policy, whether related to the governmental context or any other, it soon becomes evident that many people find it difficult to draw a definite line between what is policy and what constitutes a procedure. It is especially true at the line worker level that the two terms are used interchangeably. Management is also guilty of labeling correspondence containing behavioral directives for staff members as policies when in effect they are actually procedures.

Webster's dictionary describes policy as "a definite course or method of action selected from among alternatives and in light of given considerations to guide and determine present and future decisions," and "a high level overall plan embracing the general goals and acceptable procedures." Procedure, however, is defined as "a particular way of accomplishing something or of acting," and "a series of steps followed in a regular definite order."

It is with a firm grasp on the concept of what constitutes policy and what is actually a procedure that we can begin to narrow the focus on the policy arena where the merits of private agency involvement in corrections will tangle with traditional public control concepts.

One does not have to venture very deeply into the literature on private involvement in corrections before the difference between policy and procedure becomes readily

apparent. There is already private involvement in corrections agencies nationwide in an amount that may surprise many who have not followed the subject closely. Several private firms have even made inroads in areas of the correctional process that have been singled out by numerous authors as the most controversial.

Again, with the previous definition of policy and procedure as our conceptual foundation and evidence that situations of private involvement in corrections already exist we find the situation discussed earlier of putting the "cart before the horse." Procedures are taking place that are bringing private firms farther into once public only operated programs. What is shocking is that even with the controversy that surrounds privatization in corrections very few of the governmental entities responsible for overseeing the correctional process have developed policy that addresses to what extent, if at all, and how private involvement will be employed in their jurisdictions.

This is significant because in order to realize the full potential of private involvement in corrections at all levels and even to benefit from limited use of private sector resources, the lack of the "overall plan embracing the general goals and acceptable procedures" which will serve as a detriment to effective employment of private firms, must be overcome by establishing policy to "guide and determine present and future decisions."

The policy making level that deserves the bulk of the

attention at the current point in time in the corrections privatization debate is the level that one might traditionally think of when policy making comes to mind. That level is the legislative process and its relationship to governmental departmental function. Since this level encompasses the political aspect of policy making it is probably the most frustrating and time consuming.

The political aspects of privatization are discussed in greater detail in a later section so it is sufficient to say at this time that more controversy exists here than with the actual application of private enterprise to corrections. In fact, while the debate continues private firms are forging ahead into the correctional system. It is difficult to say if any deliberate avoidance of the issue of privatization is occurring at the legislative level but it is certain that strong sponsorship will be necessary to resolve the lack of legislative effort up to now. Carefully planned groundwork will be required to insure that the initiative makes it through the quagmire of personal favors and unlikely alliances that exist in the legislative/political arena due to the constant need for supporting votes.

It would be possible to write a great number of pages on the subject while still only scratching the surface of the goings on in the legislative policy arena. The goal of this paper is to provide enough reasons and information about the need for policy on privatization in corrections to stimulate the experts in the aforementioned policy arena to act.

THE KEY ACTORS IN THE POLICY ARENA

Identification of all the actors involved in the policy making process for this attempt to influence decisions on the appropriate level of involvement of private contractors in the correctional system may prove to be somewhat easier than for some cases but still deserves a close look.

Great care must be taken to include all the key players no matter how obscure their involvement appears to be on the surface. In the political world people, groups, and agencies have been known to fervently oppose a plan or program simply because they felt insulted because they believe they weren't properly consulted in the process. Anyone who fails to recognize the importance of protocol in the political world will have a difficult time advancing even the most innovative and promising ideas.

The key concern of corrections administrators at the implementation level that calls for legislative involvement and action is the conspicuous lack of legislation that addresses private enterprise involvement in the once all public domain of corrections. Eventhough there is a considerable amount of contracting with private firms already taking place it tends to be irregular and only at certain levels or for specific services that corrections administrators believe they have the authority to contract for. Most corrections administrators expressed the desire to have enabling legislation in place before they ventured further

into the private sector. In other words, they want the general policy framework properly established within which they can develop their procedures for dealing with the private sector.

Four states have enacted legislation that forces the corrections department to use private contracts to obtain probation services but this situation appears less than optimum because it causes administrators to act to abide by the law but not necessarily in the wisest or most cost-effective manner. The fact that no laws exist to prohibit private contracting in most jurisdictions is not enough to overcome the reluctance of corrections administrators to seek private contracts in the more controversial areas.

It appears that it is only possible to speculate on the various reasons for this lack of formal policy formulation for privatization in corrections. As unfortunate as it may seem the correctional system is one of those "out of sight, out of mind" type of functions to greater society. Everyone knows it is there but as long as it operates quietly without drawing attention to itself with riots or gross human injustices, most people are content to let the correctional process take place without much thought and almost no input.

If the previously mentioned attitude is found in society as a whole it isn't too far fetched to think that legislators may have similar feelings. Add to this the fact the correctional system is not well understood by very many people and

you have another reason why even legislators might be reluctant to become anymore involved than is absolutely necessary.

It is also highly likely that even on budget appropriations matters the general membership goes along with the recommendations of the special committees because corrections is viewed as a "necessary evil" and it would require a level of knowledge beyond those in the general membership to effectively dispute and oppose budget requests.

Except for those elected officials who already have a prison in their district most other officials only get involved in corrections issues if a new facility is proposed for location in their district. Even then this involvement is only a highly emotional opposition to the facility and not a careful study of the facts. Policy implementation for private enterprise involvement in corrections will require a concerted effort by the experts on the special committees to overcome the "gut level" emotions of the less well informed.

Having established two of the obvious sets of actors, legislators and department of corrections officials down to the individual wardens/community corrections program directors, necessary to properly construct a policy umbrella for private involvement in corrections we must now identify the less evident groups who will or may impact the process.

Members of private firms who may benefit or be hindered by the outcome certainly deserve to be heard and will also be exerting any influences they already have with correc-

tions officials. Legal experts will be necessary every step of the way, especially when questions on delegation of authority, responsibility, and liability arise. Two of the less obvious but important groups who could become strong opposition if not properly included are civil service and the labor unions representing corrections workers. Privatization could be viewed as a loss of turf for those groups.

As is the case with policy covered by legislation the final acceptance will be by vote of the general legislative bodies of which many members will have little interest in the outcome. The bulk of the decision making process on privatization in corrections will be carried out in the committee and sub-committee. It is there that the political compromises, negotiations, and trade-offs will occur. In cases such as this the full membership usually votes along party lines unless persuaded to do otherwise by a committee member from their party.

Since some of the key concerns of the actors in this policy process will very likely center around philosophical outlooks, moral values, and accepted norms the efforts to honestly and openly answer the questions posed by these actors will greatly affect their level of resistance. These concerns will be addressed in depth in the sections on the issues surrounding privatization in corrections.

Gaining support for this policy should be recognized as an effort to overcome the natural desire to maintain the status quo, as much as it is an effort to implement an additional policy option for the correctional system.

POLICY OPTIONS

Normally it is appropriate to offer several policy options at this point and describe the characteristics of each while providing justification for excluding some of them and selecting those that are considered viable. Since this attempt to influence the policy making process is not at the level of specific choices of one type of program versus another it would be a waste of time to dwell too long on this area. There are really only two options that could be considered for the focus of this paper. Either the present condition of no policy governing private enterprise involvement in corrections can be allowed to continue or, as is the driving force behind this paper, a policy framework can be formulated and adopted after careful consideration of all the issues surrounding privatization.

Even with the wide variety of opinions expressed in the literature on the subject few authors have indicated that total opposition to any type of private involvement in corrections exists. As has already been stated, privatization is already well established as having a role in the correctional system. This paper is not to argue that point, but to call for a proper policy framework to be established to guide present and future excursions into the private sector. The "option" here is more of a necessity for action than it is a process of making choices. The sorting of the issues and deciding how each applies to the different

parts of the correctional process will be where the energy needs to be applied for this subject. Each of the critical issues will be covered in separate sections so that the key actors in this policy establishing process can see what is happening with privatization in corrections elsewhere and find out what the answers are to the questions they may have on each issue.

THE ISSUES

This section will contain the "information that has been gathered during the review of the literature on privatization in the correctional system. Articles were selected from many different types of publications to achieve a varied perspective on the subject. Also, several "generic" articles on the concept of privatization were included as "think pieces" to stimulate thought on some of the foundations of the public vs private provision of services required by our society.

This issues section will be broken down into the following sections: IDEOLOGICAL/PHILOSOPHICAL This section will look at the basic feelings of people as to the appropriateness of privatization in general as well as the methods employed in the correctional system. Fears that privatization may cause continued use of inappropriate methods will also be addressed. MORAL The issues of whether it is proper to make a profit from the unfortunate circumstances of others and notions of a free market system will be looked at in this section. POLITICAL This section will address topics such as, labor relations, management opposition, loss of turf, and possible pressures to continue private involvement when it is no longer necessary. Private involvement in prison industries will also be covered. ADMINISTRATIVE/OPERATIONAL Implementation concerns such as quality, flexibility, security, contract specificity, etc., will make up the bulk of this section. LEGAL The power to contract, delegation

of authority, responsibility, accountability and other legal concerns will be the focus of this section. FINANCIAL This section will cover efficiency, cost benefits, budgeting, and profitability issues surrounding privatization.

A very quick glance at the literature on privatization reveals that it is not a debate of yes or no to privatization anymore. It is beyond the situation of saying no to privatization and is already to the point of the lack of overall policy governing the application of private enterprise to the correctional system becoming the most glaring issue. Throughout the reviews of the various articles on the subject it became evident that irregardless of an author's position on privatization the major concerns centered around the six areas described above. Each section will be an attempt to highlight and describe the major concerns in that area and then provide information and examples of how those concerns have been addressed in actual practice.

The main thrust of this issues section is to provide a stimulus to the policymakers described in the Key Actors section to act on the issue of providing a policy umbrella for the application of private enterprise to the correctional system. In showing examples of privatization already at work it is not an attempt to specifically advocate privatization it is only an effort to show that the situation has moved too far to put a stop to altogether. It is hoped that these policymakers can see that since privatization has

already made a place for itself in corrections it is far beyond the time for policy guidelines to be put in place. Each of the issues is important and the information provided will show that it is possible for the private sector to work with and compliment the public sector. The significant point of this entire paper is to convince the policy-makers that they must act before a situation develops that could jeopardize the private/public relationship.

PHILOSOPHICAL/IDEOLOGICAL ISSUES

Of all the issues surrounding privatization in the correctional system this is the one that can probably lead to the most heated debates if not outright arguments. If one gives any credibility to the views of some of the detractors of privatization in this area there is extremely strong evidence to prove the need for legislative policy to govern privatization in corrections.

In his article "Privatization of Public Services: A Growing Threat to Constitutional Rights" Harold Sullivan makes the strong statement that "privatization does threaten constitutional rights." He, as do other authors, divides the privatization issue at the point between provision of a service and the production of that service. It is indicated that provision of a service revolves around the decision making process that determines who gets a service and how much they get coupled with the possible decision not to provide the service at all. Production, on the other hand, involves the actual "operating, delivering, administering, etc., of the actual service. (Sullivan, 1987)

The contention made by Sullivan that is compelling for policymakers preparing to set standards for the application of private enterprise to corrections is that there are a "variety of arrangements between government and private service providers that immunize both government and private groups from constitutional restraints."(Sullivan, 1987)

Though the cases where these arrangements are being established to intentionally circumvent constitutional requirements are probably quite rare it is easy to see that legislative involvement at the policy level is imperative to prevent even accidental situations from developing. If there is even a small amount of truth to Sullivan's contentions that privatization is a threat to constitutional rights it is the inherent responsibility of the law making bodies not to allow private enterprise to move farther into the correctional system solely on the sales ability of the private firms or the assumed authority to utilize the private system by corrections administrators.

Sullivan goes on to indicate that while the provision vs production distinction is useful real world situations can develop that cause a blurring of the controlling factors that might ordinarily prevent the erosion of constitutional rights. Since private firms are not legally subject to the same restraints as public agencies if a private agency is given an amount of discretion that allows it to determine, even if only partially, who receives a service then the possibility of constitutional abuses could occur. (Sullivan, 1987)

This is not meant to indicate that any public or private agency would intentionally be attempting to circumvent constitutional rights or any other rights of a citizen. This simply points out that because of the different sets of rules

governing the public and private sectors the public sector must take the steps to set policy for the provision and production of any service they believe could be handled partially or completely by the private sector. So far this is not being done in the correctional system except in very limited circumstances.

Another philosophical/ideological notion that was discovered during the review of literature on privatization in the more general sense was raised by David Morgan and Robert England. Though it is a concept that defies factual proof it is an interesting element to a solid foundation on the idea of the effect of privatization on society. The authors indicate that recent trends in this country have eroded our sense of "social obligation." They believe that privatization will "further weaken the local political order and accelerate the decline of citizenship and community." (Morgan, 1988)

The indication behind this philosophy is that publicness enhances the feeling of community and citizenship while privatization serves to isolate as well as insulate those who participate in it from the rest of society. It appears on the surface that Morgan and England are really attempting to make a solid argument against privatization but in reality they end up doing what other authors have done. They use the privatization to serve as a medium to further their underlying ideology that the "haves" in our society are contin-

uously searching for ways to keep the "have nots" away from them. The failure they make is they neglect to recognize the flip side of the coin. There is some potential validity to the issues they raise but the strong reverse side of the issue is that many believe that it is long overdue for the private sector to participate in the more unpleasant parts of our society. People who support private enterprise involvement especially in corrections see it as an opportunity for the public and private sectors to share in the responsibility of social control.

Ronald Moe makes a statement in his article "Exploring the Limits of Privatization" "that the single most important characteristic that separates the public and private sectors, particularly at the federal level, involves the concept of sovereignty." The thrust of this concept is that by intermingling the public and private sectors in turn a dilution of the sovereign powers of the public sector begins and the possibility exists that the sovereign will allow some of its right and immunities to be transferred to private agencies that do not or should not possess such rights and immunities. (Moe, 1987)

Many powers of the sovereign are seen as non-transferable and tie in closely with previously mentioned constitutional issues. Some of these powers such as the legitimate right to go to war, impose taxes, and levy penalties against those who resist paying their taxes are easy to argue must always

be the exclusive domain of public only agencies. The waters begin to muddy extremely when the public agency begins to contract with private vendors for services. The main reason for the effort to encourage policymakers to act on private enterprise involvement in the correctional system is precisely for these reasons. When the sovereign begins to delegate certain amounts of its power it should continue to remain ultimately responsible. Unfortunately, eventhough this may be intended when the power is delegated a situation labeled as "third party government" emerges. (Moe, 1987)

Even under the best designed plans there is a certain amount of weakening of the control a public agency has over a service that is provided by a private contractor. This again is why legislative policy guidelines for privatization in the correctional system are absolutely necessary. While the concept of sovereignty is somewhat abstract and difficult to apply or to identify in specific situations it makes serious food for thought when legislative policy making is taking place or needs to take place.

The philosophical/ideological issue that seems to generate the most emotional response from a certain faction of opponents of privatization is the debate on the appropriateness of imprisonment as a sanction against offending members of society. Although many of the views expressed by members of this group tend to be easily labeled as radical or extremist they still are deserving of a long hard look by

policymakers preparing to take on the privatization issue in corrections.

In an article titled "A Civil Liberties View of Private Prisons" Jan Elvin outlines what is described as the American Civil Liberties Union's stand on the subject of privatization in the correctional system. Though not based in fact, and being easily stereotyped as "typical" ACLU taking up the cause of the downtrodden in society in order to preserve the rights of the masses, the article raises some serious considerations that should be part of a policymakers education on the subject of privatization in the correctional system.

The author states that the profit motive might result in the inappropriate confinement of some people or an inappropriate increase in the use of incarceration. (Elvin, 1985) One must recognize that underneath this assumption lies the belief that the use of imprisonment is only a manifestation of a greater social wrong that allows the criminal justice system to unfairly single out minorities and the poor. This fact is debated long and hard by both sides without any signs of retreat by either camp but it is not really the focus of this section. Policymakers need to be aware of the direction that the opposition to privatization will come from in this area. A key point made by Elvin is that "as a result of privatization, new institutions will be more quickly and more easily available, which is bound to reduce

government incentives to pursue alternatives." It will be the job of policymakers to set up guidelines for the application of private enterprise to corrections so that privatization is not "bound to reduce government incentives" or any other incentives to seek out the best solutions to our correctional problems. (Elvin, 1985)

Another interesting concept raised in Elvin's article is that part of the philosophy that supports private enterprise in corrections is that red tape would be reduced and moves such as new construction would happen more quickly. The point brought out in the article is that it is the slow grinding of the wheels in public buracracies that is called red tape by critics that actually serves as a form of due process safeguards. This allows time to revise or even halt a program before things have developed so far that no one has the guts to risk admitting they were wrong or too much money has been spent and someone's job could be in jeopardy if a program is dropped after a large amount of money has been spent. The fear described in the article is that privatization would cause things to move too fast. New programs could be in place or new facilities constructed and placed in operation before enough time was invested in studying alternative possibilities or even the necessity for the program or facility. Private agencies would very likely be reluctant to admit their services were not needed even if they were in a position to recognize that fact.

Also, given the current circumstances in the correctional system regarding lack of bed space any new facility would be quickly filled making it extremely difficult to discontinue its use even if a case could be made for it.

One other area that comes up in relationship with philosophical issues of the privatization movement in the correctional system that may be changing somewhat is that private agencies have been labeled as wanting only to deal with the soft end or easy offenders. This point is made more often than not in the form of an accusation by opponents of privatization, as if by creating the impression that this is surely a glaring shortcoming of the private sector no one will realize that no factual evidence has been presented as to why it might not be appropriate to allow private involvement with the less hard core offenders and leave those who require more forced control to the public sector.

Curran, 1988 indicated that there was a concentration of institutional corrections in the public sector and of community based corrections in the private sector when one looks at the juvenile justice system. Though not discussed in the article it seems quite possible that two reasons for that fact, one of a practical nature and the other more related to philosophy, exist. Since community based corrections facilities almost always are considerably smaller than institutional correctional facilities this fact makes it much easier for the private sector to become involved.

Many of the agencies in the private sector of corrections are new and attempting to establish themselves. Few are prepared to take on the large projects with their accompanying large risks.

Many people who oppose private enterprise involvement in corrections indicate that it is improper for the public sector to turn over its power to limit a person's freedom to a private agency. Since institutional correctional facilities house more hardened offenders requiring more "coersive" and controlled environments it may be very proper to maintain public control over the institutional correctional system while allowing private enterprise to become involved in providing correctional services to the "soft end" offenders.

From all of the previously mentioned philosophical and ideological perspectives on the subject of privatization it is possible to begin to see that there are many issues that are not possible to conduct research on and come up with factual, statistical evidence that can be used to discover the best course of action. Under present conditions corrections administrators are being left to their own devices and because they are functioning at the implementation level and an extremely pressured daily existence they more often than not have little time for considering philosophical and ideological issues. It is the duty of the policymakers at the legislative level to provide the guidance and establish the framework for the correctional system to move forward in.

Ronald Moe ends his article with a statement that applies heavily to the need for policymakers to establish a strong framework for applying the private sector to the correctional system. He wrote, "What is needed now is a theory, or at least a set of criteria, to assist in assignment of functions to the appropriate sector. The best thing that could happen to the private sector is to have a first class public sector, appropriately limited in size and functions but fully capable of providing the legal, economic, and public goods infrastructure that will permit the private sector to reach its full potential." This is the challenge to legislative policymakers.

MORAL ISSUES

Though this section is somewhat related to the previous section on philosophies and ideologies it is separated here because there are people who object to privatization in general and privatization of correctional services based almost exclusively on moral grounds. Those who object to privatization in general hold the opinion that the "profit motive" is inherently immoral and that true ethical standards are conveniently situationalized to accommodate the conflicts between the desire to make a profit and truly moral decisions. They contend that immoral and unethical circumstances are merely justified or explained away when profit making is held up as the main motivating factor. They also indicate that all other more moral objectives to any program or service immediately fall into secondary positions as soon as the profit making ingredient is added.

It is recognized that the resistance by many people to allowing the profit motive to enter into a "human services" system such as the correctional system stems from the "cut throat, profit and survival" daily struggle of the free enterprise business world. Evidence of the underhanded methods employed in industry to make a profit by gaining an edge on the competition as well as the "acceptable" tactics used to out fox the competition just do not mesh well with the concepts many people have of agencies designed to do public good. The executive vice president of Buckingham

Security made the comment in his article "A Private Alternative to Public Prisons" "that society has never claimed that the public sector has a monopoly on ethics. (Fenton, 1985) Although it is true that unethical, immoral, and dishonest people exist in all facets of life the issue that it is unfair to label an agency immoral or unethical simply because of its public or private status is not the issue here. It is strictly because the profit motive and human service motive are incompatible to many people.

The public sector fosters its own types of immoral or unethical behaviors such as, collusion, bribery, conflicts of interest, and contract irregularities but when profit making is pointed out to be an "evil" of the private sector, members raise their defenses and cry "we are not crooks" because we wish to earn our living in the private business world. (Levinson, 1985)

In an article titled "Private Corrections: Feast or Fiasco?" the authors expanded on the theory that human service motive motives may conflict with profit motives. They indicate that programs with strong human service motives stress a "care for your fellow person, Christian ethic" in which services are given in response to an expressed need rather than on the basis of cost effectiveness or institutional priorities. (Anderson, 1985)

As both Fenton and Levinson described with their notions that the public sector has its immoral and unethical

people and the private sector people are not crooks simply because they seek to make a profit. "The profit motive does not necessarily have to be in conflict with the human services motive. It is likely that the effort to be profitable and satisfy corporate interests can become a potentially dangerous opposing force to reformation and human interests." (Anderson, 1985)

Another aspect of the privatization issue that has somewhat moral or ethical overtones is the overcrowding of the public institutions and the slow speed with which expansion can be made and the difficulties encountered when attempting to shrink the public system once expansion has taken place. Opponents of privatization say that private agencies would resist shrinkage just as much, if not more than public agencies but the question raised by Charles Logan that is of a moral nature is not how do we acquire more prison space when we need it or get rid of it when we don't. It is that doesn't justice require that prison sentences not be dictated by prison space? Logan indicates that the Federation of New York State Judges unanimously affirmed in a formal resolution to send serious criminals to prison regardless of space. (Logan, 1985)

The point is hard to argue. It would indeed be immoral if a convicted person who was sentenced on one day served a prison term while someone sentenced another did not simply because no beds were open. It is obvious that the courts

must be just and that the correctional system can only do so much with what it is given. What also becomes obvious is that the solution to this situation must come from the legislative level. If privatization offers any help to the dilemma it must be governed by carefully established policies that certainly can not come from the courts or the correctional system itself. Only the lawmaking bodies have a broad enough perspective of the entire system to set the guidelines.

Another issue that has strong moral ties that is a personal quest for Chief Justice of the United States, Warren E. Burger is that our prisons are too much like warehouses for human beings. This may tie in more closely with the financial or political issues surrounding prison industries but Chief Justice Burger asks a question that could be said to have a moral foundation. He asks, "Are we going to build more expensive human "warehouses" or should we change our thinking and move toward factories with fences around them? Chief Justice Burger believes that the productivity of prison industries presents the possibility of overcoming some of the problems that have caused prison inmates to be maladjusted people. Some of Chief Justice Burger's ideas may seem to some to be ultra-conservative but he honestly believes that the discipline, security, self-esteem, and concepts of work accountability that many inmates were never taught at home or in school can help to teach moral values that instill

respect and concern for the rights of others and in turn foster self-respect. (Burger, 1985)

One of the key parts of the privatization issue that will have to be confronted by the legislative policymakers will be the complicated task of revising laws governing prison industries and the use of inmate labor by the private sector. There are already several success stories of cooperation between the public sector and private industry. Opponents raise the spectre of past abuses of inmates by both the public and private sectors. As has been indicated previously many instances of privatization, to include prison industries, are already well established. Almost no guidelines have been set by legislative policymakers even though many of these programs raise important issues that are above and beyond the administrative level. Prison industries can have value but only if they are governed properly.

The final moral issue that is raised the most often when the possibility of private enterprise becoming involved in the correctional system is discussed is about the morality of profiting from the misfortune of others, particularly the disadvantaged. Also, prison inmates, for a variety of reasons, are often considered "perhaps the most disadvantaged of the disadvantaged." (Gandy, 1987)

It is difficult to dispute what someone believes to be morally right but the philosophy that it is somehow improper

to imprison offenders or worse yet profit from their imprisonment encompasses a far reaching social problem that will be discussed for a long time. It is certainly not the complete responsibility of the correctional system to solve a problem in greater society especially one that no one can decide for sure even exists much less what the solution is. The correctional system is mandated by greater society to perform a function. If privatization is necessary or at least a viable part of performing that function the correctional system deserves the assistance of the legislative policymakers in determining how to address moral issues. Eventhough it is possible that society needs to look at itself and decide if its criminal justice system unfairly focuses on minorities or those who are in the lower socio-economic levels it is just as significant to argue that most offenders made free choices that caused them to end up in trouble.

The key here is the contention that it is immoral to make a profit from unfortunate members of society. In support of those private agencies who have seen a need for their services as well as an opportunity to make a profit in the correctional system is the fact that there are many places in our society where profits are being made from those who are either permanently or temporarily involved in unfortunate circumstances.

Though there are probably those who hold extremist views on the subject few people would argue that a doctor should

not be entitled to make a profit because it is immoral to benefit from an unfortunate sick person. Or, should corporations who make their profits from operating facilities for the housing and care of senior citizens be labeled as immoral. To take the thought process one step further to show that our society or more correctly our economy revolves around the idea that profit can be made from providing something that others need or want, is it somehow immoral for a taxi company or bus service to profit because some people can not afford their own cars.

The point of this whole section is not to deny that there are moral questions to anything our society does but to indicate that it is improper to expect those at the implementation level to provide the answers. In a capitalistic economy profit making in and of itself is not immoral. It is how the profit motive is applied in each particular case and the conditions it may cause that may be immoral. The policymakers must address privatization in the correctional system fully aware that moral questions must be faced boldly and realistically.

POLITICAL ISSUES

To many just the mention of the word politics conjures up images of a nightmarishly complicated system with inner workings that no one on the outside and few on the inside understand. If asked many people would compare a person who is a "politician" with the image of a slightly less than honest used car salesman. In past history even the criminal justice system resisted the influence of politics and politicians when it was apparent that personal interests were being served through corruption in many big city police departments. Politics became synonymous with all that can be had about government. For the criminal justice system to progress and especially for the correctional system to be able to move forward and appropriately explore the possibilities that the private sector has to offer, these stereotyped images of mistrust must be laid to rest.

Webster's Dictionary describes politics as "the art or science of government, of guiding or influencing governmental policy, or of winning and holding control over a government" and "competition between groups or individuals for power and leadership." Just by using this simple definition of the concept of politics it is possible to gain some insight as to how complicated the application of private enterprise to the correctional system will be even if it is done with the proper legislative policy umbrella in place.

John DiIulio wrote that "much of domestic politics in this country involves competition and struggle among two or more groups which seek to influence public policy. Correctional policy, however, is often made in the context of what political scientists like to call "subgovernments" or small groups of elected officials and other individuals who make most of the decisions in a given policy area." (DiIulio, 1988)

This perspective ties into the point made earlier that the general voting membership in the legislative bodies either vote along party lines or with the recommendation of the special committees. DiIulio questions whether or not "privatization will perpetuate correctional subgovernments that may result in situations where private executives enter into relationships with public officials that undermine regulatory mechanisms." (DiIulio, 1988)

Under the present circumstances where individual corrections administrators are making their own decisions as to how to best use the private sector DiIulio's fears are much more likely to be realized. Only tight legislative controls governing the relationships between the public and private sectors can prevent bad situations from developing. It is a case where the players need to be told the rules of the game and not be allowed to make them up as they go along.

A major political concern with the privatization issue

in general and the correctional privatization issue involves the legitimate "power of the state." Tied in directly with this concept is the reverse side that looks at too much government as being problematic for society. In an article on privatization in general the authors express the belief that excessive government has "drained people of their ability to take care of their own problems because they look to government to solve their problems for them." In describing the possible long term effects of privatization the authors discuss the aspect that "heavy handed" government stifles individual qualities such as self-reliance, self-discipline, self-help, and the entrepreneurial spirit. (Palumbo, 1989)

While there are many people who believe that government should be in the "least intrusive" form as possible the issue that comes to the forefront when privatization in the correctional system is the topic is the loss of control. This is not strictly related to the morality of having a private agency exercising coercive control over persons sanctioned for offenses against society. There is a worry over the loss of control. Even if the public sector is held ultimately responsible for what occurs in private agencies there are problems associated with effectively overseeing a facility entirely operated by the private sector where management functions such as inmate classification and inmate control have been delegated to private

sector administrators. (Mullen, 1985)

In support of the purpose of this paper which centers around encouraging the legislative bodies to establish policy guidelines to govern the relationship between public responsibility and overall control of correctional facilities Mullen also indicates that "there is a legitimate and necessary role for private enterprise in corrections management, and contracting hardly constitutes an abrogation of the governments primary responsibility for policy development. (Mullen, 1985)

A very significant facet of the political side of privatization in the correctional system centers around the labor relations issue. There are actually three distinct parts to the labor relations issue. There is the obvious collective bargaining arrangements enjoyed by the unions representing correctional workers in the public sector and their resistance to any program that may challenge their existence and there is the situation of labor unions resisting the use of inmate labor to produce goods that compete with those made in free society. The third political consequence of privatization that will be addressed here is the unique and usually overlooked concept of social mobility.

A major political hurdle for policymakers working on guiding private enterprise involvement in the correctional system will be the ironing out of rules for labor unions

and the private agency. Most private agencies engaged in attempting to make a profit would resist unionization of their correctional workers. It should also be anticipated that there will be opposition by public sector employees who will resist the loss of public jobs. Mullen also indicated that whether or not there is formal union opposition, some resentment from public employees as well as strained relations between public and private corrections staff may be inevitable, especially if private providers take over an existing public facility. (Mullen, 1985)

A major concern of policymakers as they attempt to "plug the gaps" with guidelines for private sector involvement in the correctional system will be the issue of work stoppages. If there is a strike by private corrections workers there would have to be contingency plans for providing emergency support which could be costly to the public sector. (Mullen, 1985) Labor issues will be one of the most sensitive areas that policymakers will face.

The other half of the labor relations issue that may be the most complicated half is the strong movement taking place to put inmate labor to better use. Many states have enacted legislation to compell administrators to move in the direction proposed by Chief Justice Warren Burger of establishing factories with fences. Many of the laws governing inmate labor and the goods they may produce are somewhat antiquated and need to be revised but this will be

a touchy task especially in states that are heavily pro-labor union. Though many of the beliefs on unfair competition of inmate goods in the free market or abuses of inmate labor are unfounded or founded in past problems not present economic or social circumstances, policymakers face a challenge in this delicate area. The laws on inmate labor require revision not only for what they say about inmate labor but for what they imply. Gail Funke wrote, "Inmate labor laws are significant both for how they define the status of workers and establish the goals of inmate work. The free venture model implies the notion of inmates as productive factors rather than as chattel of the state. Many of the general correctional laws relating to inmate labor, however, implicitly accept the concept of inmates as chattel; the most notable are laws requiring hard labor." (Funke, 1982)

Another view on the use of inmate labor specifically cites the private sector as having advantages. What is particularly interesting is that this view comes from our Canadian neighbors to the North. John Gandy of the University of Toronto writes, "Advocates of private sector involvement believe that the environment of privately run prison industries more nearly approximates the free world environment and that private industries maintain closer ties with free world industries. From this they assume that privately run prison industries provide inmates with better opportuni-

ties for rehabilitation and improved chances of securing employment upon release from prison. Reports of private industry experiences to date suggest at least partial validation of this assumption." (Gandy, 1987)

Though the proper use or treatment of inmate labor is largely a political issue, policymakers have a moral or social responsibility to give an inmate the potential for self-worth while serving time and productive employment after release. Tying all of these issues together will require the dedication and skill of policymakers who are committed to the best possible role for the correctional system in society.

A very unique and often overlooked part of the labor picture associated with the privatization of any area of the public sector is the impact it will or might have on social mobility of minorities. Dennis Palumbo wrote "that it is not simply self-interest that motivates public sector unions when they oppose privatization. They are also protecting an important social function traditionally supplied by public sector employment." Palumbo quotes Harvey Brooks in his article with a passage that describes the social mobility concept best. Brooks indicates that "moving from private to public employment raised earnings of urban ghetto residents by up to a factor of three. In every occupational category, blacks earn on the average more by working for the government than for private firms. And

indications are that opportunities for upward mobility in the private sector have been in nonprofessional positions that do not allow for promotion to heavily credentialed professional ranks." Palumbo goes on to say that the same is true for women; they are more heavily employed in public rather than in private sector jobs, and they are more likely to be in higher level positions in the public than in the private sphere. (Palumbo, 1989)

The concept of social mobility has important political ramifications for legislative policymakers. It will have to be decided how each trade off of the privatization movement in the correctional system will be made and at what price. This type of issue that will raise emotional debates will try the patience and wisdom of those who must set policy.

There are two other areas of political concern that will require the attention of policymakers. One involves the process of site selection for new correctional facilities and the other again centers around pressures to continue the use of private contractors even if they prove to be no longer necessary. Since the process of site selection for public facilities is very lengthy and able to be opposed through the political process, legislative policymakers will need to address policy guidelines for the site selection process by private enterprise. Many of the laws and circumstances that control the actions of public agencies

do not effect the private sector. The policy guidelines for the application of the private sector to the correctional system need to include provisions that prevent private contractors from violating the public confidence with tactics that could alienate communities that object to the location of a correctional facility.

The other half of this question is the need to create policy that addresses the worry of many people that private agencies will fight hard to stay in operation even when they are not necessary. Mullen believes that payment provisions and careful admission, transfer, and release policies can minimize the pressure to maintain high occupancy rates. (Mullen, 1985) Also, carefully established policies on development of contracts with the private sector will make it easier for the public sector to discontinue use of private agencies when the needs of the correctional system change. It will be the task of the policymakers to set guidelines that do not unfairly make it so risky for private enterprise to enter the correctional system that it stifles the possible benefits the private sector has to offer.

The last political concern that policymakers will have to work around or through that may be more of an "ego" concern than one of an actual practical nature is the "loss of turf" situation for public administrators. Camille and George Camp wrote that "the loss of state jobs is the political concern most frequently mentioned by administrators.

When a private contractor brings its own employees, agency positions might be reduced. While a cutback in state employees may cause agency labor management problems, it also curtails the sphere of influence of the administrator. Loss of turf may be more of an inhibitor to expanding the role of the private sector than the actual loss of employment for state workers. (Camp, 1985) Unfortunately many public administrators measure themselves and their power by the size of their agencies. Also, many believe that their salary level may be affected by loss of control to the private sector.

The political process is indeed complicated and many of the issues are not founded in or supported by fact. They are emotional concerns that must be delicately addressed. Legislative policymakers will have to be careful not to alienate any group because all the factors surrounding privatization in the correctional system must be faced from a non-emotional perspective. The policymakers in this case will have to be able to apply "politics as an art form."

ADMINISTRATIVE/OPERATIONAL ISSUES

Though operational and administrative issues may at first seem a little to close to the "nuts and bolts" implementation level to be a big concern for those at the legislative policymaking level it is important for those who set policy guidelines to be fully aware of how those policies are going to effect actual practices. While the first three sections dealt with the less "tangible" concepts that centered around the why or why not to allow the private sector a role in the correctional system from a "gut level" feeling perspective, the final three sections will approach the subject more from a "what happens when" private enterprise becomes involved in the correctional system.

The two most major issues that arise when actual application of the private sector to the correctional system is discussed. Those public officials who believe privatization has merit and administrators of private agencies who are pushing for a larger role for the private sector cite improved administrative operations and the greater flexibility of the private sector as prime reasons for expanding private sector involvement in the correctional system.

According to the article by Camille and George Camp the 1983 Criminal Justice Institute study found that fifty-eight percent of the participants in the study noted improvements in the efficiency of their operation. Large percentages of administrators also noted reduced need for

additional staff training, better accountability, and more economical use of space. (Camp, 1985) A key point to remember when citing administrative or operational improvement possibilities offered by the private sector is that because the practices and performance of public correctional agencies vary widely and some departments spend much more money per prisoner and perform badly while others spend less and seem to do much better, the significance or impact of private enterprise in the correctional system will also vary widely. (DiIulio, 1988)

Flexibility is an important issue for public officials who are faced with finding solutions for the ever expanding and overcrowded correctional system. "One of the goals of contracting is to inject into the public sector some of the greater flexibility that is often possible in the private sector. This presumption of flexibility and speed of response on the part of private prison contractors is not just a matter of faith." (Logan, 1985) "Most observers would agree that contracting offers public agencies the ability to respond to immediate needs with greater flexibility and speed than is typically possible under government operation." (Mullen, 1985)

Logan expands on the issue by saying that, "flexibility is especially important in the administration of public policy, where the concentration of decision-making magnifies the consequences of ignorance, uncertainty and

error. Policies regarding imprisonment, for example, contain implicit or explicit projections about trends, distributions, and patterns of crime and punishment. Even where broad trends are discernable, however, it is beyond the powers of social science to make highly accurate and reliable forecasts." (Logan, 1985) This passage is not meant to be insulting to public officials but to serve as a partial explanation as to why the flexibility of the private sector is attractive to public buracracies.

Logan also explains that "A market in corrections would share in the general advantages of markets over central planning, the most relevant being that while central planning magnifies the consequences of erroneous predictions, competition isolates and minimizes them. If a state launches a major prison construction plan and hires an army of civil servants, based on a longterm projected trend that does not materialize or that unexpectedly reverses itself after a few years, the cost will be much greater than if several competing contractors respond continuously to projected needs. (Logan, 1985)

The possibilities that private sector flexibility offers for helping untangle miles of buracratic red tape make for a very tempting drawing card for public policymakers and corrections administrators alike. The point that this red tape may actually be necessary to prevent the correctional system from moving too far too fast is raised again to

alert policymakers to be wary of the lure of an easy answer to tough questions.

Care must be taken by the policymakers who will attempt to regulate the application of the private sector to the correctional system. Mullen raises the issue that "contracting also means reducing the public sector's own facility management capabilities, making it more difficult to revert to public management. This issue hardly poses an insurmountable barrier, but needs to be considered in planning the types of facilities and contract arrangements best suited to the circumstances in a given correctional jurisdiction. (Mullen, 1985)

There are several administrative/operational issues that make it necessary to bring up the subject of private sector involvement in prison industries again. John Gandy expressed the view that "profit-making or cost-reducing goals may conflict with goals of internal security and prison rehabilitation and retraining. Profit-making criteria run counter to security and stability practices which have traditionally employed as many inmates as possible in order to prevent problems which may arise from idleness. In meeting the productivity goals of private industry, therefore, there is a high probability that rehabilitation goals will become subordinate to economic ones. (Gandy, 1987)

Gandy also addressed private sector involvement in correctional institutions from the unique perspective of the

relationship between the security level of the facility and the way the private sector should be applied to the facility. He wrote "although little research appears to have been conducted in this area, the security level of the correctional facility would seem to have some bearing on the appropriate type of private sector involvement. One American author has argued that although maximum security institutions may be attractive to industry because of the high productivity associated with low inmate turnover, their security mission places too many restrictions on productivity. It might be advisable, therefore, to limit private sector involvement in such institutions to advisory boards and/or the vendors or prison products." (Gandy, 1987)

The last major concern that will be discussed in this section is raised often by both opponents and supporters of the privatization movement in the correctional system. The quality of services and the standards that must be established to measure and insure the highest quality possible are issues that cause both sides concern. The article by Anderson offered some insight into this matter. The authors stated that "There is general agreement that private corrections providers as well as public agencies should be governed by some standard of practice. However, there is little agreement as to who should establish those standards, how they should be formulated and implemented, what they should include, and the methods of enforcement or reward."

They continue by saying that "Evaluation of performance related to standards, either qualitative or quantitative, presents a challenge to any licensing or oversight body. Such terms as effectiveness, productivity, and efficiency are utilized in evaluation, and little agreement exists as to how they should be operationalized." (Anderson, 1985)

It is important for the policymakers as they are attempting to establish guidelines that they recognize that the desired end product of our correctional system is as difficult to measure as it is to name. Some groups want it to be called rehabilitation, others like restitution as a title, and still others are fond of retribution or revenge. Depending upon which perspective one takes, their formula for measuring a successful program will be quite different.

One of the worries for those who are concerned that quality may suffer due to insufficient standards or enforcement of standards is addressed by Anderson and his co-authors when they write, "Beleaguered correctional administrators who see privatization as a means for easing the burdens of overcrowding and scarce resources may be reticent about rigid enforcement of standards. Cost conscious corporate corrections providers may likewise resist high standards for fear that required costly enhancements may limit profits." "Minimum standards for private corrections can be ignored or manipulated for self-interested purposes by private entities desiring standards

which would be cost-effective to implement." (Anderson, 1985)

Joan Mullen offers the following observation in cautious support of private sector involvement in the correctional system. She writes, "Because the private provider is under competitive pressure to perform and is free of civil service restrictions and the cumbersome administrative procedures commonly associated with government operations, many contend that the quality of privately provided services is likely to be superior, at least in the short run. Adequate monitoring, frequent on-site inspections, and judicious rebidding procedures are the key tools available to ensure continued performance, and need to be carefully designed at the outset." (Mullen, 1985)

There are many possible areas in the correctional system that might benefit from private sector involvement but again it is a challenge to the policymakers to understand and consolidate all of the issues facing the privatization movement. John DiIulio makes a statement in his article that is a fitting conclusion to this section. He says that, "Only after we have studied the enormous variations in the public sector experience does it make good sense to ask whether private firms can do better (and more consistently) than government bureaucracies. From an administrative perspective, the issue is not public versus private management, but under what conditions competent, cost-effective management can be institutionalized." (DiIulio, 1988)

LEGAL ISSUES

If there is any subject that can strike fear into the hearts of those who do business in today's society more quickly than the legal concerns surrounding their operation it would be difficult to imagine what it could be. The correctional system is no exception. In fact, in the areas of civil and constitutional law the correctional system is probably leading the way when it comes to actual litigation, and although situations involving the violation of constitutional rights or civil suits for improper practices are the first things that come to mind when legal issues in the correctional system are brought up there are several extremely important legal concerns facing the correctional system when privatization is added to the loop.

It is acknowledged that many liability and rights violation situations could be eliminated by establishing effective policy but while the policymaking that is the focus of this paper may very well assist in controlling the number of incidents that result in lawsuits or court orders it is a different point in the concept of legality that this section is intended to address. There is actually no reason to believe that privatization of any segment of the correctional system would result in less of a potential for lawsuits than if it remained in public hands. What is significant for the policymakers to be aware of is the need to establish policy guidelines, change existing laws, or even

enact new laws that do not create a host of additional legal problems for the correctional system.

As was mentioned earlier there are some jurisdictions or public corrections administrators who are either more innovative or are "forced" to turn to the private sector but they venture in that direction largely on their own initiative without any legislative support.

Camille and George Camp described the legal issue involving enabling or authorizing legislation to contract with a third party to provide correctional services in this way. They said, "the lack of such legislation may be interpreted as license since it is not prohibited, but more often it is interpreted as prohibition since it is not specifically authorized. Interpretations may vary, but no prison administrators indicated that he or she would not prefer to have such enabling legislation before contracting for such services." (Camp, 1985)

On the same subject Joan Mullen observed that "even where states and counties have statutory authority for service contracting, legislative amendments may be required to permit contracts for primary facility operations. Specific language may also be needed to open contracting to for-profit organizations." (Mullen, 1985)

Earlier points that a policy umbrella needs to be established so that corrections administrators know their authority levels or limitations and the appropriate areas of the

private sector that they may turn to for assistance in administering correctional services rise to the surface again during discussions of legal issues. Legislative policymakers are extremely remiss in their duties if they continue to ignore the privatization issue in the correctional system. It is not the responsibility of corrections administrators to determine how the private sector should be applied to the correctional system but to function within the limits established for them by the legislative bodies.

This is not to say that corrections administrators should be left out of the loop during the formulation process. They should be consulted and included on advisory committees as policy is formed but policymakers must make the final decisions in the best interest of all concerned. It should be recognized that public corrections administrators may overlook constitutional issues in order to relieve the pressures of overcrowding while private sector administrators may resist certain restrictions that might limit profit-making opportunities. Legislative control may even need to go as far as contract specificity. Joan Mullen suggests that "perhaps the most important legal issue is the development of explicit contractual standards of performance to ensure that the goals of profit maximization do not interfere with the State's interest in maintaining safe, secure, and humane facilities." (Mullen, 1985)

As described by Connie Mayer, the "most fundamental issue

in the privatization of corrections is whether the exercise of the state's power to confine persons can be delegated to a private corporation." (Mayer, 1986) The most delicate portion of this issue is the potential delegation of the police powers of the state authorized in the tenth amendment to the U. S. Constitution. The contention of opponents of privatization on this point is that it would be improper and could result in constitutional abuses if a contractor whose self-interest of profit-making was given the power to use coercive police powers such as deadly force to prevent escapes or the right to award or take away "good time" credits.

According to Mayer "the legislative branch can generally delegate its police power to political subdivisions of the state or to public administrative bodies and agencies but may not delegate its exercise of police powers to a private corporation or a private citizen to be used for a private rather than public purpose." (Mayer, 1986)

The key question that policymakers must find a satisfactory answer for in this area is whether or not delegation of state police powers in a private for-profit correctional setting is serving a public or private purpose. There is no question that a privately operated contract correctional facility would still be serving a public purpose. The conflict arises when the private purpose of making a profit from the operation is added to the picture. Even constitu-

tional experts may debate this issue without successful resolution. What may be required will be laws and standards for situations that were never even imagined by constitutional authors.

No matter how much the public sector would attempt to remain the ultimate authority or controlling factor over a private agency there must be a certain delegation of authority. The question or problem that is facing policymakers who are wrestling with the privatization in the correctional system situation as far as legal issues are concerned is who has the ultimate responsibility, which in turn leads to liability issues. If the government must remain in the position of being ultimately responsible for that actions of private contractors the question of control comes up again. There are many fears of administrators in both the public and private sector when responsibility and liability issues arise.

Many military leaders express the opinion that authority can be delegated but responsibility can never be transferred. In our complex legal system it is possible, in some circumstances to transfer liability without transferring responsibility. Using excessive use of force as an example, Connie Mayer indicates that, "If there are constitutional challenges for deprivation of due process or lawsuits are filed charging use of excessive force, the state and private contractor could both be liable." She asks, "to what extent does con-

tracting transfer the government's liability to the private vendor? There is no legal principle to support the premise that public agencies can avoid or diminish their liability by contracting to a private operator." (Mayer, 1986)

Though opponents of privatization like to indicate that avoiding or transferring responsibility and liability is the primary driving force behind the privatization movement in the correctional system there is no evidence to support this accusation. The foundation for the responsibility and liability concerns for administrators stems more from the uncertainty surrounding these important points due to the lack of any legislative policy providing directives than it does from any devious drive to circumvent rules or ethics.

Camille and George Camp give one of the best accounts of the current confusion of the liability and responsibility issues that result from no legislative policies having been established prior to privatization efforts. They write that, "the biggest legal issue is one of definition of the jurisdiction's legal authority and responsibility in contrast to that of the private sector provider. Fixing legal responsibility determines who is liable in the event of a lawsuit. Where the agency has statutory limits placed on its ability to delegate the responsibility for service, its ability to contract may be severely curtailed. An agency is not likely to expose a provider to such risks. Agencies want to delegate both the authority and the responsibility. Having the legal

authority alone is usually not sufficient basis upon which to contract for that service. Even when statutes provide authority to contract, other existing legislation may dictate ultimate agency responsibility for prisoners legally in its custody, or the responsibility may not be one that can be delegated." (Camp, 1985)

The legal spiderweb can be untangled somewhat by prior planning and policymaking that takes into account the worst case scenarios that could result from private sector involvement in the correctional system. The next section will focus on the financial aspects of private sector involvement in corrections but Shaheen Borna raises an interesting "worst case" that has potential legal and financial ramifications. He says, "the government has the ultimate liability for the handling of all prisons, even those operated by the private sector. Therefore, the government might end up paying large legal fees for litigation brought against it if the private corporations committed abuses." (Borna, 1986)

William Collins makes an accurate summation of the need for legislative policy guidelines that many corrections administrators indicate are absolutely necessary to appropriately apply the private sector to the correctional system. He writes, "To avoid confusion and uncertainty and the possibility of a contract being found void for want of enabling legislation, it is clearly preferable that enabling legislation be passed, even though analysis of the law of municipal

corporation's contracting powers generally may suggest no specific statute is necessary." (Collins, 1986)

Policymakers must recognize that they have a responsibility to establish enabling legislation that is fair to both the public and private sectors. It must be done in such a way that it does not violate the rights of the clients of the correctional system or set up new unintended consequences for the public or private agencies. If the private sector has any benefits to be offered to the correctional system the laws and policies governing its application must not hinder it needlessly or make it impossible for the private agency to make a profit. All this must be done with the realization that the ultimate responsibility of the correctional system is to greater society not to profit-making agencies.

FINANCIAL ISSUES

Though most of the most serious issues surrounding the application of the private sector to the correctional system have little or nothing to do with financial concerns, the notion that privatization can save the correctional system money is usually the first thought that most administrators have when privatization is brought up. It is certainly the most frequently cited attribute of privatization that is raised by private sector correctional administrators. The major problem with the focus on this financial relationship between the public and private sector is that it usually prompts two distinct reactions in public officials, neither of which stimulate the proper frame of mind for addressing the privatization issue. Either an administrator jumps at the chance to relieve the pressure of the financial burden on his or her agency or they react negatively to the notion that anyone could possibly presume to do a better job than the public sector.

This section will look at the financial prospects and pitfalls in the privatization issue as it applies to the correctional system while keeping them in context with the overall picture of privatization. Saving money is and should be a concern for all public officials and the legislative policymakers should establish guidelines that allow for thorough exploration of any and all possibilities.

John DiIulio offers an observation that somewhat tempers

the excitement for the money saving potential of privatization in the correctional system. He writes that even though "correctional spending has been rising rapidly, relative to other categories of public expenditure corrections ranks close to last. Less than three-quarters of a penny of every dollar of total government spending goes into corrections. In the context of public spending generally, corrections is an unpromising place to try to save money. Nevertheless, corrections represents the fastest growing part of the budget in dozens of states and local jurisdictions." (DiIulio, 1988)

Though DiIulio's points should be taken into consideration by corrections administrators and legislative policymakers, they should only serve as a "caution light" on the road to applying the private sector to the correctional system, not a stop light. It is a responsibility of every public official to save the tax dollars of the citizens no matter how small of a slice of the fiscal pie is allotted to their function. The money spent on the correctional system is a delicate issue because many taxpayers see it at best as only a necessary evil in our society and see no returns for the money spent. This point is easy to see in action whenever the media sensationalizes a condition at a correctional facility that seems to give the impression of a "country club" atmosphere. The average citizen becomes extremely outraged when they see tax dollars being spent

for things that they see as luxuries for criminals especially when they have to work hard for the same luxuries.

Since it is not really an arguable point that the correctional system should attempt to save money it is appropriate to see if the private sector can offer any assistance in money saving efforts without creating a host of new problems.

Camille and George Camp reported that "most agencies, seventy-six percent, reported savings by using contracts, but it should be noted that not every agency realized cost savings. When cost savings were not realized, the agencies concluded that the operational benefits more than outweighed the cost factor. Thus, while cost savings are an important factor to most agencies, it is not the sole factor in measuring benefits." (Camp, 1985)

As with any issue there are strong and sometimes emotional arguments on both sides. Joan Mullen observes that "the relative costs of public versus private management are a highly controversial aspect of the privatization debate. Advocates suggest that private vendors can operate equivalent facilities at a lower cost, due largely to the staffing efficiency that may be realized in the absence of civil service regulation, lower private sector pension and benefits costs, and greater market incentives to increase productivity. Critics fear that the costs of private management will escalate once vendors become established, since it will be impractical

to turn contracts over with sufficient frequency to maintain a competitive market environment. The burden of monitoring private providers is also considered a potentially large hidden cost of management contracting." (Mullen, 1985)

The private sector continues to extoll its abilities to save public agencies money and there is evidence to support the contentions, but much of the documented evidence of the private sector saving money when it takes over a once public service comes from such areas as waste disposal, transportation, and street maintenance. The difference between these services and the correctional system are both obvious and subtle at the same time. The obvious side is that the correctional system deals directly with human beings and ones being denied their freedom at that. The more subtle side is that there are many constitutional rights and treatment standards that will require a much more extensive monitoring apparatus.

Christine Bowditch summed up one of the most significant areas for a possible hidden cost to privatizing the correctional system. She stated that, "the administration of contracts would create a new cost to the state: one estimate places this cost as high as four percent of the total contract. The biggest potential cost, however, stems from the necessary creation of a regulatory bureaucracy. Even when private industry controls prison management, it must uphold federal and state guidelines on the custody and care of

inmates. To ensure compliance, the state must develop a system for monitoring private prisons." (Bowditch, 1987)

It is important that policymakers as well as corrections administrators realize that circumstances that appear on the surface to create substantial cost savings may not result in that much of a savings when the "hidden" costs or extraneous costs caused by new factors or bureaucratic positions associated with contracts with private vendors are figured in. Robert Levinson indicated that privatization could help trim public budgets by holding the line on taxes but could prove to be more costly because of the need to show profit and pay taxes by the private firm and the costs to the public sector to prepare, administer, monitor, and inspect the programs that have been turned over to the private sector. (Levinson, 1985) It will be the responsibility of policymakers and administrators to be honest and objective with their estimations and evaluations of the cost benefit potential of the private sector for the correctional system as they establish the policy umbrella.

One of the key areas that came up quite often in the literature on the subject of privatization in the correctional system especially when financing of facilities was discussed was the possibilities offered by what is called lease purchase arrangements. John Gillespie described the problem of financing new correctional facilities as one of the largest hurdles government officials must overcome.

He indicated that the lease purchase arrangement actually represents an installment sale of the facility. (Gillespie, 1986)

The main contention of opponents of private financing alternatives is one that ties in closely with earlier points about the erosion of a sense of community and social obligation. They believe that private financing alternatives will be too easy for corrections administrators to become involved in, which could result in circumvention of due process insuring "red tape" and an increased use of imprisonment because it is "easy" not because it is the wisest correctional practice.

Gillespie indicates that a lease purchase transaction allows faster receipt of funds and a quicker construction start, and allow a government to avoid significant construction inflation costs while allowing it to earn additional funds on invested proceeds throughout the construction period. (Gillespie, 1986)

Jan Elvin states that "new financing methods do not need voter approval which reduces public scrutiny of the jail and prison problem. (Elvin, 1985) Shaheen Borna wrote that, "a variety of contracts can be structured between public authorities and the private sector in order to sidestep Proposition 13-style debt ceilings and public referenda. The most popular financing techniques are bond-like notes and sales-leaseback arrangements (also called lease-purchase

agreements) which give the developer or investors all the advantages of a real estate tax shelter without requiring the approval of the voters." He describes the situation as a "deal structured as a lease-purchase, with the lease renewed annually, conditional each year on the appropriation of funds by the county commission. By structuring a contract in this manner, the transaction does not need a constitutionally mandated requirement that voters should approve bond issues, nor does it have to comply with any laws restricting debt ceiling." (Borna, 1986)

Jan Elvin quoted Martin Tolchin of the New York Times in her work on private prisons and his views echo the fears of privatization opponents that private financing will be too easy. Mr. Tolchin wrote, "that private companies say they can do a better job because they are insulated from public pressures and are free from political interference. Thus they avoid the lengthy procedure of going to the voters with a bond issue and risking its denial at the polls. The public should not, however, be denied its voice in deciding whether or not new prisons should be built. (Elvin, 1985)

Views offered by two separate authors provide evidence that there might be some foundation to fears that some administrators or government officials who may desire to bypass the normal bureaucratic hassels. Joan Mullen wrote, that while speaking at a National Institute of Justice conference on privatization, a spokesman for Massachusetts

(where a significant number of the state's secure juvenile facilities are contracted) suggested that the central advantages of contracting were the flexibility and responsiveness of private providers, and not necessarily their costs.

(Mullen, 1985)

John Gillespie wrote that "governments that are legally restricted from lease purchase financing might consider the possibility of amending their restrictive laws or clarifying authorization for issuing such securities. (Gillespie, 1986)

If, in fact, there are those in the public sector who would like to avoid red tape by turning to the private sector it should not be assumed that their intentions are devious or unethical. They are under extreme pressures to do increasingly more with the same or decreasing revenues. It falls squarely on the shoulders of policymakers to set guidelines that allow innovations offered by interaction with the private sector while still protecting the voters ability to review the actions of their public officials. The key to this will be setting guidelines that help eliminate or at least reduce the effects of emotionalism on both sides of the privatization in the correctional system debate.

IMPLICATIONS/CONCLUSION

The implications for public policy in the application of the private sector to the correctional system are many and varied. It is no longer a matter of just deciding if and when the private sector will have something to offer to the correctional system. Not only does the private sector believe that they have services that can benefit the public correctional system, public sector corrections administrators, in increasing numbers, are turning to private organizations for assistance in meeting the heavy demands placed on the correctional system in our society.

The private sector has already established a strong position in the correctional system and there continues to be exploration by private sector administrators into new opportunities to make a profit in the correctional system. There are examples of private vendors providing services ranging from simple laundry or food services all the way to complete facility operation with new situations developing all the time.

This paper has not been an attempt to advocate the application of the private sector to any specific area of the correctional system or to indicate that the private sector has the ability to solve long standing correctional problems, nor has it been an attempt to show that the private sector has no place in the public correctional system. It has been an attempt to show the legislative policymakers that their

action is desperately needed in order to guide and regulate a new facet of the correctional system. As was described earlier many programs that have been deemed unsuccessful in the criminal justice system have fallen by the wayside before it was really known if they offered benefits due mainly to the way they were instituted or controlled, not because of the quality of the program itself.

Privatization in the correctional system is in danger of suffering this same fate if it is allowed to continue in a disorganized and uncontrolled manner. The information offered in this paper was provided with the hope that policy-makers would recognize the complexity of the privatization issue and move to explore the situations discussed in this paper further in order to educate themselves and then act to establish the necessary policy umbrella. *W. A.*

It should be apparent that the privatization issue has many intermingled and underlying circumstances that must be sorted out before the private sector is allowed to venture further into the correctional system or as some would say before the correctional system is allowed to venture further into the private market. It seems that legislative policymakers have been lax in their attention to this matter and it may be due to a situation described by one observer of legislative involvement in correctional matters. This person indicated that elected officials shy away from controversial issues in the correctional system

because they offer no hope for increased voter support during the next election but they can certainly result in a loss of votes.

The moral, philosophical, and ideological issues of the privatization in the correctional system situation will undoubtedly create controversy but it is hoped that the information provided in this paper will cause policymakers to become more aware of the situation and their responsibility to govern it.

If nothing is done and privatization is abandoned and the private sector could have indeed provided benefits to the correctional system then policymakers will have failed in their responsibility to the society they serve to search out the best ways to provide the services society requires. Also, if privatization of the correctional system is allowed to continue in its present largely uncontrolled form it could be extremely difficult and costly to remove the private sector from corrections once it has become entrenched if it is determined at some future time that the correctional system was an inappropriate place for the private sector.

It is not the most enviable position for the policymakers to be in but some would say it comes with the territory. It is the duty and responsibility of the legislative policymakers to establish the rules for the use of the private sector by the correctional system. As was expressed earlier, this paper does not advocate the traditional

"policy change" because in this case no policy exists. It is a situation that requires a policy addition and this will demand the utmost in wisdom and patience on the part of policymakers and corrections administrators.

As increasing demands and pressures drive the need for future innovation in the correctional system a partnership between the public and private sectors may provide new possibilities for the prudent spending of tax dollars. Policymakers must establish an equitable set of guidelines for the private sector and the correctional system.

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