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Privatization of Corrections: Defining the Issues*

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Although something must be *done about the sordid state of our nation's prisons and jails, we should not permit the purported benefits of privatization to thwart consideration of the broad, difficult policy questions that are involved.*

Even as the public is demanding that more criminals be incarcerated and that their sentences be lengthened, the problems of America's prisons and jails continue to plague, if not overwhelm, us. More than two-thirds of the states are currently under court order to correct conditions that violate the United States Constitu-

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This article is adapted from testimony that I presented before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 99th, Congress 1st Session, Nov. 13, 1985.

The reader should he aware that I served as the Reporter on Legal Issues for the National Institute of Justice's National Forum on "Corrections and the Private Sector" (Feb. 1985) and am currently serving as Reporter for the American Bar Association Criminal Justice Section's study on the privatization of corrections. Although the analyses, conclusions, and points of view expressed herein are my own, and do not reflect the positions of the Federal Judicial Center or the National Institute of Justice, a slightly modified version of this paper served as the Report that accompanied a Resolution presented by the ABA Criminal Justice Section to the ABA House of Delegates, recommending that "jurisdictions that are considering the privatization of prisons and jails not proceed . . . until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved." The Resolution was passed by the House of Delegates at its February 1986 meeting.

tion's prohibition against cruel and unusual punishment. There are many important questions, but there are still no clear, satisfactory answers.

The last few years have thus witnessed diverse, controversial developments. Some, like the voluntary accreditation of correctional facilities by the Commission on Accreditation for Corrections, have begun to take root. Others, like a 1982 proposal in Congress to build an Arctic penitentiary for serious offenders,[1] have been inconsequential. Yet the number of prisons and the cost of housing them still mount. Prison and jail populations have doubled in a decade, and—with preventive detention, mandatory-minimum sentences, habitual-offender statutes, and the abolition of parole in some jurisdictions—there is no relief in sight. Some states are even leasing or purchasing space in other states. And it is costing the taxpayers approximately $17 million a day to operate the facilities, with estimates ranging up to $60 a day per inmate. Several commentators have not so facetiously noted that we could finance college educations at less cost for all of the inmates in the country.

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

At the outset, it should be emphasized that private prisons are different from the notion of private *industries* in prison—Chief Justice Burger's "factories with fences" proposal[2]—which seeks to turn prisoners into productive members of society by having them work at a decent wage and produce products or perform services that can be sold in the marketplace. (In the process, the prisoners can also pay some of the costs of their incarceration, and, we would hope, gain some self-esteem.)

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

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1. *See* H.R. 7112, 97th Cong., 2d Sess. (1982) ("Arctic Penitentiary Act of 1982") (introduced by Rep. Leboutillier).

2. Keynote Address by Warren E. Burger, National Conference on "Factories with Fences": The Prison Industries Approach to Correctional Dilemmas (June 18, 1984), *reprinted in* Robbins, ed., PRISONERS AND THE LAW ch. 21 (New York, N.Y.: Clark Boardman, 1985).

company to run the *total* institution.

Advantages and Criticisms

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

The private sector, advocates claim, can save the taxpayers money. It can build facilities faster and cheaper, and it can operate them more economically and more efficiently. With maximum flexibility and little or no bureaucracy, both new ideas (like testing new philosophies) and routine matters (like hiring new staff) can be implemented quickly. Overcrowding—perhaps the major problem of corrections today—can be reduced.

A final—and significant—anticipated benefit of privatization is decreased liability of the government in lawsuits that are brought by inmates and prison employees.

The critics respond on many fronts, beginning with two major constitutional objections: the mere fact that the government would no longer directly be operating the institutions cannot shift liability under the Federal Civil Rights Act, 42 U.S.C. § 1983, pursuant to which most prison-condition litigation is brought; and, in any event, the government does not have the power to delegate to private entities the authority for such a traditional and important governmental function. In brief, critics argue that, to be properly acountable, the government must operate its prisons and jails and be subject to liability.

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

Cost-cutting measures will run rampant. Conditions of confinement will be kept to the minimum that the law requires. As a

reporter for *Barron*'s has written: "[T]he brokers, architects, builders and banks . . . will make out like bandits."[3] But questions concerning people's freedom should not be contracted out to the lowest bidder. In short, the private sector is more interested in doing well than in doing good. This idea was succinctly expressed recently by the director of program development of Triad America Corporation, a multimillion-dollar Utah-based company that has been considering proposing a privately run county jail in Missoula, Montana: "We'll hopefully make a buck at it. I'm not going to kid any of you and say we are in this for humanitarian reasons."[4]

Privatization also raises concerns about the routine, quasi-judicial decisions that affect the legal status and well-being of the inmates. To what extent, for example, should a private-corporation employee be allowed to use force—perhaps serious or deadly force—against a prisoner? It is difficult enough to control violence in the present public-correctional system. It will be much more difficult to assure that violence is administered only to the extent required by circumstances when the state relinquishes direct responsibility. Another important concern is whether a private employee should be entitled to make recommendations to parole boards, or to bring charges against a prisoner for an institutional violation, possibly resulting in the forfeiture of good-time credits toward release. With dispersion of accountability, the possibility for vindictiveness increases. As an employee who is now in charge of reviewing disciplinary cases at a privately run Immigration and Naturalization Service facility in Houston told a *New York Times* reporter last year: "I'm the Supreme Court."[5]

Finally, the critics claim, the financing arrangements for constructing private facilities improperly eliminate the public from the decisionmaking process. Traditionally, correctional facilities have been financed through tax-exempt general-obligation bonds that are backed by the tax revenues of the issuing governmental body. This debt requires voter approval. Privatization abrogates this power of the people. In Jefferson County, Colorado, for example, the voters twice rejected a jail-bond issue before E.F. Hutton underwrote a $30 million issue for private-jail construction.[6] The

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

4. *Deseret News*, June 20-21, 1985, at B7 (statement of Jack Lyman); *see also infra* n. 50.

5. NEW YORK TIMES, Feb. 19, 1985, at A15 (statement of Corrections Corporation of America employee John Robinson).

6. Rosenberg, *Who Says Crime Doesn't Pay?*, JERICHO, Spring 1984, at 1, 4; *see also*

corporation can build the institution and the government can lease it. The cost of the facility then comes out of the government's appropriation, avoiding the politically difficult step of raising debt ceilings. Once the lease payments have fulfilled the debt, ownership of the facility shifts to the governmental body.[7] This position was acknowledged by Senator Alfonse D'Amato (R-N.Y.),[8] who proposed a bill in 1984 to provide federal investment and rehabilitation tax credits and accelerated-depreciation deductions for private-prison construction.[9]

One example of the potentially egregious effects of reducing accountability and regulation concerns a proposal by a private firm in Pennsylvania to build a 720-bed medium-and maximum-security interstate protective-custody facility on a toxic-waste site, which it had purchased for $1. The spokesperson for the Pennsylvania Department of Corrections is reported to have said: "If it were a state facility, we certainly would be concerned about the grounds where the facility is located. [As for a private prison, there] is nothing in our legislation which gives anyone authority on what to do."[10] In the face of proposed legislation in Pennsylvania to place a one-year moratorium on the construction or operation of private prisons, the company has since abandoned its plan. It reportedly is now attempting to sell the toxic-waste site for $790,000, and is seeking to open the protective-custody facility in Idaho.[11]

CONSTITUTIONAL ISSUES

The relative advantages and disadvantages of privatization are not merely academic, for more than 30 institutions—immigration, juvenile, work-release, and halfway-house facilities—are now owned and operated by private groups. Further, a few of the above

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National Institute of Justice, THE PRIVATIZATION OF CORRECTIONS 45 (Washington, D.C.: Government Printing Office, 1985).

7. *See* National Institute of Justice, *supra* n. 6, at 40-50.

8. *See* NEW YORK TIMES, Feb. 17, 1985, at A29.

9. *See* S. 2933, 98th Cong., 2d Sess. (1984) ("Prison Consturction Privatization Act of 1984"). Senator D'Amato has stated that, although he supports the private ownership of prisons, he does not support their private operation. *See* NEW YORK TIMES, Feb. 17, 1985, at A29.

10. Levine, *Private Prison Planned on Toxic Waste Site*, NATIONAL PRISON PROJECT JOURNAL, Fall 1985, at 10, 11.

11. *See* Elvin, *Private Prison Plans Dropped by Buckingham*, NATIONAL PRISON PROJECT JOURNAL, Winter 1985, at 11. On March 21, 1986, Pennsylvania Governor Dick Thornburgh signed a bill imposing a 15-month moratorium on private prisons, to allow a panel to study the issues. *See* NEW YORK TIMES, Mar. 23, 1986, at 16; NEW YORK TIMES, Mar. 20, 1986, at A22.

issues have preliminarily been litigated.

There are two major constitutional questions regarding the privatization of corrections: whether the acts of a private entity operating a correctional institution constitute "state action," thus allowing for liability under 42 U.S.C. § 1983; and whether, in any event, delegation of the corrections function to a private entity is itself constitutional. In this section, I shall address the caselaw pertaining to these questions.

State Action. When a private party, as compared with a government employee, is charged with abridging rights guaranteed by the Constitution or laws of the United States, the plaintiff, in order to prevail under 42 U.S.C. § 1983, must show that the private party was acting "under color of state law." The reason for this is fundamental. The Fifth and Fourteenth Amendments, which prohibit the government from denying federal constitutional rights and which guarantee due process of law, apply to the acts of the state and the federal governments, and not to the acts of private parties or entities.[12]

The ultimate issue in determining whether a person is subject to suit for violation of an individual's constitutional rights is whether "the alleged infringement of federal rights [is] 'fairly attributable to the State.' "[13] A person acts under color of state law "only when exercising 'power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' "[14]

Three basic tests have been used to determine "state action":[15] the public-function test; the close-nexus test; and the state-compulsion test. State action will be held to exist if any one of these tests is satisfied. I believe that, in the private-prison context, *each* of these tests for state action is satisfied.

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12. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3, 11 (1883).

13. Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)). The Supreme Court in *Lugar* found state action when state officers had acted jointly with a private creditor to secure the plaintiff's property by garnishment and prejudgment attachment.

14. Polk County v. Dodson, 454 U.S. 312, 317-18 (1981) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)); *see also* Evans v. Newton, 382 U.S. 296, 299 (1966).

15. The constitutional standard for finding state action is identical to the statutory standard for determining "color of state law." *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982).

Public-Function test. The case that is perhaps most directly relevant to state action in the private-prison context is *Medina v. O'Neill.*[16] Sixteen inmates of the privately run Houston Immigration and Naturalization Service facility who had been confined in a single, windowless, 12-by-20-foot cell that was designed to hold six persons sued the private corporation and the INS. Another issue in the case was that one private security guard, who had not been trained in the use of firearms, had been using a shotgun as a cattle prod when the gun went off, killing one inmate and seriously wounding another.

The plaintiffs claimed that they had been unconstitutionally deprived of life and liberty, arguing, *inter alia*, that the INS had a duty to oversee their detention and that the defendant's failure to do so constituted state action. In opposition, the federal defendants contended that at all times the plaintiffs were in the custody of the private company, and, therefore, that the problems stemming from the plaintiffs' detention arose from purely private acts. Thus, the defendants averred that there was no state action.

The federal district court, in 1984, rejected the defendants' argument, finding "obvious state acton" on the part of both the federal defendants and the private company.[17] The court noted that, although there was no precise formula for defining state action,[18] the Supreme Court has recognized a "public function" concept, which provides that state action exists when the state delegates to private parties a power "traditionally exclusively reserved to the State."[19] As the Supreme Court stated in 1982 in *Rendell-Baker v. Kohn*,[20] "the relevant question is not simply whether a private group is serving a 'public function' . . ., [but] whether the function performed has been 'traditionally the *exclusive* prerogative of the State.' "[21] The *Medina* court found that detention came squarely within this test.

More recently, in August 1985, the United States Court of Appeals for the Eleventh Circuit, in *Ancata v. Prison Health Services, Inc.*,[22] addressed the question whether a private entity that

16. 589 F. Supp. 1028 (S.D. Tex. 1984).

17. *Id.* at 1038.

18. *See* Burton v. Wilmington Park Auth., 365 U.S. 715, 722 (1961).

19. Flagg Bros., Inc. v Brooks, 436 U.S. 149, 157 (1978); *see also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

20. 457 U.S. 830 (1982).

21. *Id.* at 842 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

22. 769 F.2d 700 (11th Cir. 1985).

was responsible for providing medical care to county jail inmates was liable, under section 1983, to the estate of a deceased county-jail prisoner who, following recalcitrance and improper diagnosis and treatment by doctors of the private health service, was diagnosed as having leukemia. Finding the state action issue so well settled as not to require extended discussion, the unanimous court of appeals panel stated:

> Although Prison Health Services and its employees are not strictly speaking public employees, state action is clearly present. Where a function which is traditionally the exclusive prerogative of the state (or here, county) is performed by a private entity, state action is present.[23]

Close-nexus test. Another standard that enlightens state-action jurisprudence is the "close-nexus" test. The inquiry here is "whether there is a sufficiently close nexus between the State and the challenged action . . . so that the action of the latter may be fairly treated as that of the State itself."[24]

A good example of the application of this test is *Milonas v. Williams*.[25] The plaintiffs, former students of a school for youths with behavior problems, brought an action against the school on the ground that it had used a "behavior modification" program that allegedly violated their constitutional rights. Specifically, the plaintiffs claimed that the school administrators, acting under color of state law, had caused them to be subjected to antitherapeutic and inhumane treatment, resulting in violations of the cruel and unusual punishment clause of the Eighth Amendment and the due process clause of the Fourteenth Amendment.

The unanimous panel of the court of appeals found state action, because "the state ha[d] so insinuated itself with the [school] as to be considered a joint participant in the offending actions."[26] The court made this determination after considering the following

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23. *Id.* at 703; *see also* Lawyer v. Kernodle, 721 F.2d 632 (8th Cir. 1983) (private physician hired by county to perform autopsies was acting under color of state law); Morrison v. Washington County, 700 F.2d 678 (11th Cir.) (refusing to dismiss physician employed by county from section 1983 action), *cert. denied*, 464 U.S. 864 (1983); Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974) (finding state action for private institution's acts where the City of New York had removed a child from the mother's custody and placed the child in a private child-care institution); *compare* Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984) (no state action found where private doctor had no supervisory or custodial functions, whose function and obligation was solely to cure orthopedic problems, and who was not dependent on the state for funds), *cert. denied*, 105 S. Ct. 2667 (1985).

24. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

25. 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

26. *Id.* at 940.

factors: many of the plaintiffs had been placed at the school involuntarily by juvenile courts and other state agencies acting alone or with the consent of the parents; detailed contracts were drawn up by the school administrators and agreed to by many local school districts that placed boys at the school; there was significant state funding of tuition; and there was extensive state regulation of the educational program at the school. These facts "demonstrate[d] that there was a sufficiently close nexus between the state sending boys to the school and the conduct of the school authorities so as to support a claim under Section 1983."[27]

Application of the close-nexus test to the private-prison context should yield the same result, especially considering, among other factors, the involuntary nature of the confinement, the detailed nature of the contracts between the government and the private entities, the level of government funding,[28] and the extent of state regulation of policies and programs.[29]

State-compulsion test. Like the public-function test and the close-nexus test, the state-compulsion test can also result in improper state action, in violation of 42 U.S.C. § 1983. The inquiry is whether the state had a clear duty to provide the services in question.

In *Lombard v. Eunice Kennedy Shriver Center,*[30] for example, the plaintiff—a mentally retarded person who was a resident of a state institution that had contracted with a private organization for medical services—sued under 42 U.S.C. § 1983, alleging that he had been denied adequate medical care, that he had been subjected to inappropriate medical treatment, and that his property had been improperly managed. The defendants contended that, because the private organization that provided all of the medical care about which the plaintiff complained was a private entity, the

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27. *Id.; see also* Woodall v. Partilla, 581 F. Supp. 1066, 1076 (N.D. Ill. 1984)(finding sufficient nexus between private food corporation and state to constitute state action); Kentucky Ass'n for Retarded Citizens v. Conn, 510 F. Supp. 1233, 1250 (W.D. Ky. 1980)(finding sufficient nexus between private residential-treatment center and state), *aff'd,* 674 F.2d 582 (6tb Cir.), *cert. denied,* 459 U.S. 1041 (1982); *compare* Calvert v. Sharp, 748 F.2d 861, 863-64 (4th Cir. 1984)(finding insufficent nexus between private doctor and state on tbe particular facts), *cert. denied,* 105 S. Ct. 2667 (1985).

28. On the question of the private entity's dependence on the state for funds, see Blum v. Yaretsky, 457 U.S. 991, 1011 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982).

29. On the question of whether the particular function is subject to extensive state regulation, see Blum v. Yaretsky, 457 U.S. 991, 1007-08, 1009-10 (1982); Rendell-Baker v. Kohn, 547 U.S. 830, 841 (1982).

30. 556 F. Supp. 677 (D. Mass. 1983).

state could not be held accountable for the acts of the private corporation and, further, that the corporation could not be held responsible for not conforming with constitutional and statutory requirements that are applicable only to governmental entities. In short, the issue was "whether the acts and omissions of the [private entity] constitute[d] state action for purposes of the Fourteenth Amendment, and whether [it] acted 'under color of law' for the purposes of 42 U.S.C. § 1983."[31]

The court responded to these questions in the affirmative, stating that "[t]he critical factor in our decision is the duty of the state to provide adequate medical services to those whose personal freedom is restricted because they reside in state institutions."[32] The court added:

> [I]t would be an empty formalism to treat the [private entity] as anything but the equivalent of a governmental agency for the purposes of 42 U.S.C. § 1983. Whether the physician is directly on the state payroll . . . or paid indirectly by contract, the dispositive issue concerns the trilateral relationship among the state, the private defendant, and the plaintiff. Because the state bore an affirmative obligation to provide adequate medical care to plaintiff, because the state delegated that function to the [private corporation], and because [that corporation] voluntarily assumed that obligation by contract, [the private entity] must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if [the private entity] were not held so responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.[33]

The foregoing statement virtually summarizes the experiences of the courts on the questeion of whether the acts of private entities performing functions that are delegated by the state constitute state action. In the context of detention—whether in a prison, a jail, an immigration facility, a juvenile facility, or a mental-health center—the answer is clearly affirmative.

Delegation. In *Ancata v. Prison Health Services*[34]—which involved the contracting out by the county of the provision of medical care to incarcerated individuals—the United States Court of Appeals for the Eleventh Circuit recently stated:

> Although [the private entity] has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by the policies or customs of the [private entity]. In that sense,

31. *Id.* at 678.
32. *Id.*
33. *Id.* at 680.
34. 769 F.2d 700 (11th Cir. 1985).

the county's duty is non-delegable.[35]

In other words, there is an area of overlap between state action and the propriety of a delegation of governmental powers: Government liability cannot be reduced or eliminated by delegating the governmental function to a private entity. But the non-delegation doctrine goes further than that, holding that some governmental functions may not be delegated *at all.* Whether the privatization of corrections would be held invalid under that doctrine is debatable; certainly the answer to that question is less clear than is the answer to the question whether such a delegation constitutes state action.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[36] Strictly interpreted, this clause prohibits Congress from delegating its legislative powers to any other institution.[37] Due to societal changes, advances,and complexities, however, a strict adherence to the doctrine of non-delegation is not possible.[38] Practicality necessitates that many of the comprehensive regulations that are required by modern life be delegated, for they are often too intricate and detailed for the direct legislative process. Thus, Congress—under the "necessary and proper" clause of the Constitution[39]—can "delegate authority . . . sufficient to effect its purposes."[40] But *which* purposes? Can the governmental functions of incarcerating, punishing, deterring, and rehabilitating criminals constitutionally be delegated to private entities?

Historically, the Supreme Court expressed an antipathy to the delegation of policymaking responsibility to private organizations.[41] Although it has been suggested that the continued vitality of this position is suspect,[42] as the doctrine has not been employed to invalidate a delegation in more than 50 years (with similar experience in many states),[43] the doctrine at the least retains important

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35. *Id.* at 705.

36. U.S. CONST. art. I, § 1.

37. *See* Davis, ADMINISTRATIVE LAW § 3.4 (3d ed. 1972).

38. *See* Schwartz, ADMINISTRATIVE LAW § 2.1 (2d ed. 1984).

39. U.S. CONST. art. I, § 8, cl. 18.

40. *E.g.,* Lichter v. United States, 334 U.S. 742, 748 (1948).

41. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935); *see also* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

42. *See, e.g.,* FPC v. New England Power Co., 415 U.S. 345, 353 (1974) (Marshall, J., concurring and dissenting); *see also* Tribe, AMERICAN CONSTITUTIONAL LAW § 5-18, at 291 (1978).

43. *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama

influence by requiring that Congress provide an articulation of policy along with any delegation of authority. This requirement not only limits agency excesses, but it also facilitates the practicality of judicial review of agency action.[44] Nevertheless, it may be that, with a sufficiently broad delegation of a traditionally exclusive governmental function, the doctrine might be used once again.

In many areas, the courts have regularly allowed private entities to exercise authority that could be characterized as amounting to a deprivation of a property or liberty interest.[45] The area of family law provides a familiar example.[46] And it is also true that, even in areas that are traditionally thought of as belonging in the realm of public rather than private decisionmaking, courts have tolerated broad delegation of lawmaking power to private bodies.[47]

There comes a point, however, where concerns about the fairness of decisionmaking that affects the interests of individuals in what is so clearly a governmental function must outweigh the need for unchanneled exercises of expertise and claims of efficiency and reduced cost.[48] Whether that point is reached with privatization of corrections is a very difficult question, without any good, clear, recent help from the caselaw. Even if such a delegation is constitutional, however, that does not necessarily mean that it is wise to transfer this most basic function of government—the doing of justice—to private hands.[49]

Other Important Questions

Although there has been litigation on some of the issues that are likely to be raised concerning the privatization of corrections, the concept has yet to be fully tested, for there are presently no primary medium-or maximum-security adult facilities in the country that are owned or operated by private bodies.

Refining Co. v. Ryan, 293 U.S. 388 (1935).

44. *See* American Power and Light Co. v. SEC, 329 U.S. 90, 106 (1946). "The delegation doctrine is alive, but not well articulated or coherently applied by the Supreme Court." Schoenbrod, *The Delegation Doctrine: Could the Court Give It Some Substance?*, 83 MICH. L. REV. 1223, 1289 (1985). *See generally* Comment, *The Fourth Branch: Reviving the Nondelegation Doctrine*, 1984 B.Y.U. L. REV. 619; Note, *Rethinking the Nondelegation Doctrine*, 62 B.U.L. REV. 257 (1982).

45. *See generally* Note, *The State Courts and the Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398, 1399 (1954).

46. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 602-03 (1979); Wisconsin v. Yoder, 406 U.S. 205 (1972).

47. *See, e.g.*, Todd & Co., Inc. v. SEC, 557 F.2d 1008 (3d Cir. 1977).

48. *See* Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

49. *See infra* nn. 51-53 and accompanying text.

Such adult correctional facilities are different from juvenile, immigration, work-release, and halfway-house facilities. Juvenile facilities, for example, typically require only minimum security, while adult institutions can range from minimum to maximum security. As a result, higher costs for security may be incurred by the private contractor. As the security level increases, so too will concern for escapes, assaults, and prison discipline. Moreover, the special problems of long-term confinement must be considered, for the length of imprisonment in an adult facility is certain to be much longer than the length of stay in a juvenile, detention, or INS facility. Further, the political climate surrounding an adult facility will usually involve stronger public opposition, since the inmates will pose more of a threat to the immediate community. This opposition could delay, as well as increase the cost of, plans to contract with the private sector. For these reasons and others, notwithstanding the claims of proponents of privatization, it may be that lower cost is not an advantage of privatization for adult primary institutions.[50]

If the concept of privatization of corrections does take hold, however, we should move slowly and cautiously, for statutes may have to be amended or repealed, and comprehensive contracts will have to be drafted narrowly and unambiguously. Among the many questions, both general and specific, that will have to be confronted are the following:

What standards will govern the operation of the institution?

Who will monitor the implementation of the standards?

Will the public still have access to the facility?

What recourse will members of the public have if they do not approve of how the institution is operated?

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50. *See, e.g.*, NEW YORK TIMES, May 21, 1985, at A14 (reporting $200,000 in cost overruns for privately operated prison in Tennessee); *see also* American Federation of State, County, and Municipal Employees, POSITION ON CONTRACTING OUT CORRECTIONAL FACILITIES (July 1985). Kenneth F. Schoen, former Commissioner of Corrections in Minnesota, has stated: "Private operators claim they can build prisons more cheaply. While more efficient administration of construction may reduce costs, the savings are lost to the higher cost of private borrowing, a against public bonds. And, since prison construction is financed through tax shelters, tbe effect is to narrow the national tax base, sbifting the burden of financing jails to our lower-income taxpayers." Schoen, *Private Prison Operators*, NEW YORK TIMES, Mar. 28, 1985, at A31.

Further, privatization of prisons and jails may cost the government *more* than public ownership and operation of the faciliites would cost because, by delegating the incarceration function, the state may waive the defense of sovereign immunity in ordinary-negligence actions. *See* Opinion Letter from W.J. Michael Cody, Tennessee Attorney General, to Shelby A. Rhinehart, Tennessee State Representative, at 2, 10-11 (Nov. 27, 1985).

Who will be responsible for maintaining security and using force at the institution?

Who will be responsible for maintaining security if the private personnel go on strike?

Where will the responsibility for prison disciplinary procedures lie? For example, will private personnel be permitted involvement in quasi-judicial decisions, including not only questions concerning good-time credit, but also recommendations to parole boards?

Will the company be able to refuse to accept certain inmates—such as those who have contracted AIDS?

What options will be available to the government if the corporation substantially raises its fees?

What safeguards will prevent a private contractor from making a low initial bid to obtain a contract, then raising the price after the government is no longer immediately able to reassume the task of operating the prisons (for example, due to a lack of adequately trained personnel)?

What will happen if the company declares bankruptcy (for example, because of liability arising from a prison riot), or simply goes out of business because there is not enough profit?

What safeguards will prevent private vendors, after gaining a foothold in the corrections field, from lobbying for philosophical changes for their greater profit?

Questions like these present some hard choices—but ones that will have to be addressed if we should seriously move toward the private ownership and operation of correctional institutions.

SYMBOLISM: THE HIDDEN ISSUE

In its 1985 policy statement on privatizaiton, the American Correctional Association began: "Government has the ultimate authority and responsibility for corrections."[51] This should be undeniable. When it enters a judgment of conviction and imposes a sentence, a court exercises its authority, both actually and symbolically. Does it weaken that authority, however—as well as the integrity of a system of *justice*— when an inmate looks at his keeper's uniform and, instead of encountering an emblem that reads "Federal Bureau of Prisons" or "State Department of Corrections," he faces one that says "Acme Corrections Company"?

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51. American Correctional Association, NATIONAL CORRECTIONAL POLICY ON PRIVATE SECTOR INVOLVEMENT IN CORRECTIONS (Jan. 1985).

This symbolic question may be the most difficult policy issue of all for privatization: Who *should* operate our prisons and jails—apart from questions of cost, apart from questions of efficiency, apart from questions of liability, and assuming that prisoners and detainees will retain no fewer rights and privileges than they had before the transfer to private management? In an important sense, this is really part of the constitutional-delegation issue, in that it could be argued that virtually anything that is done in a total, secure institution by the government or its designee is an expression of government policy, and therefore should not be delegated.[52] I cannot help but wonder what Dostoevsky—who wrote that "[t]he degree of civilization in a society can be judged by entering its prisons"[53]—would have thought about privatization of corrections.

Further, just as the prisoner should perhaps be obliged to know—day by day, minute by minute—that he is in the custody of the state, perhaps too the state should be obliged to know—also day by day, minute by minute—that it alone is its brother's keeper, even with all of its flaws. To expect any less of the criminal-justice system may simply be misguided.

CONCLUSION

We should not be swayed by brash claims, such as the one by a private-facility owner who told a *New York Times* reporter: "I offer to forfeit my contracts if the recidivism rate is more than 40 percent."[54] Nor should we be fooled by the "halo effect"—that is, that the first few major experiments will be temporarily attractive because the private administrators, being observed very closely, will be under great pressure to perform. Prison operation is not a short-term business. We should further be wary that private-corrections corporations may initiate advertising campaigns to make

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52. *Cf.* Carter v. Carter Coal Co., 298 U.S. 238 (1936): "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311.

As the executive director of the Vera Institute recently stated: "Justice is not a service, it's a condition, an idea." NEW YORK TIMES, Sept. 17, 1985, at A17 (statement of Michael E. Smith). This theme is echoed by the president of the Police Foundation: "Being efficient does not mean that justice will be served." *Id.* (statement of Hubert Williams).

53. Dostoevsky, THE HOUSE OF THE DEAD 76 (C. Garnett trans. 1957).

54. NEW YORK TIMES, Feb. 11, 1985, at B6 (statement of Ted Nissen, president of Behavior Systems Southwest).

the public feel more fearful of crime than it already is, in order to fill the prisons and jails. Finally, and most importantly, we should not permit the purported benefits of prison privatization to thwart, in the name of convenience, consideration of the broader, and more difficult, problems of criminal justice.

To be sure, something *must* be done about the sordid state of our nation's prisons and jails. The urgency of the need, however, should not interfere with the caution that must accompany a decision to delegate to private companies one of government's most basic responsibilities—controlling the lives and living conditions of those whose freedom has been taken in the name of the government and the people. At the least, the debate over privatization of corrections may provide an incentive for government to perform its incarceration function better.

Referring to privatization, the Director of the National Institute of Justice recently stated: "[W]hen we have opportunities to do things more efficiently and more flexibly without in any way harming the public interest, we would be foolish not to explore them to the fullest."[55] What the public interest is, however, and where day-to-day government power should reside, are questions that are too important to leave only to criminal-justice professionals and academics. Whatever direction we may take on privatization, we must generate a thoughtful and deliberate review of the complex issues that are involved, for resolution of these issues will say a great deal about how we, as a society, wish to be perceived. To *rush* toward privatization, therefore, is clearly inappropriate.

55. 16 CORRECTIONS DIG. 2 (1985) (statement of James K. Stewart).