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This Issue in Brief

In this issue, the editors are pleased to feature three articles authored by United States probation officers. In that the manuscripts were sent unsolicited, we believe that they offer good indication of issues that are of real interest and concern to persons working in the Federal Probation System. The articles, the first three presented in this issue, discuss counseling offenders, preventing job burnout, and employing community service as a sentencing alternative—information valuable not only to probation officers but to professionals in all phases of criminal justice and corrections.

Counseling in Federal Probation: The Introduction of a Flowchart into the Counseling Process.—In many probation officer-probationer/parolee relationships, the potential problems facing clients are not addressed, often because the client does not understand or consciously accept the problem or focus area. To assist Federal probation officers and other change agents in using counseling methods and problem-definition skills, author John S. Dierna introduces a systematic framework. The tool is a flowchart—which defines a variety of processes and decisions which may be pertinent in addressing issues such as, "What is the problem?" The flowchart—which the author applies to an actual probation case—offers a flexible yet structured approach to defining problem areas and defusing the resistive barriers which initially inhibit steps toward problem resolution.

Probation Officer Burnout: An Organizational Disease/An Organizational Cure, Part II.—Paul W. Brown authors his second article for *Federal Probation* on the topic of burnout. While the first article (March 1986) discussed the influence of the bureaucracy on probation officer burnout, this second part emphasizes some specific approaches that management can take to reduce organizationally induced burnout. Noting that organizational behavior can influence staff burnout, Brown points out that the role of the supervisor is vital in reducing the stress which can lead to burnout. Much can be done to provide a work environment which is healthier for the employee and more productive for the organization.

Experimenting with Community Service: A Punitive Alternative to Imprisonment.—For the past

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The Propriety of Proprietary Prisons

BY CHARLES H. LOGAN*

CAN THE "Invisible Hand" administer criminal sanctions as well as the "Iron Fist"? Dispensing justice is generally regarded as one of the primary functions of the state. And yet, a small but growing number of penal institutions, such as prisons, jails, detention centers, and reformatories, are now privately owned or managed under contract to local, state, or Federal government agencies. These "proprietary" correctional facilities appear to push the limits of privatization to an extreme. However, what seems at first to be a radically conservative proposal—private ownership of the means of state punishment—can be shown to be fully consistent with the principles of classical liberalism.

Only a few anarchists believe that the state should totally abdicate its penal authority in favor of private companies. While the state may *delegate* to a private agent its authority and responsibility for administering penalties, it cannot *relinquish* them.[1] Thus, what is now under serious consideration around the country is not a corporate takeover of the legislative and judicial functions of the state, but the subcontracting of some aspects of the executive function.

The Source and Delegation of Authority to Imprison

The most principled objection to the propriety of commercial prisons is the claim that imprisonment is an inherently and exclusively governmental function and therefore should not be performed by the private sector at all, even under contract to the government. How can it be proper for anyone other than the state to imprison criminals? Perhaps the place to start is by asking what makes it proper for the state itself. By what right does the state imprison?

In the classical liberal (or in modern terms, libertarian) tradition on which the American system of government is founded, all rights are individual, not collective. The state is artificial and has no authority, legitimate power, or rights of its own other than those transferred to it by individuals.

Why does this transfer take place? John Locke argued that individuals in the state of nature have the right to punish those who aggress against them. However, there will always be disagreement over interpretations and applications of natural law; people cannot be unbiased in judging their own cases; and those in the right may lack the power to punish. For these reasons, said Locke, people contract to form a state and completely give over to it their power to punish. Thus, the power and authority to imprison does not originate with the state, but is granted to it. Moreover, this grant is a conditional one. Citizens reserve the right to revoke any of the powers of the state, or indeed, the entire charter of the state, if necessary.

Robert Nozick, like Locke, sees the right to punish as one held by individuals in a state of nature. He also insists that no collective rights or entitlements emerge beyond those held by individuals. Thus, the right to punish is not exclusive or unique to the state. Is it, however, *special* to the state in some way? Is there an argument for individuals turning over their punishment power to a *state* rather than directly to some private agency?

In *Anarchy, State and Utopia,* Nozick answers as follows. Punishment, to be just, can be administered only once (or up to the amount deserved). Thus, anyone who punishes will preempt others in their exercise of this right. When persons authorize an agent to act for them, they confer their own entitlements on that agent. The more clients on whose behalf a protection agency acts, the fewer others whose exercise of the right to punish has been preempted or displaced. Therefore, a dominant protection agency (a state) has a higher degree of entitlement to punish, in the sense that it preempts the fewest others.

Whatever the reasons for placing the power to punish in the hands of the state, however, the major point is that it must be transferred; it does not originate with the state. The power and authority of the state to imprison, like all its powers and author-

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[1] This principle was recently affirmed when a Federal court ruled in *Medina v. O'Neill* that the Immigration and Naturalization Service could not escape its legal responsibility for illegal aliens held in a privately managed detention facility under Federal authority. The court held that the actions of the private contractor "were state action within [the] purview of the public function doctrine" (589 F. Supp. 1028 (1984) at 1039). This meant the government could be sued, under Section 1983 of Title 42 of the U. S. Code, for violation of constitutional rights, though it was still protected from monetary damages under the doctrine of sovereign immunity.

ity, are derived from the consent of the governed and may therefore, with similar consent, be delegated further. Since all legitimate powers of government are originally, and continuously, delegated to it by citizens, those same citizens if they wish can specify that certain powers be further delegated by the state, in turn, to private agencies. Because the authority does not originate with the state, it does not attach inherently or uniquely to it, and can be passed along.[2]

The state does not *own* the right to punish. It merely *administers* it in trust, on behalf of the people and under the rule of law. There is no reason why subsidiary trustees cannot be designated, as long as they, too, are ultimately accountable to the people and subject to the same provisions of law that direct the state.

Legitimation of Authority

In any prison, someone will need authority to use force, including potentially deadly force in emergencies. Questions of legitimacy in the use of that force, however, cannot be resolved simply by declaring that for state employees some use of force is legitimate, while for contracted agents none is.

In a system characterized by rule of law, state agencies and private agencies alike are bound by the law. For actors within either type of agency, it is the law, not the civil status of the actor, that determines whether any particular exercise of force is legitimate. The law may specify that those authorized to use force in particular situations should be licensed or deputized and adequately trained for this purpose, but they need not be state employees.

The distinction between a contractual relation and salaried state employment, in terms of the derivation in authority, may be more apparent than real. In both cases, the authority of the actor, say a guard, derives from the fact that he is acting, not just on behalf of the state, but within the scope of the law. Consider the case of a state-employed prison guard who engages in clear-cut and extreme brutality. We do not say that his act is authorized or legitimate, or even that he is acting at that moment as an agent of the state. In fact, we deny it, in spite of his uniform and all the other trappings of his position. We say that he has overstepped his authority and behaved in an unauthorized and unlawful fashion. The state may or may not accept some accountability or liability for his act, but that is a separate issue. The point here is that the authority or legitimacy of a position does not automatically transfer to the actions of the incumbent.

There is, in effect, an implicit contract between a state and its agents that makes the authority of the latter conditional on the proper performance of their roles. This conditional authority can be bestowed on contractual agents of the state just as it is on those who are salaried. Where contractually employed agents, such as guards, have identifiable counterparts among state-salaried agents, there is no reason why their authority should not be regarded as equivalent. Thus, the boundaries of authority for contracted state agents should be no less clear than those for state employees and they could be even clearer, if they are spelled out in the conditions of the contract.

What about authority inside the prison itself? Would private prisons lack authority in the eyes of inmates? Some critics worry about that prospect:

> 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"?[3]

I suspect that prisoners will be more concerned about practical, not philosophical, distinctions. They will care more about how the guards treat them, than about what insignia grace their uniforms. To the extent that they are treated with fairness and justice, inmates will be more inclined to legitimate their keepers' authority and to cooperate with them.

This is especially important to a private prison. The exercise of naked power is extremely costly; cooperation is much more cost-effective (and therefore profitable) than is coercion. Commercial prisons, unlike the state, cannot indefinitely absorb or pass along to taxpayers the cost of riots, high insurance rates, extensive litigation by maltreated prisoners, cancellations of poorly performed or controversial contracts, or even just too much adverse publicity. These are some of the potential costs of the unfair treatment of inmates.

Legitimation constitutes one of the most effective

[2] Anarchists go further. They argue that people may delegate their rights, including the right to punish violation of their rights, directly to private agents acting on their behalf. Only the weaker (libertarian but not anarchist) claim is defended in this article: that any legitimate governmental authority may be further delegated, through the government, to private agents. This assumes the existence of a legitimate and representative government, so that the chain of authority is unbroken from its original source: the people.

[3] Ira Robbins, "Privatization of Corrections: Defining the Issues," *Judicature* vol. 69 (April-May 1986), p. 331.

methods of cutting the cost of power in all forms of social organization;[4] prisons are no exception. Since legitimation is generally granted in exchange for the fair exercise of power, a profit-seeking prison has a vested interest in being perceived by inmates as just and impartial in the application of rules. Moreover, the state is more likely to renew a contract with an organization that has a good record of governance than with a contractor who generates numerous complaints and appeals from inmates. Thus, economic self-interest can motivate good governance as well as good management. At the least, there is no inherent incompatibility between the making of profit and the pursuit of justice.

Justice and Due Process under Contracting

Certain aspects of prison administration have a quasi-judicial character. Controversial examples would include imposing solitary confinement or other disciplinary actions, "good time" sanctions that affect the date of release, and classification procedures that significantly affect the conditions of confinement. Moreover, even where a commercial prison's actions are purely administrative, the coercive environment in which they occur makes the question of their fairness all the more important.

Being suspicious of authority in the hands of commercial prison managers is an example of having the right attitude for the wrong reasons. It is not because they pursue profit that we should be vigilant, but because they wield power. A constructive response to this suspicion would be to require as part of a contract that commercial prisons codify the rules that they will enforce, specify the criteria and procedures by which they will make disciplinary decisions, and submit to review by a supervisory state agency. In short, the requirements of due process should be built into the conditions of the contract. This is no different from the attitude we should have toward the state itself, and its employees.

Our focus should be on the procedures that will best protect the due process rights of inmates regardless of whether they are applied by government employees or by contracted agents. The procedures that will do this best will probably be the same in either case. It should be treated as an open, empirical question whether these procedures are adhered to better under one system or another. Therefore, it is no solution to propose, as some have,[5] that all decisions having implications for due process should simply be left in government hands. The whole point of having procedures is to reduce our reliance on being in "the right hands."[6]

It is one of the strengths of contracting that it forces us to make visible and to treat as problematic some important issues of authority and due process that we might otherwise ignore or take for granted. Due process requires preset rules and rigorous adherence to them. It is universalistic, not individualistic: discretion, individualization, and "creativity" in punishment are detrimental to due process. Contractual arrangements offer an excellent means of limiting and controlling discretion, of clarifying rules, and of enforcing adherence to procedures.

In addition to due process, justice requires clarity as to the purpose of punishment. It is the state's job to ensure that private prisons pursue a proper penology. This may be difficult, since states themselves are rarely clear and consistent in penal philosophy. One of the services private contracting will render is to require state agencies to specify their goals as clearly as possible, along with criteria by which their attainment is to be assessed. This is just one more way in which contracting makes visible, and therefore more solvable, problems of penology that are always there but usually overlooked.

One critic[7] has cited the case of a transcendental meditation group that wanted to build and run a prison with the requirement that all prisoners practice meditation. Lest it be thought that this proves the irresponsible extremes to which only the private sector is prone, let us remember how the penitentiary got its name: through the Quaker-inspired but state-imposed requirement that prisoners spend their time in solitary, silent contemplation of the evil they had done. Indeed, the contractor so worrisome to this critic already operates a meditation program inside one of Vermont's state-run prisons. Other state prisons, such as Folsom, also have TM programs. In

[4] Peter M. Blau, *Exchange and Power in Social Life*. New York: John Wiley & Sons, 1967.

[5] Peter Greenwood, "Private Prisons: Are They Worth a Try?" *California Lawyer*, July/August 1982, pp. 41-42.

[6] Greenwood points out that these functions account for less than 5 percent of current prison administration budgets, so it would not burden the state to retain full responsibility for their administration. However, evaluating, sanctioning, and controlling inmate behavior must be an integral part of every aspect of a prison program; it cannot be handled by a separate and distant staff. Moreover, while protection of due process is ultimately guaranteed by the state, it should be made a responsibility of contractors as well. The contract should establish a system of supervision whereby the state can monitor the administration of discipline and good time provisions by the contractor, and whereby inmates can appeal what they view as unfair treatment in these regards or others. The expense of this system should be calculated into the cost of the contract.

[7] Institutions Etc., "If You Think This Sounds Good, Wait'll You Hear About Discount Gas Chambers," *Investigative Newsletter on Institutions/Alternatives* vol. 6 (November 1983), pp. 6-8.

fact, it is hard to imagine a private company subscribing to penological beliefs so bizarre that they have not been implemented already in some state system. Nonetheless, it is still true that it is the mandate of the state to define the parameters of justice and to see that they are fulfilled. It would seem, however, that this is at least as likely to occur under contractual arrangements as otherwise.

The Profit Motive vs. Other Motives

Before we look at motives, we should note one point of logic at the outset. Strictly speaking, the motivation of those who apply a punishment is not relevant either to the justice or to the effectiveness of the punishment. It is true that for punishment to be a moral enterprise, it is important that it be done for the right reasons. This, however, is a stricture that applies more to those who determine and decree the punishment than to those who carry it out—to legislative and judicial more than to executive agents. The immediate agents of punishment may be humans with motives virtuous or venal, or robots with no motives at all; that does not affect the requirements of justice.

Still, the matter of motives—or rather, one particular motive—seems to be of such great importance to so many opponents of proprietary prisons that it must be dealt with. These critics believe that "criminal justice and profits don't mix." The ACLU in particular has complained repeatedly that "the profit motive is incompatible with doing justice."

If it is legitimate to examine the motives of interested parties, then to be consistent we ought to examine the motives of *all* parties, including state agencies, public employee unions, prison reform groups, and "public interest" groups.[8] All these parties, like private vendors, have motives that reflect self-interest as well as altruism, and agendas that are hidden as well as overt. For example, the ACLU's National Prison Project may really be as much opposed to prisons *per se* as to running them like a business. They may be afraid that more efficient prisons will mean more imprisonment. They do not object to the profits that are made from the private administration of community correctional programs that serve as *alternatives* to prison.

A consistent objection to the existence of vested interests in punishment would have to focus as much on the public sector as on the private. Is it wrong for state employees to have a financial stake in the existence of a prison system? Is it wrong for their unions to "profit" by extracting compulsory dues from those employees? Is it wrong for a state prison bureaucracy to seek growth (more personnel, bigger budgets, new investment in human and physical capital) through seizing the profits of others (taxation) rather than through reinvestment of its own profits? Are the sanctions of the state diminished or tainted when they are administered by public employees organized to maximize their personal benefits? If not, why would it tarnish those sanctions to be administered by professionals who make an honest profit? I admit I have posed these questions in prejudicial language, but I have done so to make a point. The notion that any activity carried out for profit, *as compared to salary and other benefits,* is thereby tainted, is simply an expression of prejudice. Both are economic motivations.

Of various possible motivations for serving as an agent of punishment, the profit motive is among the most benign. Compare, for example, some alternative motives: self-righteousness, enjoyment of power, sadism, vengefulness, zealotry, adventurism, or displacement. No one has proposed that all criminal sanctions be administered by unpaid volunteers motivated by pure love of justice. If someone does propose it, watch out! Great injustices are often done in the name of noble-sounding values. The history of corrections, from the penitentiary to the juvenile court, is a road paved with many good intentions that produced bad results.[9] The clear lesson from this history, drawn by criminologists of all persuasions, is that criminal justice policies and practices must be judged by their consequences, not by their motives. In particular, declarations of "public service" should not be taken at face value.[10] Rather, public service should be judged as an outcome, regardless of whether the motivating force behind it is probity, power, or profit.

Replacing "public servants" with "profit seekers" in the management of prisons will not trade those whose motives are noble for those whose motives are base. Rather, it will replace actors whose motives we suspect too little with actors whose motives we are inclined to suspect perhaps too much. Still, whether we are right or wrong to suspect the motives of profit-seeking prison administrators, it is a step in the right

[8] Including the ACLU. See William A. Donohue, *The Politics of the American Civil Liberties Union.* New Brunswick, NJ: Transaction Books, 1985.

[9] Francis A. Allen, *The Borderland of Criminal Justice.* Chicago: University of Chicago Press, 1964. David J. Rothman, *The Discovery of the Asylum.* Boston: Little, Brown, 1971; American Friends Service Committee, *Struggle for Justice.* New York: Hill & Wang, 1971.

[10] Willard Gaylin, Ira Glasser, Steven Marcus and David J. Rothman, *Doing Good: The Limits of Benevolence.* New York: Pantheon Books, 1981.

direction, when we consider the high cost of relying on good intentions in the past.

Constraining (Everyone's) Self-Interest

But won't a commercial institution be "driven by profit" and, as a result, be tempted to put its own welfare ahead of the welfare of inmates, the needs of the state, or the interests of justice? This concern is legitimate, but it is at least partially misplaced if it is portrayed as a problem unique to commercial enterprises. Actually, the problem exists for public as well as private, for nonprofit as well as profit-making organizations. If it were really true that "justice and the profit motive are incompatible," then justice would be doomed, because in one form or another the profit motive is universal. Like the rest of society, politicians, government bureaucrats, and other state actors are motivated by self-interest. The field of public choice, a hybrid of economics and political science, is founded on this insight, and one of its founders, James Buchanan, recently received a Nobel Prize for his extensive research and theory in this area.

One of the most universal of motives is one that could be called the "convenience motive." All human beings, and the organizations they construct, are motivated to behave in ways that maximize their own convenience. Compared to the profit motive, the convenience motive has few positive external benefits; it is much more asocial and self-interested. Indeed, one of the strongest constraints on the convenience motive is the profit motive. Businesses, for example, must often put the desires of others ahead of their own convenience, if that will increase their profit. Businessmen understand that to sustain any competitive profit-making enterprise it is generally necessary to satisfy some needs other than one's own.

All institutions, from hospitals and universities to courts and prisons,[11] tend to operate according to their own convenience unless they are motivated to do otherwise. For public or non-profit institutions, this motivation must take the form of political pressure. For private, profit-making institutions, the motivation can take economic as well as political forms, because market mechanisms of discipline and supervision are added to those of the state apparatus.

The effects of this addition are not simply economic. Competition does not just contain costs; it advances other goals as well. When it is possible for a commercial company to take business away from a competitor (including the state) by showing that it can do a better job, then that company becomes a self-motivated watchdog over other companies (and over the state). Such a company will have an interest in critically evaluating the quality of its competitors' services and an interest in improving its own.

In the case of prisons, the existence of competition, even potential competition, will make the public less tolerant of facilities that are crowded, dirty, unsafe, inhumane, ineffective, and prone to riots and lawsuits. Indeed, the fact that these conditions have existed for so long in monopolistic state prisons is a big part of what makes private prisons seem attractive. The possibility of an alternative will make the public, quite rightly, more demanding in its expectations.

Without competition, the state has had a monopoly over both service and supervision, over both doing justice and seeing that it is done properly. With competition, there will be a proliferation of agencies having a direct stake in both, without detracting at all from the state's role as the final arbiter of justice.

For these reasons, among others, the profit motive is not necessarily in conflict with the pursuit of justice; it can, in fact, be conducive to it.

Conclusion

If we want to have prisons that do justice and follow due process, then here's what we should do. First, we should define what we mean by these concepts and decide how to measure them. Then, we should shop around. Where can we get the most, or the best, of these values for our money? It may turn out to be the department of corrections and its public employees, or it may turn out to be a provider competing on the open market. We cannot know which unless we are able to make comparisons. What we should *not* do is beg the question by declaring proprietary prisons to be either unjust by definition or improper on principle

[11] David J. Rothman. *Conscience and Convenience. The Asylum and Its Alternatives in Progressive America.* Boston: Little, Brown, 1980.

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