LEGISLATIVE RESEARCH COUNCIL

Report Relative to

PRISONS FOR PROFIT

July 31, 1986

By
Charles R. Ring
Senior Research Analyst
Legislative Research Bureau
In January of this year, with the signing into law of Chapter 799 of 1985, Massachusetts became the second state in the nation to authorize privately-operated state prisons. Section 25 of the Act authorizes the Commissioner of Correction to contract with a private organization for the financing, operation and maintenance of one state correctional facility constructed pursuant to the Act.

Absent the extreme overcrowding, court-ordered improvements and tight budgets that presently confront many state and local penal systems, discussions of prisons for profit would probably still be confined to academia and various free market think tanks. Privately-operated prisons, whether one supports or opposes the concept, are a dramatic departure from the widely-held precept that incarceration is a prerogative of the state. While the increasing use of private vendors for delivering health, education and various other ancillary prison services has blurred the distinction between the public and private domains, turning over the actual management and operation of corrections facilities to private parties raises a host of ethical, financial, legal and other public policy concerns that are only just beginning to receive the careful consideration they require.

Public agencies are held in such low regard that private companies’ ability to outperform them has assumed axiomatic proportions in many people’s minds. Thus, even individuals who are otherwise apprehensive about turning incarceration into a business are inclined to concede that private companies can operate prisons more efficiently. But the pivotal question according to most observers is whether businessmen-wardens are merely going to run an outmoded, inhumane system more efficiently, or whether they are going to implement real improvements and new ideas.

Companies marketing correctional facility management services claim that their exclusion from state and local penal systems is needlessly costing taxpayers millions of dollars per year. Prisons are unduly expensive, they argue, because they are operated by inefficient government bureaucracies which possess neither the motivation nor the capacity to cut costs and improve services. Corporate wardens, on the other hand, will use the intrinsic advantages of the private sector to pare correctional costs by as much as 25 percent and still
operate facilities conforming to higher standards. These intrinsic advantages include: (1) superior management skills and a streamlined decision-making process; (2) the ability to rapidly expand or contract the number of employees and scale of operations in response to changing needs; (3) the opportunity to hire nonunion workers and avoid burdensome civil service requirements; and (4) more flexible and efficient purchasing procedures.

Opponents counter that injecting the profit motive in prison operations will result in a system which is less just, less accountable and which will sacrifice the welfare of the incarcerated in the pursuit of profits. Reform and rehabilitation will be subverted by cost-effectiveness and profit maximization. Alternatives to incarceration will be ignored as a powerful private prison lobby pushes for ever harsher sentences and ever increasing numbers of prison beds. Medical and food services will be held to a minimum; educational and vocational programs will disappear; and environmental conditions will deteriorate as businessmen-wardens strive to wring the last cent of profit from their helpless wards. Correctional employees will also suffer as their cost-conscious employers cut wages and eliminate benefits.

**Taking Sides**

According to a recent survey, correctional systems in 39 states contract with private providers for at least one service or program. The ten most frequently contracted services are medical and mental health, community treatment centers, construction, education, drug treatment, college programs, staff training, vocational training, and counseling. Survey respondents indicated general satisfaction with their contracting experiences, although they did note some drawbacks to the practice.

Contracting-out specific services has occurred in an incremental fashion, engendering little controversy and attracting almost no attention outside of the corrections field. In sharp contrast, private prison proposals are extremely controversial and have attracted considerable attention both within and outside the corrections profession. The National Sheriff's Association, for one, has adopted a resolution staunchly opposing privately-operated jails. Also opposed are the overwhelming majority of corrections officials who
responded to a recent survey, 75 percent of whom indicated that they would not even consider contracting for the management of an entire facility. The survey results are open to interpretation. On the one hand, public corrections employees are the experts and their views should be given great weight. On the other hand, as noted by a 1981 report to the National Institute of Corrections: "If the potential of private management of corrections is ever to be explored thoroughly, initiative for the testing will have to come from . . . governmental executives and legislators; no one can reasonably expect . . . correctional administrators to preside over the demise of their functions with good will and cooperation."

Private prison entrepreneurs have mounted a direct challenge to assertions that public agencies and employees are exclusively qualified to operate secure facilities for convicted offenders. Elected officials in four states, including Massachusetts, have lent their support to this challenge by authorizing privately-operated prisons or jails. The concept of private prisons has also won cautious support from the American Correctional Association which has adopted the position that, while government has the ultimate authority and responsibility for corrections, it is consistent with good correctional policy and practice to consider using profit-oriented organizations for the development, funding, construction and operation of facilities when such an approach is consistent with the public interest and sound correctional policy.

Public correctional employees' antagonism towards private prison proposals is understandable since privatization often involves the replacement of public employees with private workers. Such sweeping personnel changes would not, at least initially, be the case with private prisons. Most states, including the Commonwealth, are going to have to build additional prisons in the immediate future. Under such circumstances, private prisons will supplement rather than displace publicly-operated institutions. Contracting for the operation of a single state correctional facility — as provided for by Chapter 799 of 1985 — will not require any reduction in the number of public correctional employees. Indeed, the Commonwealth's prisons are currently so overcrowded that several privately-operated facilities could be opened without any loss of jobs in the public sector. The real choice confronting states such as Massachusetts is not whether to replace public employees with private workers, but whether to hire private providers instead of additional public employees.
As future construction establishes a balance between inmate populations and prison capacity, private and public facilities will to some extent compete with each other. Assuming private prisons are as successful as their advocates predict, this competition could encourage reductions in the number of publicly-operated prison systems. This process would take several years, however, during which time the number of public correctional employees could be reduced through attrition and transfers. Moreover, judging by the limited experience to date, employees of public facilities that are converted to private operation could continue in their jobs under private management. Jurisdictions could even require private contractors to give current public employees priority consideration for employment at similar salary and benefit levels.

_Dollars and Scruples_

Debates over transferring various functions from public to private providers usually focus on the impact such a change will have on the cost, quality and availability of programs and services. While these issues are also central to the debate over private prisons, there is an ethical element to the prison controversy which does not arise in other contexts. The deprivation of liberty is second only to the imposition of capital punishment as an exercise of the state's power over its citizens. Some people are opposed on principle to delegating such authority to private parties.

Such a view was espoused by the authors of a report to the American Bar Association who wrote: "When it enters a judgement 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'?" According to the authors, "(t)his symbolic question may be the most difficult policy issue of all for privatization . . . 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."

Private prison advocates agree that the state is ultimately responsible for ensuring that persons convicted under its laws are
incarcerated in a safe, humane, fair fashion. They do not believe it necessarily follows that the day-to-day operation of a penal institution should not be delegated to private parties. Proponents stress that private prisons will be overseen by government employees and operated in conformance with standards established by statute, regulation and contract. Furthermore, privately-managed facilities will be scrutinized by the judiciary, the media and various prisoners’ rights groups. Finally, inmates at private prisons will retain all of the rights and protections guaranteed them by statutory and constitutional law of both the state and federal governments.

Operating a prison under such circumstances is described as a ministerial function that neither supplants the state’s authority over persons sentenced by its courts nor relieves the government of its responsibility towards such individuals. As precedent, proponents point to the use of private providers to care for and confine mentally-ill persons and juvenile offenders. In both cases, the state, while retaining ultimate responsibility for individuals committed or convicted under its laws, has delegated its custodial functions to private parties. The real issue, privatization advocates argue, is not what words appear on the guard’s uniform but what kind of care the inmates receive.

Disputes over the ethical propriety of delegating such a powerful exercise of the state’s authority to a private company will never be completely resolved. Ethical objections are unlikely, however, to pose a major obstacle to private prison proponents’ efforts to win popular support for their proposals. Instead, the concept of private prisons, with its promise of reducing the size and cost of public correctional departments, will probably attract a growing number of supporters as it becomes better known.

**Prisoners and Profits**

Opponents contend that private prison operators will exert an untoward influence on criminal justice policy and contribute to the incarceration of more prisoners under worse conditions. Adherents of the “if you build them, you’ll fill them” view of prison construction fear that privately-operated prisons, by reducing costs and expanding capacity, will stimulate an increase in incarceration. Expressing this view, a recent article maintains that “the current prison population boom is already a reflection of our shortsighted, narrowminded
judicial and public policy. Add to that a profit motive, and the possibility of meaningful reform in the way of alternatives to incarceration becomes even more remote than it is now.” Thus, say opponents, private operators, whose growth depends upon an expanding prison population, will develop into a powerful lobby pushing for ever-harder sentences. A lobby which, given the public’s unabating fear of crime, lawmakers will find very hard to resist.

Private prison operators will certainly lobby in their own behalf. It does not necessarily follow that they could manipulate public opinion and the lawmaking process as easily as their opponents suggest. It seems rather cynical, moreover, to presuppose that the public and their lawmakers could be persuaded to adopt tougher sentencing measures by the patently self-serving arguments of private prison operators. The relationship between crime rates and imprisonment policies is unclear, and grounds for lively debate. Private prison operators will add a new voice to this debate; they will not drown out opposing views. In the end, decisions controlling the apprehension, conviction and sentencing of offenders will continue to be made in the public sector by the same process that they are now.

Nor is it clear — at least in the short run — that private prison operators will have any need to lobby for harsher sentences. Given present levels of overcrowding at state prisons and local jails there will be no shortage of inmates to fill private facilities. As present population pressures ease, this situation could change. But among the advantages of contracting for correctional services is the opportunity to more easily expand or to constrict the level of services in response to changing needs.

Profits and Standards

The supposition that mixing prisons and profits will promote incarceration rests largely on the companion arguments that privatization will reduce accountability and encourage unbridled cost cutting. There is certainly an abundance of evidence from recent litigation that many jurisdictions have allowed their prisons and jails to deteriorate to the point where they offend even minimal standards of decency and concern. Medical care has been neglected, educational and recreational programs have been ignored, and overcrowding has become the norm rather than the exception. Indeed, overcrowding in particular has become so pervasive that it is, either by effect or
design, a standard practice of many state and local correctional systems.

Opponents allege that privatization will encourage public officials to evade their obligation to correct present deficiencies by abdicating their responsibilities. Long-overdue improvements in prison conditions will be neglected as inmates become victims of their cost-cutting wardens. "Should constitutional conditions of confinement be sacrificed for the profit motives of private business?" asks one adherent of this view.

While some public officials may embrace privatization in the hope of avoiding the need to eliminate unconstitutional conditions of confinement, they will be quickly disabused of that notion by the courts. There is no legal precedent to support the tenet that converting from public to private management will terminate prisoners' constitutional protections against cruel and unusual punishment. Private prison operators will be held accountable to the same constitutional standards as are state and local governments.

In addition to this judicial and governmental oversight, private prison operations will be closely watched by the media and various civil rights and prison reform groups. Many members of these groups will probably be far less tolerant of deficiencies at private rather than public prisons. Thomas Beasley, President of Corrections Corporation of America, echoes the private prison industry's views when he says: "The claim that our level of visibility is so low that we will be able to cut corners is ludicrous, we are the highest profile people in corrections today."

The impact of privatization on the conditions at state and local penal facilities can be, to a large extent, whatever the contracting jurisdiction wishes to make of it. For example, private prison operators will have little or, if the government so desires, no opportunity to cut costs by overcrowding their facilities or allowing conditions to deteriorate. By establishing and enforcing population limits and operating standards the government can, in fact, require much better conditions at private prisons than presently exist at many public institutions. Alternatively, privatization may simply enable governments to provide equivalent facilities at lower cost. It is inconceivable, however, that privatization could perpetuate unconstitutional conditions of confinement by placing prisons and jails beyond the reach of judicial oversight.
Opponents correctly predict that unbridled cost-cutting by private jailers would result in conditions that make even the worst public prisons seem benign by comparison. The potential for conflict between private companies' concern with the bottom line and the government's interest in safe, humane care cannot be overemphasized. Therefore, great care must be taken during the contractor selection process to identify and eliminate unscrupulous or incompetent operators. For the same reason, it is imperative that jurisdictions contemplating privatization proposals be prepared to promulgate and enforce controls capable of ensuring contractor compliance with laws and regulations designed to safeguard public safety and inmate care.

Private prison entrepreneurs are in business to make a profit and will operate their facilities as efficiently as possible. Efficiency is not, however, as opponents often suggest, synonymous with exploitation. Private prison operators, especially if they construct and own the facility, will be required to make substantial front-end commitments of capital and other resources. Thus, private operators will have to balance their desire to cut costs with their need for long-term contracts. Furthermore, many of the companies seeking private prison contracts desire to operate facilities in several states. Those companies will not wish to jeopardize future contracts by operating substandard institutions. Consequently, reputable private prison operators actually have a vested interest in promoting strict enforcement of government standards in order to deter fly-by-night outfits that could, by association, taint the entire industry.

This conflict between short-term profits and long-term success creates a powerful incentive for private companies to avoid the excesses feared by their detractors. As noted by Anthony Travisono, Executive Director of the American Correctional Association: "It's true that the profit motive could cause a conflict of interest. For that very reason, people are going to watch private industry very closely, probably more closely than they watch the public sector. The companies have a lot of incentive to do a good job because they won't be rehired if they don't."

The likelihood that privately-operated prisons could be held to a higher standard than their public counterparts has important implications. Better prisons are more expensive prisons. Private operators may, as they claim, be able to run equivalent facilities at lower cost than public agencies. In many cases, it appears, they will
be expected to run superior institutions. Jurisdictions which demand a higher level of performance from private providers must be willing to accept the impact such a policy will have on costs. Many people feel prisons are already too expensive; hence, the “it’s cheaper to send a kid to college” analogy. Actually, some states, by inadequately funding their penal systems, have developed unrealistically low standards of correctional costs. In comparison to these standards, even an extremely efficient private facility may seem to be an expensive alternative.

Requiring better conditions at private prisons is a tacit admission that inferior public operations are unacceptable and implies a moral obligation to improve them. Even if private prisons cost more than public institutions, they may still be less expensive than operating public prisons that conform to these higher standards. As noted by a National Institute of Justice study of the privatization of corrections: “Under a contract system, the costs of confining particular numbers of clients under specified conditions will be clearly visible and more difficult to avoid through crowding and substandard conditions. While corrections authorities might welcome the opportunity to demonstrate clearly that more prisoners require more resources, it remains to be seen whether legislators and voters will be prepared to accept the real costs of confinement practices that meet professional standards.”

*Dollars and Cells*

When considering the operational advantages and disadvantages of private versus public prisons, it is important to distinguish situations where a private company both owns and operates the facility from those where private operators merely manage a public institution. For example, one of the advantages attributed to privatization proposals is the opportunity to enhance government’s ability to respond to temporary or unexpected fluctuations in inmate populations.

Public corrections agencies often labor under an institutional inertia that severely limits their ability to respond to changing needs. According to one view, contracting, by eliminating the need to make long-term commitments, can overcome this inertia and provide much greater flexibility. The contract between the government and the provider will be renegotiated at mutually-agreed upon intervals. As
its needs change, the government can adjust the contract accordingly or cancel it outright. In effect, the financial and management burden of adjusting the scale of operations and number of employees as correctional needs change is shifted from the government to the private provider.

There is little doubt that private prisons — whether the company just operates the facility or both owns and operates it — will augment jurisdictions’ ability to accommodate changes in prison populations. Private companies are, for example, able to hire and fire employees much more easily than government agencies. Additionally, the private sector is generally acknowledged to be considerably more efficient at adjusting program and service levels, planning and modifying purchasing agreements and otherwise adapting to changing circumstances. Given those advantages, privately-operated prisons appear to offer a flexible alternative to public operations. It is less clear that substituting private for public ownership will significantly reduce the cost to the government of building new prisons or closing existing ones.

Prisons, after all, serve a public need and the government will have to pay for them either directly through their correctional agency budgets or indirectly through its contracts with private providers. Obviously, private companies are not going to invest millions of dollars to construct a correctional facility if the need for that facility is likely to be short-lived. Indeed, companies which agree to build and operate new facilities will insist on some guarantee that their capital investments will be reimbursed if the government subsequently decides it no longer needs the additional space or wishes to change contractors. Thus, while contracting with private operators might offer significant advantages in terms of adjusting personnel, program, and service levels to changing needs, the financial burden of expanding or contracting institutional capacity cannot be contracted away.

A Seller’s Market?

The raison d’etre for virtually all proposals involving the replacement of public agencies with private providers is that the introduction of competitive forces will produce superior services at less cost. Correctional facilities have been operated as public monopolies for so long that there is no alternative to which they can be compared. Private prisons, proponents argue, will introduce an
element of competition to correctional management (both public versus private and private versus private) and provide a yardstick against which public prisons can be measured. The lessons learned from private operators might actually benefit public prisons since, as correctional agencies become more involved in monitoring the work of contractors who operate total facilities, these skills will improve and be applied to monitoring their own programs and operations.

Opponents counter that the development of a competitive market for private correctional management is a matter of conjecture. If instead, only a few large, well-capitalized firms come to dominate the private prison industry, the competitive forces needed to encourage efficient operations will not emerge. As a result, opponents allege, the short-term advantages of greater flexibility and lower initial prices will be purchased at the expense of long-term dependency and steadily increasing costs.

Costs will increase, according to opponents, because private operators will engage in low-balling: intentionally underestimating costs in their initial bids in the hope that the government will become dependent upon their services over time. Once this occurs, the contractor will raise his fees or allow conditions to deteriorate, gambling that the government will accept the changes rather than risk losing his services.

The potential for low-balling by bidders for public contracts is always a concern. Governments' best defense against such tactics is a highly detailed request-for-proposals (RFP) reinforced by a careful review of the contractor's cost estimates and service descriptions. Comparison of the contractor's estimated costs with the state's actual cost of providing equivalent services and programs should reveal any insupportable cost projections. The state can further protect itself from unexpected cost increases by binding the contractor to contractually-established procedure for negotiating rate increases. If the contractor is unable to abide by these terms, the state can cancel the contract and re-award it to another provider. Some observers are concerned that the state's ability to cancel, renegotiate or re-award a contract, while sound in theory, might prove difficult in practice.

At present, several firms are actively marketing private prison management proposals; others are awaiting the development of a sufficient market for such services to warrant their entry into the field. Thus, when the government awards an initial contract, it will have
several companies from which to choose and can require whatever conditions it deems appropriate. But once the state has transferred custody to a private company, the contractor’s bargaining power will be enhanced. Even worse, it is argued, this erosion of bargaining parity can become self-perpetuating since, as the government’s reliance upon a company increases, it will become more reluctant to jeopardize that relationship by rejecting contractor demands or imposing stricter program and fiscal controls.

The government can guard against the problems associated with provider dominance by not becoming overly dependent upon any particular contractor. In this sense, the single facility approach to privatization authorized by Chapter 799 of 1985 is an excellent method of experimenting with private sector management of correctional facilities. Reflecting the Commonwealth’s preference for small to medium size institutions, a private prison’s inmate population would probably range between 100 to 200 prisoners. Even if problems developed at the private facility which necessitated its immediate closure, this relatively small number of inmates could be redistributed among the state’s other institutions. If the state later decides to increase its use of private contractors, the number of private prison inmates could surpass the public correctional system’s ability to accommodate them. Therefore, the state, if it decides to proceed with privatization, may wish to diversify its options by employing several contractors. Then, if one contractor’s performance proved unsatisfactory, the government would have several alternative providers from which to choose. Moreover, the availability of alternative providers would encourage the competitive pressures needed to hold down costs, maintain quality and avoid provider dominance.

**Better Management**

Because the prisons-for-profit industry is still in its nascent stage, its members’ claims of superior management are difficult to judge. Most of the companies that make up the industry have little or no experience operating secure, adult correctional facilities. To date, private operators have been most successful in winning contracts for the detention of juvenile offenders and illegal aliens. Many firms, however, either have been founded by or have hired experienced
corrections professionals from the public sector. Corrections Corporation of America, for instance, has as its executive vice president, T. Don Hutto, former Commissioner of Corrections in Arkansas and Virginia and president-elect of the American Correctional Association (ACA). In addition, the company's advisory board includes five past winners of the ACA's Cass award for distinguished correctional administrators. These former public administrators assert that in their new roles as private prison executives they can exercise greater control over costs and introduce more efficient practices than were possible in the public sector.

Opponents are unconvinced, since, as a recent report sponsored by the American Federation of State, County and Municipal Employees (AFSCME) notes, "One can only wonder where the wizards of correctional management, now transplanted from the public to the private sector, have been hiding the expertise and knowledge they are now prepared to apply so efficiently for their corporate bosses." Opponents further maintain that while private operators have hired a number of former public administrators with impressive credentials, their need to cut personnel costs will force them to be far less selective in hiring rank and file employees. Thus, a report sponsored by AFSCME argues that: "(i)n terms of salary, benefits, training, and respect and recognition, correctional officers have always been at the bottom of the criminal justice heap . . . Every major commission and study group that has looked at corrections in the past two decades has emphasized the need for selective recruitment, higher salaries, much more training, better staff-to-prisoner ratios, and stress reduction programs as keys to improving the operation of our jails and prisons; all have bemoaned the impact of high turnover on correctional efficiency."

In light of present deficiencies, opponents argue, introducing the profit motive is guaranteed to make a bad situation worse. Reductions in wage and benefit levels would make it even more difficult to attract and retain qualified personnel. Moreover, private prison employees, unprotected by union contracts and civil service requirements, and employed by companies that depend upon holding down labor costs to maintain profits, will not develop the career orientation most correctional officials believe is crucial for improving prison management.

Corrections Corporation of America (CCA), among others,
promises that its workers will be at least as qualified as many current public correctional employees, and in some cases more qualified. According to spokesmen for the company, the gross overcrowding and miserable working conditions that exist at many public prisons are the main culprits in producing high rates of absenteeism and employee turnover. By improving working conditions and paying greater attention to employee morale, the company intends to reduce these disruptions and achieve significant savings. Even greater saving will result from preventing the excessive overtime costs that plague many public operations because budgetary constraints and personnel caps have forced corrections departments to understaff their facilities. CCA, when setting its fees, will factor in a sufficient number of employees to avoid excessive reliance upon overtime.

AFSCME and other opponents' concern over the impact private prisons will have on the quality of corrections employees and their working conditions reflects their view that privatization will encourage public officials to abdicate their responsibility to correct present deficiencies at public institutions by converting them to private management. Yet, it should be self-evident that private prisons, as an extension of public corrections systems, will reflect the financing and operating standards of the contracting government. Jurisdictions which systematically underfund and overcrowd their facilities, underpay and inadequately train their employees and otherwise countenance substandard penal operations are unlikely to hold their contractors to higher standards. Private prisons, operating in such a milieu, will no doubt duplicate or even surpass the deleterious practices of publicly-managed facilities.

Yet, as with virtually every other aspect of private prison operations, it is the contracting jurisdiction which will determine the levels of training, experience, supervision, and other employment conditions it feels are necessary to provide the desired level of service. There is nothing to prevent the government, for example, from requiring private prison employees to meet the same qualifications and receive the same training as public employees. Indeed, there is no convincing argument for doing otherwise. Likewise, staffing levels and supervisory procedures at private prisons will be subject to government oversight and control.

Inadequately funded, overpopulated prisons will be subject to the same problems whether they are operated by public agencies or private
companies. However, the central issue in the debate over the relative cost-effectiveness of public versus private prisons is not whether jurisdictions are currently spending too much — as many voters seem to believe — or too little — as most professionals agree — on meeting their corrections needs. The core issue raised by privatization proposals is whether government is spending its funds as efficiently as possible. AFSCME and others reject the claim that public corrections agencies waste 10 to 25 percent of their operating budgets due to inefficiency and government red tape. Even if private companies could reduce current operating costs by such margins, opponents argue that those savings would be more than offset by the cost of licensing and monitoring privately-operated facilities and the companies’ need to purchase expensive liability insurance. Thus, they conclude that private operators’ only means of reducing costs sufficiently to generate profits for themselves and cost savings for the government will be to exploit inmates and workers alike.

Private prison operators respond that they need not and will not reduce or eliminate essential services and programs in order to generate profits. The waste is there, they insist, and by eliminating it through more efficient employment, purchasing and other business practices, they can operate superior facilities at less cost. CCA, for example, emphasizes that it will operate its facilities in conformance with standards promulgated by the American Correctional Association’s Commission on Accreditation of Corrections. CCA and other private companies’ ability to meet those standards is, of necessity, contingent upon the sponsoring government’s willingness to provide adequate funding.

Private operators do not possess, and do not claim to have, any “magic formula” for increasing productivity and reducing costs. Their advantage over public agencies lies not in any well-guarded secret, but in their ability to operate free of the cumbersome and expensive civil service systems, public purchasing procedures and other well-meaning, but inefficient, requirements that constrain public managers. Many state and local governments, having long ignored their corrections officials’ inability to reconcile the public’s “get tough” approach to crime with its “less is better” attitude towards government, now find that they must approve substantial increases in their corrections budgets. Private prison operators and their supporters argue that spending new money in the old ways will result in the same problems. The time has come, they maintain, to try a new
approach. "The work done in the public sector in the last 30 years has been a dismal failure," claims Ted Nissen, President of Behavioral Systems Southwest, which operates both federal and local facilities. "We have a national recidivism rate of 50 percent; I offer to forfeit my contract if the recidivism rate is more than 40 percent."

Whether or not private prison operators can reduce costs while maintaining standards can only be proven by experience. As yet, there is no evidence that privatization will produce major reductions in correctional costs. The INS, for example, reports only modest savings (on the order of 6%) from its use of privately owned and operated detention centers. Similarly, the Kentucky Corrections Cabinet believes the state could run the privately-operated St. Mary's Corrections Facility at approximately the same cost as private management. Finally, the Silverdale Work Farm experiment with privatization has produced mixed results concerning the cost advantages of public versus private management of penal institutions.

It should be recognized, however, that none of these initial forays into privately-operated corrections facilities have been subjected to the type of rigorous examination by disinterested parties that is necessary to produce unbiased assessments. Just as private companies tend to exaggerate their ability to generate major cost savings, public agencies have a vested interest in understating their private competitors' capacity to provide comparable services at lower cost. Thus, while a public agency might welcome the opportunity to reduce expenses or improve services by contracting with private providers, it should not be relied upon to compare its own and its contractors' cost and quality of services. Indeed, the more successful a contractor is in reducing costs and improving services, the more inefficient the contracting agency will appear in comparison. Even the most dedicated of public employees will be hard pressed to maintain their objectivity under such circumstances. This divergence of interests, when coupled with the provisional character of most correctional cost estimates, is good reason to reserve judgment concerning private operators' present and prospective contribution to reducing corrections costs.

Individuals on both sides of the private prison debate advance persuasive arguments in support of their respective interests and concerns. However, there does not appear to be any evidence to support extreme claims that private prisons by their very nature are
time bombs waiting to inflict injury on those detained. Privately-operated prisons will be subject to all of the problems that beset publicly-operated facilities: escapes will occur; guards will abuse prisoners; and the strong will continue to prey on the weak. Most importantly, privatization is no substitute for a long-overdue reconciliation of society’s need to punish those who violate its laws and the amount of resources it is willing to devote to doing so. More prisoners cost more money; this is a fact of correctional policy that private prisons (even if they fulfill their most enthusiastic advocates’ claims) cannot wash away.

Private Prisons and the Courts

Private prisons are such a new, and as yet largely untried, concept that there has been virtually no litigation of many of the issues raised by the privatization of corrections. Moreover, as noted by one source, “(t)he legal implications of . . . (private prisons) are many and will vary depending upon the particular contractual arrangement, the statutory authority . . . for private prison operations, a particular set of facts, and differing public entity immunity laws. Differences in state law concepts may dictate different results on the same issue in neighboring states.”

One of the issues which most concerns individuals on both sides of the private prison debate is what effect, if any, contracting for prison management will have upon governmental liability for unconstitutional conditions of confinement and inmate care. Prisoners’ rights suits have become the bane of corrections officials nationwide. Some observers have expressed concern that public officials might endorse privatization proposals in the hope of evading liability under such suits. According to one source, some private prison advocates have encouraged this belief by stressing the potential immunity of private providers as a major selling point.

The consensus among individuals who have examined this issue is that there is no legal principle to support the premise that public agencies will be able to diminish their liability merely because services have been delegated to a private party. According to one legal commentator, “the decisions of the Supreme Court, which have led to fundamental improvements in corrections and have increased
safeguards for prisoner rights, are based on fundamental constitutional norms and therefore private operation of prisons and jails is unlikely to diminish the impact of these decisions.”

Based upon numerous court decisions involving private companies operating under government contracts, it appears that both private prison operators and the sponsoring government will be liable for violations of prisoners’ constitutionally and statutorily protected civil rights. In addition, private operators will be subject to the same general tort liability faced by public prison employees and administrators. Since the contracting government will probably be named as a co-defendant in such suits, it must anticipate and prepare for that liability. At a minimum, the government should require the contractor to acquire sufficient liability insurance to cover its and the government’s likely exposure. Further, the state may wish to insist the contractor assume all costs of defending actions brought as a result of its performance.

Public Prisoners and Private Discipline

While private prison operators can be prevented from overcrowding their facilities, they will have a strong incentive to operate as closely as possible to full capacity since they are usually compensated on a per prisoner, per diem basis. This payment method creates a direct link between profitability and occupancy levels. There is concern in some quarters that the resulting pressure to maintain high occupancy levels — known as the “Hilton Inn Mentality” — could create a conflict between the state’s interest in maximizing parole or pre-release opportunities and the companies’ financial interest in maximizing population levels.

Although opponents probably overstate the private sector’s ability to influence sentencing policies, private prison operators and their staffs may be in a position to affect prison populations through their involvement in decisions concerning the assignment, transfer and release of inmates. Correctional officers make numerous decisions affecting the length and conditions of an inmate’s confinement. For example, many states, including Massachusetts, provide for so-called “good time” reductions in sentence length for prisoners who do not commit institutional infractions. Such reductions can substantially reduce the length of time an inmate actually serves.

Many of the disciplinary offenses that can result in major or minor
sanctions leave little room for arbitrary or subjective enforcement: for example, (1) escape or possession of escape tools or (2) refusal to take a breathalyzer test or provide a urine sample. Other offenses, however, permit a great deal of discretionary or arbitrary enforcement: for example, (1) disobeying an order, lying to or insolence toward a staff member or (2) failure to keep one's person or quarters in accordance with institutional rules.

Many observers are wary of allowing private prison employees to make such important yet discretionary decisions. They suggest that private prison operators may attempt to use disciplinary procedures to have troublesome inmates reclassified and removed from their premises to higher security, state-run institutions. Similarly, private operators might seek to use eligibility standards to avoid accepting problem prisoners. Such practices, known as “skimming,” enable the contractor to weed out the most troublesome, and, hence, least profitable prisoners while retaining easily handled, more profitable, inmates. According to a recent National Institute of Justice report, “the tendency to skim off the ‘cream of the crop’ has been seen in many community corrections endeavors where private providers (in all good faith) are able to restrict eligibility standards and to terminate . . . any cases who may subsequently pose performance problems.” As a result, private providers give the appearance of efficiency while public institutions seem even worse by comparison. Conversely, public correctional employees, if left to their own devices, might be tempted to use private prisons as a means of purging public facilities of troublesome inmates.

This potential for mutual exploitation needs to be addressed when establishing criteria for assigning inmates to public or private institutions. Whatever assignment method is ultimately used, the state's ability to stipulate how such decisions will be made suggests that skimming by private providers probably does not pose a significant threat. The state would have to be fair, however, about distributing problem prisoners between public and private facilities. Private operators' ability to provide equivalent services at lower cost depends upon their success in reducing the average cost per prisoner. They will be unable to achieve this if the difficult, and consequently, expensive, inmates are disproportionately assigned to private facilities.

Contractor involvement in disciplinary decisions is more
problematic because it is more difficult to eliminate. The state has several options, however, for minimizing undesirable contractor involvement in decisions affecting the lives and legal status of prisoners. By far, the most restrictive approach would be to prohibit any private employee participation in disciplinary matters. Monitoring contractor compliance with laws, regulations and contract terms will probably require the presence of a representative state staff at the private facility. These public employees could be given sole authority to make disciplinary decisions. An obvious problem with this approach is that a small staff of state employees cannot be everywhere at once. Another problem with prohibiting private employee participation in disciplinary procedures is such a policy’s potential effect on their ability to keep order. Correctional officers, who work in a hostile environment under constant pressure, are required to be part policeman and part social worker. Their ability to perform this dual role is intimately connected with their participation in disciplinary decisions. If private correctional officers are relegated to a mere administrative or housekeeping role, they are likely to encounter substantial problems in dealing with inmates.

Thus it appears that completely eliminating private employee participation in disciplinary proceedings is probably neither feasible nor desirable. Consequently, jurisdictions which elect to utilize private contractors must strike a balance between permitting private operators sufficient authority to maintain control of the facility and protecting inmates from unscrupulous or incompetent contractors and their employees. Towards this end, written regulations, backed up by appropriate sanctions, should limit, as far as possible, private employee discretion in regulating prisoner conduct. As a starting point, private employees should be subject to all of the laws and regulations governing public correctional officers’ conduct in the performance of their duties. In addition, disciplinary boards that hear and decide disciplinary matters could be made up, in whole or in part, of public employees. Finally, an appeal process could be established for inmates who feel they have been treated unfairly or illegally by a private employee.

Controls: The Crucial Element

A recurring theme of this report is the extent to which the sponsoring government can by law, regulation and contract dictate
whatever level of performance it feels is necessary. Thus, in some instances, private prisons will simply mirror the underfunded, overworked human warehouses which are an all too common element of the nation's troubled public prison system. Alternatively, jurisdictions which are committed to adequately funding and monitoring their contractor's operations can encourage model institutions operated according to strict standards. Individuals differ in their assessment of which of these outcomes is more likely and, for this and other reasons, have chosen their position accordingly.

Although they agree on very little else, persons on both sides of the private prison question stress the importance of devising and enforcing controls capable of ensuring that public safety and inmate care — not private profits — retain their paramount role in the formulation of corrections policy. While more than a dozen states have considered legislation authorizing private prisons, only three states (Mass., N.M. and Tenn.) have enacted laws specifically authorizing privately-operated state corrections facilities. In addition, New Mexico and Texas have enacted legislation authorizing local governments to contract with private companies for the operation of jails. These statutes reflect very different conceptions of the best method of governing private prisons. The laws of Tennessee and New Mexico evidence a legislative determination that licensing, monitoring and otherwise overseeing private prisons is best achieved within a statutory framework which explicitly recognizes the special nature of privately-operated facilities. In contrast, the Massachusetts and Texas laws make little or no distinction between publicly and privately operated prisons.

**A Time to Decide?**

The Commonwealth has established a well-deserved reputation as a pioneer in the use of private providers in the community-based corrections, youthful offender and mental health fields. All of these programs have experienced problems. But the successes have outweighed the failures and there is little, if any, support for abandoning these public/private partnerships in favor of a return to the government monopolies of the past. Massachusetts has taken that first step towards allowing corporate wardens to test their ability to incarcerate a like number of prisoners, under comparable conditions,
at less cost than their public counterparts. Indeed, until private prison operators are given an opportunity to succeed or fail in meeting their promises, the debate over private prisons will continue to be clouded by the claims, counterclaims and vested interests that arise in response to any proposal which represents a dramatic departure from the status quo.