The Case against the Prison-Industrial Complex

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Prison and jail populations have more than 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. Nearly two-thirds of the states are under court order to correct unconstitutional prison and jail conditions, and taxpayers are paying more than $20 million a day to operate the facilities.

To reduce some of this stress on the system, a new concept has emerged: the privatization of corrections, sometimes known as “prisons for profit,” “punishment for profit,” or even “dungeons for dollars.” 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. In effect, the government contracts with a private company to run the total institution. This concept is more than a simple matter of cost and efficiency. It is bad policy, based on a tenuous legal foundation, that has profound moral implications.

Policy Questions

There are three basic policy benefits that are commonly advanced for privatization of corrections: (1) that the private sector can build and operate correctional facilities more cheaply than the public sector can, thereby reducing overcrowding; (2) that the private sector can manage the facilities more efficiently; and (3) that privatization will reduce or eliminate governmental liability in suits that are brought by inmates and prison employees.

These purported benefits are fallacious for many reasons. First, 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), no incentive to consider alternatives to incarceration, and no incentive to deal with the broader questions of criminal justice. On the contrary, a fact of correctional life is that if we build more prison space, we will fill it. As stated in a different context in the movie Field of Dreams, “If you build it, they will come.” Building more prisons, however, is not necessarily the best answer to complex criminogenic problems.

Further, through privatization — with the companies beholden to their shareholders and the financial bottom line — cost-cutting measures will run rampant, at the expense of humane treatment. For example, the director of
program development of the Triad Corporation, which was a multimillion-dollar Utah-based company that had been considering proposing a privately run county jail in Missoula, Montana, stated: “We will hopefully make a buck at it. I am not going to kid any of you and say that we are in this for humanitarian reasons.” Questions concerning individuals’ freedom, however, should not be contracted out to the lowest bidder.

Privatization also raises policy concerns about the routine quasi-judicial decisions that affect the legal status and well-being of inmates. To what extent, for instance, should a private-corporation employee be allowed to use force, perhaps serious or deadly force, against a prisoner? Or, should a private-company employee 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 the inmate’s release? These decisions in the parole and good-time areas can certainly increase one’s period of confinement.

Consider the prospects for accountability in the process when, for example, the private employee who was in charge of reviewing disciplinary cases at a privately run Immigration and Naturalization Service facility in

Houston told a *New York Times* reporter, “I am the Supreme Court.” This concern can be especially sensitive and raise a possible conflict of interest if the private company is paid on a per-prisoner basis, or if the company’s employees are given stock options as a fringe benefit. Both of these situations exist in some of the current contracts.

Finally, the financing arrangements for constructing private facilities improperly eliminate the public from the decision-making process. Traditionally, corrections facilities have been financed through tax-exempt

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general-obligation bonds that are backed by the tax revenues of the issuing governmental body. This debt requires voter approval. Privatization, however, 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. Nevertheless, the 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, thus completing an end run around the voters.

One example of the possibly egregious effects of reducing accountability and regulation was a proposal by a private firm in Pennsylvania to build an 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 the following: “If it were a State facility, we would certainly be concerned about the grounds where the facility is located. As for a private prison, there is nothing which gives anyone authority on what to do about it.”

Other examples abound. Two sex offenders escaped from a privately run facility in Texas that housed out-of-state inmates. Texas authorities could do nothing to punish the inmates for the escape; they didn’t even know that these particular Oregon inmates had been incarcerated in Texas. In Colorado, allegations of rape and assault at a privately run juvenile facility prompted the state to admit that it does not guarantee the safety of inmates at private jails. In Louisiana, a federal court issued a temporary restraining order against a private-prison company whose facility reportedly used inmate labor illegally. More than a third of that private prison’s inmate population had also tested positive for drugs. These are telling examples about the potential for major problems in the private-incarceration industry.

Legal Questions

Legal questions concerning private incarceration can be separated into constitutional and contractual issues. Constitutional issues can be further subdivided into two questions: first, whether the acts of a private entity operating a correctional institution constitute “state action,” thus allowing for liability for violation of an individual’s civil rights; and, second, whether delegation of the corrections function to a private entity is itself constitutional.

First, there is no doubt that courts will find state action present in the full-scale privatization context. The United States Supreme Court has stated that, for privatization in general, “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.’” Justice Brennan wrote in the non-prison context that “[t]he government is free . . . to ‘privatize’ some functions [that] it would otherwise perform. But such privatization ought not automatically release those who perform government functions from constitutional obligations.” Certainly this is true of the incarceration function. Furthermore, a federal district court found what it termed “obvious state action” regarding a privately run Immigration and Naturalization Service facility in Houston. In short, if the private entity were not held responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities. This situation
Supreme Court Backs Appeal of Parental Rights

The Supreme Court has ruled that an indigent mother is entitled to appeal a decree terminating her parental rights, despite her inability to pay court fees. *M. L. B. v. S. L. J.*, 117 S. Ct. 555 (1996). The ruling marked the first time the Court has held that access to an appeal in a civil case could not be denied based solely on a party’s financial capability. Previously, the Court has upheld the right to an initial appeal of a criminal conviction, regardless of a defendant’s poverty.

In *M. L. B.*, a Mississippi Chancery Court determined that the appellant, an indigent mother, was unfit to be a parent and issued a decree forever terminating her parental rights. She filed a timely appeal but was denied access to the courts because she could not pay record preparation fees of more than $2,000.

Writing for the majority, Justice Ginsburg emphasized Equal Protection and Due Process considerations, noting that the Court consistently has distinguished between the “mine run” of civil cases and those involving “[s]tate controls into family relationships.” The Court held that the parent-child relationship is “sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.”

*Kristen Lecky Greenberg*

Poverty Rates Challenged

A new study questions the very foundation of the debate over welfare reform by finding that official poverty rates are flawed. Researchers at the University of Chicago and Harvard University argue that federal estimates of U.S. child poverty rates are inflated, reporting that the share of children living in poverty has fallen to 9% in recent decades instead of rising to 19%, the official number.

The researchers contend that U.S. Census Bureau poverty estimates fail to take into account the overall material well being of children by not including in-kind benefits such as food stamps and housing subsidies in calculations. To compensate, the researchers include the value of non-cash benefits and count income received by all adults living in children’s households, where official estimates ignore the income of non-husband adults living in female-headed households. To adjust for cost-of-living changes, the researchers use a different inflation gauge than the often-criticized Consumer Price Index, which may overstate inflation.

Overall, the study indicates that child poverty in 1989, the most recent year examined, is about the same as it was in 1969, and poor children generally improved in their material well being during the intervening years. Even so, America’s children still account for two of five people living in poverty.

*Amy Fox*

California Bars Contracts Using Slave Labor

California has adopted the first law of its kind in the U.S. to ensure that goods procured by state agencies are not produced by force, convict or indentured labor. 1996 Cal. Adv. Legis. Serv. 1149 (Deering). Under the statute, businesses that “knew or should have known” goods were produced by slave labor could have their state contracts voided, be fined and possibly barred from doing business with California.

Human rights activists have strongly supported the act as a symbolic breakthrough against cruelty and suppression and as an economic weapon against unfair trade advantage for countries accused of using slave-labor, such as India, Pakistan, Brazil and China.

To limit the cost and burden of administering the act, public works contracts are excluded and investigations are limited in scope. The state will begin an inquiry only after receiving a complaint and will proceed based solely on information provided by the complainant and the accused contractor.

Because of the difficulty of determining what goods are produced by slave labor, critics have questioned the statute’s enforceability. Even so, states including New York and Massachusetts are following California’s lead and pursuing measures to ensure that public purchases are not produced by slave labor.

Amy Fox

Child Labor Abuses Hit

In Orissa, India, news accounts report that children working at the Rourkela Steel Plant dump incur burns and respiratory diseases from handling molten metal. In Honduras, children work 15-hour shifts to produce garments for U.S. companies, with bathroom visits limited to twice daily and talking forbidden.

A new study by the International Labor Organization estimates that 250 million children between the ages of 5 and 14 now are in workforces of developing countries — often employed by multinational corporations that would be barred from such labor practices in their home countries, including the U.S.

Efforts are underway in Washington, D.C., to address the situation. A bill was introduced last year to ban the importation of products made with child labor, prohibit foreign aid to countries without child labor laws and block loans from federal agencies to overseas projects using child labor. H.R. 3812, 104th Cong., 2d. Sess. (1996).

Additionally, former Labor Secretary Robert Reich called for apparel and retail companies to monitor their suppliers voluntarily for child labor abuse.

Becky Nichols