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This Issue in Brief

The Development of a Juvenile Electronic Monitoring Program.—Author Michael T. Charles reports on a research project concerning the juvenile electronic monitoring program undertaken by the Allen Superior Court Family Relations Division, Fort Wayne, Indiana. Reviewing the planning and implementation phase of the program, the author discusses (1) the preplanning and organization of the program; (2) the importance of administrative support; (3) the politics and managerial issues faced during program development, implementation, and management; and (4) the role and function of surveillance officers.

Morrissey *Revisited: The Probation and Parole Officer as Hearing Officer.*—Author Paul W. Brown discusses the Federal probation officer's role as hearing officer in the preliminary hearing stage of the parole revocation process. This role was largely created by the landmark Supreme Court case of *Morrissey* v. *Brewer* in which the Court indicated a parole officer could conduct the preliminary hearing of a two-step hearing process possibly leading to a parole revocation and return to prison. How this role was created in *Morrissey* and how it has been carried out by the Federal probation officer are examined.

Defense Advocacy Under the Federal Sentencing Guidelines.—This article sets forth the duties and responsibilities of defense counsel in effectively representing clients in all phases of the criminal process under Federal sentencing guidelines. Author Benson B. Weintraub offers practice-oriented tips on arguing for downward departures, avoiding upward departures, and negotiating plea agreements under the guidelines and discusses procedures to employ in connection with the presentence and sentencing stages of a Federal criminal case.

Federal Bureau of Prisons Programming for Older Inmates.—The "graying" of our society is creating a change in our prison populations. More sentenced offenders will be older when they enter the institutions, and longer sentences will result in more geriatric inmates "behind the walls." Balancing the needs and costs of geriatric care is a critical issue to be addressed. In this article, authors Peter C. Kratcoski and George A. Pownall discuss various attributes of criminal behavior of older persons and the distribution of older offenders within the Federal Bureau of Prisons. They also discuss the complete health care programming that correctional systems must provide to meet legal mandates already established in case law. According to the authors, significant programming adaptations have taken place in the past several years at the Federal level; more are anticipated in the near future.

Privatization of Corrections and the Constitutional Rights of Prisoners.—Many in the legal and corrections community have presumed that "private" correctional facilities will be held to the same constitutional standards as those directly administered by the state itself. Author Harold J. Sullivan

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Privatization of Corrections and the Constitutional Rights of Prisoners

BY HAROLD J. SULLIVAN
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AT A time when increasing the role of the private sector in general government operations has attracted broad support,[1] it should come as no surprise that pressure for "privatization" has been felt by the criminal justice system. Corrections, in particular, has attracted the attention of politicians and private entrepreneurs. Dissatisfaction with the correctional system and pressure for rapid expansion of facilities have stimulated proposals for private alternatives to both public prison construction and operation.[2]

In debating the merits of proposals for privatized corrections, many in the legal and corrections community have presumed that private correctional facilities will be held to the same constitutional standards as those directly administered by the state itself. Summarizing this view, Connie Mayer has argued: "There is no legal principle to support the premise that public agencies can avoid or diminish their liability by contracting to a private operator."[3] Although the U.S. Supreme Court has not yet ruled on the constitutional status of privately run correctional facilities, the Court has in a wide variety of cases addressed the circumstances under which privately owned and operated agencies, which provide services to government, are subject to constitutional restraints. These cases provide reasons to doubt the emerging conventional wisdom that the recognized rights of those confined to public correctional institutions must in all instances be protected by private facilities. If this proves correct, privatization can be used by governments to evade constitutional protections.

In an attempt to contribute to the on-going debate concerning privatization of corrections, this article identifies circumstances under which arrangements between government and private corrections contractors could jeopardize the constitutional rights of inmates. No effort is made to identify all potential legal or policy concerns arising in the private corrections context, rather the sole intent of this essay is to highlight factors which could serve to diminish both government responsibility and constitutional protections.[4]

The State Action Doctrine

Generally rights guaranteed by the U.S. Constitution are protected only from government infringement. The 14th amendment, for example, provides that "[n]o state shall deprive any person of life, liberty or property without due process of law." According to the U.S. Supreme Court, before one can challenge an alleged denial of due process rights, he or she must first show that the deprivation results from "state action."[5] Under the state action doctrine, anyone challenging an action of an ostensibly private institution on constitutional grounds must first satisfy the court that the action under challenge is "fairly attributable to the state."[6]

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[1]See: S. Butler, *Privatizing Federal Spending, a Strategy to Eliminate the Deficit* (Washington: The Heritage Foundation, 1985); Carroll, "Public Administration in the Third Century of the Constitution: Supply-Side Management, Privatization, or Public Investment?," vol. 47 *Public Administration Review* 106 (January/February 1987); R. DeHogg, *Contracting Out for Human Services* (Albany: State University of New York Press, 1984); Farrell, "Public Services in Private Hands." Venture, July 1984, at 34; Ferris and Graddy, "Contracting Out: For What? With Whom?" 46 *Public Administration Review* 332 (July/August 1986); Main, "When Public Services Go Private." *Fortune*, May 27, 1985, at 92; E.S. Savas, *Privatizing the Public Sector* (Chatham: Chatham House, 1982).

[2]See: Brakel, "'Privatization' in Corrections: Radical Prison Chic or Mainstream Americana?" 14 *New England Journal of Civil and Criminal Confinement* 1 (Winter 1988); C. Camp and G. Camp, *Private Sector Involvement in Prison Services and Operations* (Washington, DC: U.S. Department of Justice, National Institute of Corrections, 1984); J. Mullen et al., *The Privatization of Corrections* (U.S. Department of Justice, National Institute of Justice; U.S. Government Printing Office No. 027-000-01226-4, February 1985); Savas, "Privatization and Prisons." 40 *Vanderbilt Law Review* 889 (May 1987); Wollan, "Prisons: The Privatization Phenomenon." 46 *Public Administration Review* 678 (November/December 1986); Wooley, "Prisons for Profit: Policy Considerations for Government Officials." 90 *Dickinson Law Review* 307 (Winter 1985); *Comment*, "Private Prisons." 36 *Emory Law Journal* 253 (Winter 1987).

[3]Mayer, "Legal Issues Surrounding Private Operation of Prison." *Criminal Law Bulletin* (July–August 1986) at 321. See also: Johnson, "What Are the Legal Problems Involved in Privatization of State/Local Corrections." 17 *Corrections Digest* 1 (April 9, 1986); Kay, "The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983," 40 *Vanderbilt Law Review* 813 (May 1987); Robbins, "Privatization of Corrections: Defining the Issues." 69 *Judicature* 325 (April–May 1986); Robbins, "Privatization of Corrections: Defining the Issues." 40 *Vanderbilt Law Review* 813 (May 1987); Wooley, *Id.*; "Private Prisons," *Id.*

[4]For comprehensive discussion of some of the broader policy and legal issues concerning privatized corrections, see: Camp and Camp, *supra* note 2; Mayer, *Id.*; Mullen; Wooley, *Id.*; "Private Prisons," *Id.*, especially at 253-260.

[5]Civil Rights Cases, 109 U.S. 3 (1883).

[6]*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937.

It is not yet clear how the Supreme Court might apply this state action doctrine to private correctional facilities. Although there have been lower court decisions relating to privatized corrections,[7] no case has as yet received a full U.S. Supreme Court review.[8] In coming to their decisions concerning private corrections, the lower courts have, of course, sought guidance from prior decisions of the U.S. Supreme Court concerning the applicability of constitutional restraints to private conduct. Before assessing what the lower courts have done in the private corrections field, a brief review of some of the most relevant recent Supreme Court decisions is in order.

In a series of decisions during the 1970's and early 1980's, the Court made it increasingly clear that state funding and/or regulation of a private agency is insufficient to establish the necessary state action. Generally, only those private actions that are specifically "ordered" or "initiated" by the state or in which state officials have directly participated are subject to constitutional restraint.[9]

Two Court decisions, *Rendell-Baker* v. *Kohn* and *Blum* v. *Yaretsky*[10] in particular raised issues resembling those that could arise in litigation concerning privatized corrections. The cases involved constitutional challenges to decisions of privately owned facilities, one a school for maladjusted students and the other a nursing home. Both institutions were subject to extensive and detailed governmental regulations and both served a clientele whose expenses were borne almost entirely by government. Because both institutions were so heavily reliant on government funding, it is fair to say they owed their existence to government programs, the first to a Massachusetts program requiring the state to provide education for "special needs" students[11] and the second to Medicaid coverage for nursing home expenses of indigents.[12]

In these cases the Supreme Court identified the very limited circumstances under which constitutional guidelines would apply to actions of governmentally funded and extensively regulated private institutions. In effect the Court ruled that the level of funding or the degree of overall regulation does not determine the applicability of constitutional restraints to actions of privately owned and operated institutions. In *Blum*, for example, although the Court recognized that the decision to transfer categories of patients to a lower level of nursing home care was both publicly funded and mandated by detailed regulation, if the determination concerning which specific patients would be transferred were left in private hands, the state could not be held accountable for such decisions nor would the private decision makers be required to follow 5th and 14th amendment due process guidelines in making those decisions.[13]

From these and other recent cases[14] it has become clear that unless government compels a private actor to make a specific decision in an individual case, only direct official participation in the implementation of a policy or in determining individual eligibility for some government mandated sanction or benefit will trigger constitutional restraints applicable to government action.

The exceptions to these state "compulsion" or "participation" requirements are those activities covered by the so-called "public function" doctrine. When the state turns over to a private institution a function that has traditionally been performed "exclusively" by the state,[15] the private institution in question is held to the same constitutional standards as the state itself. To date the Court has only explicitly and unequivocally recognized two such traditional and exclusive public functions: the conduct of elections which determine "the uncontested choice of public officials" and a company town that "has taken on *all* the attributes of a town."[16] Although Justice Rehnquist in *Flagg* mentioned such "functions as education, fire and police protection, and tax collection" for possible inclusion in the exclusively public functions category, he explicitly withheld judgment concerning whether government "might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment."[17] In considering whether the Court might recognize these and other areas as exclusively governmental functions, one commentator has observed: "[a]s of late, the Supreme Court has demonstrated little inclination toward characterizing any function as traditionally the exclusive prerogative of the State."[18] As Justice Rehn-

[7] See *infra*, notes 29 through 36 and accompanying text.

[8] In *West* v. *Atkins*, 56 LW 4664 (6-21-88) the Court did find "State Action" in the actions of a private physician who had contracted with the state to provide medical services to prisoners confined in a state owned and operated correctional facility. For a further discussion of the relevance of *West* see note 27 *infra*.

[9] *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972); *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (1982); *Blum* v. *Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982).

[10] *Id.*

[11] *Rendell-Baker*, *id.* at 832-33.

[12] Blum, *id.* at 1011.

[13] Phillips, "The Inevitable Incoherence of Modern State Action Doctrine," 28 *St. Louis University Law Journal* 683 (June 1984), especially at 715.

[14] See: *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978) [discussed *infra*] and *Lugar* v. *Edmondson Oil*, 457 U.S. 922 (1982).

[15] Jackson, *supra* note 8, at 352-353.

[16] *Flagg*, 436 U.S. 149, 158, citing *Terry* v. *Adams*, 345 U.S. 461 (1935) and *Marsh* v. *Alabama*, 326 U.S. 501, 502 (1946).

[17] *Flagg*, *id.* at 163-64.

[18] Hala Ayoub, "The State Action Doctrine in State and Federal Courts," 11 *Florida State University Law Review* 893 (Winter 1984), at 915.

quist, himself, stated in *Flagg*, "[w]hile many functions have been traditionally performed by government, very few have been "exclusively reserved to the State."[19]

In essence in the public functions area the Court asks whether the activity in question is one that the state has exercised alone or if it is one in which the private sector has shared. This requirement of state "exclusivity," however, is not purely a question to be determined through historical research. In *Flagg Bros.* v. *Brooks*, the Court opens the door for a private agency to exercise, free of constitutional restraints, what had been historically an exclusive public function as long as the state continues to provide *some* potential alternative channels for redress to those adversely affected by the private party's action.[20]

The issue in *Flagg* was whether 14th amendment due process requirements applied to "a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by the New York Uniform Commercial Code."[21] The U.S. Supreme Court rejected the finding of the U.S. Court of Appeals that "New York not only had delegated to the warehouseman a portion of its sovereign monopoly power over binding conflict resolution . . ., but also let him, by selling the stored goods, execute a lien and thus perform a function which had traditionally been that of the sheriff."[22]

Although Justice Rehnquist's opinion argued that "the settlement of disputes between debtors and creditors is not an exclusive public function,"[23] it placed greatest emphasis on the fact that within the law there were options available to block the proposed sale. It was the availability of such options that appeared to dictate the Court's conclusion that the warehouseman in question had not been delegated an exclusive public function. He had, in effect, not been delegated "exclusive" control over this alleged governmental power. The state still retained some role. As the warehouseman exercised his "private" role, he would be free from constitutional restraint. Only the state would be subject to the 14th amendment when, and if, it were called upon to intervene.

The dissenters on the Supreme Court in *Flagg* challenged the majority's notion of "exclusivity" on a number of grounds. Justice Stevens claimed that the Court's position was based ". . . on some vague, and highly inappropriate, notion that the respondents should not complain about this state statute if the State offers them a glimmer of hope of redeeming their possessions . . . through some other state action."[24] As Justice Marshall emphasized, the alternative available to one damaged by the private use of state power may in reality prove so burdensome to the party seeking redress as practically to leave them at the mercy of the private party arguably clothed with the authority of the state.[25] In the instant case Justice Marshall pointed out that the only legal remedy available to Flagg would have required her to put up money potentially greater than the value of the goods in dispute. While the remedy in question, "replevin," was technically available, "it is also true that, given adequate funds, respondent could have paid her rent and remained in her apartment, thereby avoiding . . . [the] eviction [which later led to] the seizure of her household goods by the warehouseman."[26]

As a result of *Flagg* the question for those claiming that a private agency is exercising a "traditional" public function becomes: has the state abdicated completely its power to a private entity? If yes, and if the activity in question has been "traditionally" an "exclusively" governmental prerogative, the private party now exercising state power is bound by the constitution as if it were the state. If, however, the state retains *some* continued role in the exercise of the power in question, the private party is free from constitutional restraints as it exercises its share of what had been a governmental power.

Privatized Corrections Litigation

Although the Supreme Court has yet to rule on any case directly relating to privatized corrections,[27] commentators who have argued that privatized corrections facilities will be subject to the same constitutional restraints as those operated by the state have found support for their position in lower Federal courts. The limited litigation to date concerning privately operated detention and corrections facilities generally supports the continued applicability of constitutional protections. The only court decision that has directly addressed issues involving private

[19] *Flagg*, *supra* note 13, at 158.
[20] *Id.*, at 160.
[21] *Id.*, at 151.
[22] *Id.*, at 155, quoting from 533 F.2d., at 771.
[23] *Id.*, at 161.
[24] *Id.*, Stevens, J., dissenting, at 172, n.8.
[25] *Id.*, Marshall, J., dissenting, at 166-67.
[26] *Id.*, at 167.
[27] Because in *West* v. *Atkins*, *supra* note 8, Dr. West ". . . was paid approximately $52,000 annually to operate two 'clinics' each week at Central Prison Hospital" *id.* at 4665, he was considered for constitutional purposes to be a state employee. "The fact that the State employed respondent pursuant to a contractual arrangement . . . does not alter the analysis." *id.* at 4668. "[S]tate employment is generally sufficient to render the defendant a state actor." *Id.* at 4666, citing *Lugar*, 457 U.S. at 936, n. 18. The fact that West worked within a state prison leaves unresolved the status of private prisons.

correctional facilities[28] is *Medina* v. *O'Niell.*[29] *Medina* concerned the detention of stowaways in a private facility pursuant to an Immigration and Naturalization Service (INS) order. Plaintiffs challenged the failure of the INS to oversee their detention, contending that the conditions within the facilities within which they were detained amounted to "punishment" in violation of their fifth amendment due process rights.[30]

Without discussing whether there was historic precedent for private detention facilities and without citing any relevant U.S. Supreme Court precedent, the *Medina* Court asserted that "detention is a power reserved to government, and is an exclusive prerogative of the state."[31] Because Congress delegated its authority over immigration to the INS and because Congress authorized the INS to designate places of detention for excludable aliens, the Court concluded that both the INS and the private facilities in which it ordered the plaintiffs detained were bound by the fifth amendment due process standards.

The question for anyone considering this case is: do its findings control the issues of the constitutional status of private corrections? The answer is unclear. If, for example, the decision is based at least in part on the Court's conclusion that the statutes demonstrate that "Congress intended the agency to furnish suitable facilities which comply with minimum due process standards,"[32] then the evident failure of the INS and the private parties detaining the plaintiffs would amount to a failure to meet statutorily imposed legal obligations. The application of constitutional standards would then hinge on the specific statutorily imposed tripartite relationship between the INS, the private shipping concern, and the detainees. This could leave open the question of whether in instances in which statutory requirements were less clear, treatment of detainees in a private facility would be regulated by constitutional standards.

In *Milonas* v. *Williams*,[33] the Court of Appeals for the Tenth Circuit focused on the degree and nature of the interactions between government and private institutions. The Court's decision upheld a Section 1983 Civil Rights judgment against a private school for violating the rights of youths who were assigned to it by the state because of behavioral problems. The Court did not find explicitly that the school performed a "public function," rather it found against the school because some students ". . . [had] been involuntarily placed in the school by state officials who were aware of, and approved of, certain of the practices which the district court has enjoined."[34] The Court's decision, however, does not make clear whether the state placement of the youths alone would trigger constitutional protections or whether the state's "approval" of the challenged practices was the determining factor in finding state action. If the state's approval of the practices was the determining factor, then the result might be different were a state to decide to follow a less pervasive regulatory policy toward private institutions in which prisoners or detainees are confined.

In discussing the *Milonas* decision, Paul B. Johnson and Ira Robbins conclude that even in the absence of a court finding that private correctional institutions perform exclusively public functions, constitutional restraints will be applied to their operations as a result of such factors as "the involuntary nature of confinement, the detailed nature of contracts between the government and the private entities, the level of government funding, and the extent of state regulation of policies and programs."[35] In support of their conclusion that funding and regulation would trigger a finding of "state action," the authors cite the U.S. Supreme Court decisions in *Blum* v. *Yaretsky* and *Rendell-Baker* v. *Kohn*; yet in both those cases the Court found that state action was *not* present despite the almost complete reliance on government funding of the institutions in question. On the issue of regulation state action was also found to be absent in both cases cited because the government regulation did not dictate the specific decision under challenge.[36]

It is on the basis of cases such as these that commentators have concluded that privatization cannot be used to evade constitutional protections within

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[28] *Wooley, supra* note 2, at 328.

[29] 589 F. Supp. 1028 (1984).

[30] *Id.*, at 1032.

[31] *Id.*, at 1038. The only decision cited by the District Court, *Flagg Brothers*, 436 U.S. at 157 citing *Fuentes* v. *Shevin*, 407 U.S. 67, 84 (1972), in fact provides no support for the conclusion that "detention is a power reserved to government." On the contrary, the decision argues that *only deprivations* of property and, by implication, liberty *by the state "or private persons whose action 'may be fairly treated as that of the State itself'"* may be subject to constitutional challenge (emphasis add). When, or if, action of private detention facilities, or persons employed by them "may fairly be treated as that of the State itself" is *not* addressed by the decision. In citing this section of *Medina* in support of its conclusion that private prison operations will be considered state action, "Private Prisons" simply compounds this error, at 275-276.

[32] *Medina*, 589 F. Supp. 1028, 1040.

[33] 691 F.2d. 931 (1982), U.S. cert. den. 460 U.S. 1069.

[34] *Id.*, at 940.

[35] Robbins (1986), *supra* note 3, at 328-29; Johnson, *supra* note 3, at 4; see also: "Private Prisons," *supra* note 2, at 263.

[36] The *Milonas* Court, itself, recognizing the apparent conflict between its decision and that of the U.S. Supreme Court in *Rendell-Baker*, argued that the cases can be distinguished. Although both cases concerned institutions in which the state had placed "special needs" youth, the issue in *Rendell-Baker* concerned the discharge of employees at the school while *Medina* concerns the treatment of students placed at the school. "The [U.S. Supreme] Court recognized that 'in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters.' " 102 S. Ct. 2764, cited at 940.

private correctional facilities. This conclusion in turn has led some to warn states that they must carefully supervise private correctional facilities if they are not subsequently to become liable for possible abuses which might follow from failure to carefully supervise.[37] These warnings combined with the reasoning supporting them, however, border on the tautological. On the one hand we are told that the Courts will find state action and thus both the state and the private prison contractors liable for constitutional violations, *because the state so heavily and comprehensively regulates* private agencies which provide correctional services. On the other hand, we are warned that because the states will be held liable, the *states ought comprehensively to regulate* private correctional facilities in order to assure they will not have to pay for abuses not of their own making. The alternative argument, that commentators on "privatization" of corrections generally ignore, is the real possibility that the state can avoid liability precisely by limiting its role in the management of private corrections agencies.[38] The question that remains is how might this be accomplished?

State Action and Privatized Corrections

Much of the constitutional litigation in the corrections area focuses on 8th amendment challenges to prison conditions which impose "cruel and unusual punishment" and 5th and 14th amendment challenges to the imposition of discipline without due process. Because the state would certainly retain responsibility for conviction and sentencing, it would appear improbable that the state could evade its eighth amendment requirements for assuring that no punishment is "cruel and unusual."[39] Contracts between governments and private prison operators would, however, likely address such issues as "classification," security and the use of force, discipline and "good time."[40] On such questions, it is far less clear that privatization accompanied by loose regulation could not lead to the diminution of constitutional safeguards.

In assessing the impact of "privatization" on such issues, there is no need to outline in any detail the current status of due process requirements governing such issues. The issue here is not the precise nature or adequacy of those requirements, rather it is whether any requirements of due process apply in privatized correctional facilities.

The fate of constitutional protections within privatized correctional facilities hinges on two factors: first, on the precise nature of the contractual relationships between the state or Federal governments on the one hand and private corrections agencies on the other; and second, on whether or not all aspects of corrections will be deemed traditionally exclusive governmental functions.

Even if a state's contract with operators of private prisons specified in detail the conditions of incarceration, including, for example, specific procedures to be followed in administering discipline and/or providing security, there are reasons to doubt that the U.S. Supreme Court would find that the requirements of the state action doctrine had been met.

If, however, state officials or employees participate directly in disciplinary proceedings or in maintaining security within "private" correctional institutions, such participation would trigger constitutional restraints. When public and private officials or employees act in concert, the actions of both are considered by the Court to be subject to constitutional limitations.[41] When, on the other hand, private actors, such as private security personnel, act independently of the state, their actions have not been viewed as controlled by constitutional restraints.[42]

If the requirements of the state action doctrine are triggered by extensive government regulation of, and participation in, specific practices of private institutions, then the greater the discretion left to such institutions, the less the chance that they or governments will be held to constitutional standards. Were governments to leave significant discretion in the hands of private prison operators over security and disciplinary matters and leave imple-

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[37] See, e.g., Mayer, *supra* note 3, at 321-22; Wooley, *supra* note 2, at 327-330.

[38] Although Kay has recognized that by limiting its supervisory role over the details of prison administration, the state might "effectively . . . shield the private contractor from civil rights liability," she argues in so doing the state ". . . might increase its own liability on the theory that it did not comply sufficiently with its responsibility to assure the proper care of the prisoners placed in its custody." See Kay, *supra* note 3, at 872-74. As Kay, herself, acknowledges, however, no such state liability has as yet ". . . been addressed by any court." *id.* at 873.

In the absence of direct participation by state officials in private prison operations, it is still possible that the courts might find that the initial conviction and placement in a private prison is sufficient to implicate the state in all that follows. Since the state incarcerates an individual in a private facility, the state assumes responsibility for all that happens within. Such an approach, however, would entail the Supreme Court's carving out an exception to its overall approach to the state action doctrine. As the discussion above demonstrates, state funding or regulation of an institution, however extensive, does not make every action of the institution the responsibility of the state.

[39] See: *Estelle* v. *Gamble*, 429 U.S. 97 (1976) and *West* v. *Atkins*, 56 LW 4664 (1988).

[40] *Id.*, Mayer, at 316-17; Wooley, at 320-23.

[41] See, e.g., *Lugar* v. *Edmondson Oil*, 457 U.S. 922, especially at 937 and private security cases: *Lusby* v. *T.G. & Y Stores Inc.*, 749 F.2d 1423, certiorari granted and vacated *City of Lawton, Oklahoma* v. *Lusby*, 106 S. Ct. 40, 88 L. Ed. 2d 33, on remand 796 F.2d 1307, certiorari denied 107 S. Ct. 275, 93 L. Ed. 2d 241 (1984); *El Fundi* v. *Deroche*, 625 F.2d 195 (1980).

[42] See, e.g., *Hurt* v. *G.C. Murphy Co.*, 624 F. Supp. 512, affirmed 800 F.2d 260 (1986); *Granet* v. *Wallich Lumber*, 536 F. Supp. 479 (1983); *Gipson* v. *Supermarkets General Corporation*, 564 F. Supp. 50 (1983); *Davis* v. *Carson Pirie Scott & Co.*, 530 F. Supp. 799 (1982); *Klimzak* v. *City of Chicago*, 539 F. Supp. 221 (1982); *White* v. *Schrivner*, 595 F.2d 140 (1979); *Hurt* v. *G.C. Murphy Co.*, 624 F. Supp. 512.

mentation of such policies to private prison employees, then the applicability of constitutional restraints would likely depend on, first, whether the courts determine that the activity in question is traditionally an exclusive public function, and second, a continuing government role in the exercise of the public function.

Although decisions concerning what constitutes a criminal offense and who may be subject to a criminal sanction are clearly both traditionally and exclusively governmental functions,[43] there is historical precedent for privately owned and operated jails and places of detention. Indeed, Travis et al. argue that the development of publicly run institutions was a response to the record of abuses in private facilities.[44]

Even before the current drive for privatized corrections gained momentum, there was extensive private involvement in providing juvenile facilities, halfway houses, and drug and alcohol rehabilitation centers.[45] For the courts to conclude that corrections is an "exclusive" public function, therefore, they will have to disregard both historical precedent and current practice. The fact of private corrections in the past means simply that corrections cannot be viewed as a function that has been traditionally "exclusively" performed by the state. Additionally the *Flagg* decision appears to permit private actors participating in the execution of even a traditional and exclusive public function to disregard constitutional restraints as long as the state provides those adversely affected by the private action some possible alternative governmental channels for protecting their interests.

Within the corrections context, if the state provided guidelines for private correctional officials in applying discipline and crediting "good time," but left actual implementation to the private prison operators, the private agents could avoid the procedural due process requirements demanded of public prisons as long as the state provided prisoners some means of appeal or some alternative channel to challenge abuse of the state guidelines. As both Justice Marshall and Stevens made clear in their *Flagg* dissents, however, alternative channels might well prove burdensome to those who must rely on them—so burdensome as to make their routine use impractical. Under such conditions the initial decisions of the private prison operators on matters of discipline and security might stand unchallenged even though those decisions were arrived at without due process.

Finally, even the need for such appeals mechanisms might be avoided if placement in a private correctional facility rather than a public one were an option selected by a convicted felon. If the state were to provide for both public and private correctional facilities, prisoners could be given a choice. The state might offer such inducements as possible early release or more rehabilitation options as an inducement to prisoners to elect the private facilities. Under such circumstances because the state has not completely abandoned the corrections field to private contractors, both the contractors and the state might be freed from liability for any alleged denial of constitutional rights within private corrections facilities.

Conclusion

At least until the U.S. Supreme Court rules definitively in a case concerning actions of private correctional institutions, we cannot assume that such institutions must follow the same constitutional standards as those operated by the state itself. The Court's approach to the state action doctrine in recent years has raised the threshold of state involvement that is required before constitutional restraints apply to ostensibly private conduct. This shift has been led by now Chief Justice Rehnquist; it has been supported by the Court's emerging conservative majority. There is no reason to expect that this inclination to insulate actions of private institutions which provide services to the state, or in the place of the state, from constitutional constraints will not continue.

If private correctional facilities are freed from many of the constitutional constraints placed on public institutions, then both they and their government sponsors will be freed from the constant threat of Section 1983 civil rights suits from inmates. Neither they nor government would be subject to liability for denying civil rights to inmates. Because most observers have assumed that private prisons will be held to the same constitutional standards as public ones, however, many have counseled governments to regulate and control virtually every aspect of private prison operations. Such regulations have often

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[43] Mayer, *supra* note 2, at 320.

[44] Lawrence F. Travis et al., "Private Enterprise and Institutional Corrections: A Call for Caution." XLIX *Federal Probation* 11 (December 1985); also for a discussion of the role of the private sector in the 19th century, see generally Cody, "The Privatization of Correctional Institutions: The Tennessee Experience." 40 *Vanderbilt Law Review* 829 (May 1987); also see Mayer, *supra* note 2, at 311; Savas, *id.*, at 898; and "Private Prisons," *id.*, at 253-254. None of these authors, however, discuss the implications of the historical role of private corrections under the Supreme Court's "public function" doctrine.

[45] See Camp and Camp and Mullen, *supra*, note 2.

been recommended as a means of assuring that governments will only be held liable for conditions of their own making. It is, however, possible that these regulations designed to protect governments from liability may, themselves, prove to be the mechanisms for assuring government liability. Such continued government participation in prison operations may implicate government as much or more than it may protect government.

Neither advocates nor opponents of privatization can safely assume that privatized corrections will be held to the same constitutional standards as those operated by the state itself. All must consider the real possibility that a privatized correctional institution may be free to accord inmates less rights and legal protections than a public facility. If corrections officials or political decision makers elect tightly to regulate and control the operations of private correctional facilities, they should do so because they want to assure that those confined within continue to benefit from the procedural protections afforded by the Constitution of the United States. In the absence of such continued direct government involvement, much of the limited progress made to date in assuring prisoner rights may be lost. In drawing up contracts for private correctional facilities, public officials must recognize the dangers of allowing private operators discretion over matters of such fundamental public concern. Advocates of prisoner's rights, however, should be alert to the possibility that governments will deliberately use privatization effectively to evade constitutional restraints.