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## Policy Implications of Private Sector Involvement in Correctional Services and Programs

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**ABSTRACT:** The movement toward private sector involvement in our correctional services and programs is growing. Before our focus is turned completely to privatization of these services, it would be prudent to analyze the "policy impact of such change. It is evident that the diverse and incompatible policies guiding the government approach to corrections and the absence of any rational planning to answer public interest goals is costly. Moreover, despite the increasing complexity of problems now confronting public authorities, little change has been made in their approach to resolving them. However, is it realistic to assume that the profit/loss barometer of the private sector can be applied in an area of social problems that are so pluralistic and ill defined? What of the many areas of potential legal concern, that is, vicarious litigation, First Amendment right of prisoners, and so forth? These are all areas that need to be researched so that any judgments or decisions made will be sound.

**KEYWORDS:** jurisprudence, prisons, privatization, politics

The purpose of this paper is to stimulate research and encourage policy analysts to distinguish between what governments and the private sector can and cannot do with reference to our correctional programs. In short, we must begin to determine *how well* governmental policies designed to cope with correctional institutions and their programs actually work. Does the traditional approach of relying on government-sponsored correctional programs and institutions better meet our public interest goals than the slowly emerging privatization of these services? Levine et al. suggest that if our concern is to determine the effectiveness of government policies in meeting public interest goals we should pursue this analysis through a "policy impact approach" [1, p. 63].

A brief word of caution before policy analysts begin to look at this problem. That is, we should stipulate that for many decades the governmental sector has imposed four specific policies, all different, and by and large incompatible, to guide their correctional philosophy. These policies which have been used to direct correctional institutions and their programs are as follows:

- (1) rehabilitation
- (2) deterrence,
- (3) retribution, and
- (4) incapacitation.

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It is precisely this lack of similarity and compatibility that make rational planning for the future in this field so difficult. In short, the political forces obstructing change are powerful and the reformers (not to mention the emerging field of private sector entrepreneurs) have not agreed upon program. On occasion, they may agree upon what is wrong, but they cannot agree upon what should be done to correct it [1, pp. 307-310].

Regrettably, these diverse and incompatible policies, plus the absence of any real ability to focus on public interest goals with any degree of rational planning, are incredibly costly, not only in terms of public policy, but in terms of public funding as well.

Nationwide, corrections is a multibillion dollar industry with most of the money going for institutional maintenance and salaries for prison employees. There are more than 200,000 employees working under federal, state and local jurisdictions, which process 2.5 million offenders annually. These operating costs would be extremely hard to eliminate or drastically change [1, p. 339].

There are additional structural weaknesses that are attendant to assessing the policy implications of private sector involvement in our correctional field. These are specifically related to what Quade terms the unsatisfactory state of public policy-making. Quade notes that among the weaknesses is the difficulty the public decision maker confronts in the organizations and bureaucracies that must be worked with (including his own and any that interact with it) in terms of the:

- (1) red tape,
- (2) poor communication,
- (3) low morale,
- (4) inadequate staff,
- (5) inadequate records, and
- (6) pressures from special interest groups with ready-made solutions.

Moreover, governmental organizations do not have the same reputation for attracting or making efficient use of individual skills and competence that is usually attributable to private industry [2, p. 20].

The legislative process itself is not a model of great efficiency in terms of its contributions to a rational state of public policy-making. Another reason for failures within our traditional governmental correctional programs is the simple fact that despite the increasing complexity of problems now confronting them, the methods used by public authorities for their resolution have remained virtually unchanged since the beginning of government [2, p. 21]. In fact, Quade suggests that governmental programs rarely have an automatic regulator that indicates when an activity has ceased to be productive, or could be made more efficient, or should be replaced by another activity. In the private sector, businesses rely upon profits and competition to furnish such needed incentives. The private sector has the discipline then to invoke the necessary decisions.

It is precisely these sets of facts that have encouraged the movement towards privatization of our correctional system. We have seen similar efforts in the fields of mental health, alcohol, and substance abuse, and within segments of our social welfare field. Policy analysts can engage in comparative research and perhaps extrapolate some of the strength and weaknesses in these fields and apply them to this emerging movement.

As a result of their very nature as social problems, however, public policy problems within the correctional field tend to be more pluralistic and ill defined. The fields of systems analysis and operations research (both precursors to the policy analysis field) addressed problems that related more to engineering and technology. They concerned themselves with public policy problems which were both easier to formulate and to resolve using quantitative methods [2, p. 25]. Thus, the challenge to the private sector will be to avoid, if possible, some of the pitfalls that confront the public sector and that we hypothesize will not be avoidable as a

result of the social problem nature of these issues. In other words, the private sector may be moving into this field with misplaced confidence in their engineering, technology, and decision-making processes as related to their profit-making concept. It is safe to suggest that the motivating factor to the private sector is the multibillion dollar correctional industry and the possibility of tax advantages through lease-back financing arrangements. Obviously, the notion of profit through others' misfortunes will provide many philosophical challenges to the private sector. Not the least of these will be the timely release of inmates despite loss of daily fees once that inmate is released. Certainly, today, with our incredible overcrowding and jail backlog, this should prove no immediate additional threat to the public. However, what about five, ten, or fifteen years from now?

Another aspect of the dimension of the social problem that the private sector will be confronting was best stated in the following:

It takes far more than the discovery of a solution on paper to eliminate any major public policy problem. There are additional tasks of communicating the proposed solution to all involved and convincing them that it is a valid solution. Also, problematic is the addressing of jurisdictional problems and boundaries, and the marshalling of the necessary resources . . . In short, the problems of public policy are wicked problems in that they may have no definite formulation and no stopping rule to tell the problem solver when he has a solution. Moreover, a proposed solution is not true or false but good or bad. There may be neither an immediate nor even an ultimate test of a solution, as the set of potential solutions is not enumerable; every such problem is essentially unique and is a symptom of another problem [2, p. 25].

Finally, and most importantly for the private sector, is the frequency with which public policy problems cut across established political and administrative boundaries presenting jurisdictional issues to overcome, for instance, when the indirect costs to the public from a project dwarf the direct costs and benefits. The difficulty with many of these problems is more in deciding what needs to be done rather than how to do it. The allocation of resources for efficiency may be secondary to the question of equity, that is, "who benefits," "who pays?" [2, p. 26].

The private sector will also have an immense problem with the concept of vicarious liability litigation. Indeed, a rough estimate of SS1983 liability reveals pending claims in excess of \$20 billion, with judgments on the rise. In fact, over 40 states have major cases pending, and in the past 5 years we have experienced in excess of 1700 court decisions in this important area. Of further concern to the private sector should be the ease with which these claims are litigated. In fact, most attorneys refer to this area as "boiler plate litigation."

Another area of legal vulnerability for the private sector is the First Amendment right of prisoners. We have no precedent established with reference to private operations as yet. Also, there is a question of bonding risk with reference to no limit lawsuits. While the corporate veil will protect investors, the corporation and its officers will still remain at risk and vulnerable.

Other areas of potential legal concern to the private sector that should necessitate assessment of policy implications reside in the many actions which fall under SS1983. These will in all probability be tort cases and insurance claims in the private sector. Therefore, the importance of insurance to private providers will be immense. Insurance companies are just beginning to recover from their industry's worst three years ever in the casualty area. Provided full or partial coverage will be available for all areas, premiums promise to escalate substantially. Therefore, the concept of risk management and risk assessment will be paramount concerns to confront the private sector.

## **Conclusion**

We have no empirical data that suggests that privatization within our correctional field is or could be as effective or more effective than our present public sector operations. This is

not to say that we should not experiment with this concept. However, where we do experiment, let us provide the adequate research design to offer sound judgments as to its strengths and weaknesses.

### References

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