Policy Options for Correctional Facilities in West Virginia

Richard A. Ball

Policy Monograph Series
No. 1

Institute for Public Affairs
West Virginia University

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FOREWORD

The Institute for Public Affairs at West Virginia University, in conjunction with the West Virginia Legislature and Executive, is pleased to present the first in a series of *Policy Monographs* addressing significant policy issues facing the State of West Virginia. Each monograph provides an overview of a particular policy problem and an array of options for decisionmakers.

Policy Monograph No. 1, *Policy Options for Correctional Facilities in West Virginia,* focuses on one of the most immediate concerns to state policymakers—what to do about the State Penitentiary at Moundsville. Although no one solution is recommended here, a number of options are analyzed and the experiences of other states are explored. It is hoped that this monograph will contribute to public discussion and informed commentary as the time approaches for the State to make this important decision. Of course, the opinions expressed in this monograph are those of the author and do not necessarily reflect the views of the Institute for Public Affairs nor of West Virginia University.

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CHAPTER 1

THE "CORRECTIONAL CRISIS"

Across the United States, correctional systems are faced with a serious dilemma amounting to a "correctional crisis." The problem has resulted from rising rates of incarceration that have crowded more and more inmates into deteriorating correctional institutions at a time when correctional funds are short. All this is exacerbated by the fact that the same time period has seen the rise of a prisoners' rights movement that has generated successful legal challenges from those suffering most directly from the "crisis." For more than a decade, West Virginia has been caught up in these developments, which have emerged most sharply in the recent West Virginia Supreme Court of Appeals' order that the Penitentiary at Moundsville be closed by July 1, 1992.

The closing of the Penitentiary is the result of the Court's finding that conditions are constitutionally inadequate and without significant possibility of improvement. Perhaps the best definition of correctional "adequacy" must be put in terms of the carefully defined "standards" developed by the American Correctional Association (ACA) in cooperation with the Commission on Accreditation for Corrections (American Correctional Association, 1981). Among the guiding documents are the "Code of Ethics" for Library Standards for Juvenile Correctional Industries, the *ASHRAE Handbook and Product Directory* of the American Society of Heating, Refrigeration and Air Conditioning Engineers, the *BOCA Basic Building Code* of the Building Officials and Code Administrators International, Inc., and the *Life Safety Code* of the National Fire Protection Association. *Recommended Dietary Allowances* materials from the National Academy of Sciences provide food service standards, and the *State Salary Survey* of the United States Office of Personnel Management provides standards with respect to wages and salaries. Considered as a whole, the correctional standards are consistent and detailed, resting upon the prevailing consensus of the experts as to what is deemed "adequate" with respect to their areas of concern.

Prisoners' Rights

For nearly the entire history of corrections in the United States, prisoners were regarded as essentially without legal rights. Over a century ago, in *Ruffin v. Commonwealth* (1871), the inmate was described as a "slave" of the state who had forfeited his or her rights upon sentencing. Institutional privileges were treated as matters entirely in the hands of prison administrators, who could grant them or take them away without explanation. The courts maintained a strictly "hands off" attitude. During these years observers often pointed to the paradox of justice in the U.S.—the way in which defendants were guaranteed so many substantive and procedural rights during the trial and almost none after sentencing.

This long-standing situation was summarized by the National Commission on Criminal Justice Standards and Goals for Corrections (1973:18) as follows:

> Judges felt that correctional administration was a technical matter to be left to experts rather than to courts, which were deemed ill-equipped to make appropriate evaluations. And to the extent that courts believed that offenders' complaints involved privileges rather than rights, there was no special necessity to confront correctional practices, even when they infringed on basic notions of human rights and dignity protected for other groups by constitutional doctrine.

Habeas Corpus Rights

Eventually one of the chief weapons in the hands of prisoners proved to be the writ of *habeas corpus*. When an individual was incarcerated under state or federal authority, he or she had long been recognized as still entitled to *habeas corpus* relief, as guaranteed by Article I, Section 9 of the United States Constitution, in addition to which protection was provided by the Federal *Habeas Corpus* Act as well as various state *habeas corpus* laws. Traditional use of the *habeas corpus* writ, however, was limited to contesting the legality of the incarceration itself. The opening for change came with the *Coffin v. Reichard* (1944) decision coming during WWII.

In the *Coffin* decision the Sixth Circuit U.S. Court of Appeals held that suits challenging the *conditions* of confinement were proper under the Federal *habeas corpus* law, reasoning as follows:

> A prisoner is entitled to the writ of *habeas corpus* when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits (*Coffin v Reichard,* 1944:447)

Despite the *Coffin* decision, however, the law required that inmates in state institutions exhaust all remedies at the state level before seeking relief through a federal writ of *habeas corpus*. This had the effect of delaying matters and slowing any tendency for prisoners' use of the federal approach for many years.

General Civil Rights

Ironically, the chief opening allowing pleas from inmates incarcerated in state institutions to come into the federal courts turned out to come through a long-dormant section of the Civil Rights Act of 1871, a statute passed in the same year the Ruffin decision was handed down. In *Monroe v Pape* (1961), the United States Supreme Court held that citizens could bring suits against state officials into the federal courts *without first exhausting state judicial remedies.* In addition to the possibility of monetary damages, this became the major advantage of such a suit compared to a *habeas corpus* approach, the major disadvantage being that the remedy of release from imprisonment available under successful *habeas corpus* was later ruled unavailable through this means (*Preiser v Rodriguez,* 1973).

The West Virginia Penitentiary Problem

The various court rulings with respect to prisoners' rights are quite complex. Key questions faced by the West Virginia Supreme Court of Appeals in dealing with the situation at the Penitentiary have included (1) issues of discipline and due process, (2) problems with respect to medical, dental and psychiatric care, (3) guidelines dealing with prison law libraries, (4) questions surrounding the status of administrative segregation, and (5) the extremely complex concept of "totality of conditions."

Discipline and Due Process. Throughout most of the history of corrections in the United States, common practice allowed even the harshest disciplinary decisions to be made with little or no evidence and virtually no appeal. With the beginning of the prisoners' rights movement in the 1960s, inmates had some success in seeking relief through pleas based on the due process clauses of the Fifth and Fourteenth Amendments. Still, the courts appeared to take a narrow approach, restricting such due process relief to situations in which "arbitrary and/or capricious" behavior on the part of the correctional authorities could be clearly established.

During the 1970s the courts began to intervene more directly in the specific procedures employed in disciplinary proceedings. In *Wolff v McDonnell* (1974), the U.S. Supreme Court ruled that an inmate must be given advance written notice of the charges against him or her at least 24 hours prior to his or her appearance before a prison hearing committee. The Court also required that there be a written statement of the findings, including relevant evidence

and reasons for any disciplinary action, that the inmate should be allowed to call witnesses and provide evidence in his or her defense provided that such would not pose undue problems for institutional security or correctional goals. The Court also ruled that the inmate must be allowed representation by surrogate counsel in the form of a "jailhouse lawyer" or prison staff member when the inmate was illiterate or the case too complex to be handled adequately by the inmate charged. Finally, the decision required that the hearing panel itself be impartial, suggesting that, for example, the members not include any individuals involved in the original charge or subsequent investigation. Although at the time the Court limited such due process quarantees, however, to proceedings that could result in solitary confinement or loss of "good time," subsequent decisions gave more consideration to general discipline and due process issues.

Medical, Dental, and Psychiatric Care. Inmates' rights to proper medical care are protected by common law, state statutes, the Civil Rights Act of 1964, the due process clause of the Fifth and Fourteenth Amendments, and the Eighth Amendment prohibition against cruel and unusual punishment. In *Estelle v Gamble* (1976:98) the U.S. Supreme Court defined relevant terms as follows:

> Deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoners' needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

In general, federal courts have taken the position that an "adequate" amount of medical care is essentially dependent on the facts of each case and has not set down a specific standard. It seems likely that the accepted notions of "adequate medical care" will shift with changes in the quality of care available in society at large as well as with changes in the prevailing views of members of the judiciary.

Law Libraries. More and more, a basic law library was deemed a right of prisoners. In *Younger v Gilmore* (1971) the U.S. Supreme Court ruled that the state must maintain in the prison library a number of law books and other legal materials adequate to inform inmates of issues of legal relevance to them. Six years later, in *Bounds v Smith* (1977), the Court ruled that even when "jailhouse lawyer" assistance is permitted by institutional policy, prison officials are still obligated to establish either a legal services program for the inmates or a law library sufficient to meet their needs.

Administrative Segregation. During the 1970s the movement for recognition of prisoners' rights encountered several problems. One of these had to do with

the fact that correctional staff remained in a position to insist that while prisoners *in general* might be entitled to certain rights, a "certain segment" of those incarcerated had to be denied them for various reasons. Included were those inmates who were segregated from the general prison population, whether for disciplinary reasons, for administrative reasons, or for their own protection. The key question that emerged had to do with the extent to which such segregated inmates could be denied the rights discussed above, as well as visitation, exercise, recreation and access to educational, vocational and rehabilitation services.

"Totality of Conditions." In a series of important court cases beginning in the early 1970s, lawyers for the prisoners began to cite a host of issues including violence, inadequate medical care, overcrowding, lack of exercise and recreation and inadequate educational, vocational and rehabilitation programs as representing a "totality of conditions," which *taken together* constituted "cruel and unusual punishment" under the Eighth Amendment. Such an approach made it unnecessary to rest the argument upon an allegation of one particular violation of prisoners' rights. In *Alabama v Pugh* (1978), the U.S. Supreme Court acknowledged some of the implications of the "totality of conditions" argument, and it soon became a favorite means of attacking prison conditions.

This argument had developed over many years. The framers of the Constitution included the Eighth Amendment in the Bill of Rights to protect convicts from torture—not from sentences to deplorable prison conditions (Granucci, 1969). During the twentieth century, however, the U. S. Supreme Court gradually expanded the coverage to include conditions that "shock the conscience" (*Rochin v California,* 1952) or are contrary to "the evolving standards of decency that mark the progress of a maturing society" (*Trop v Dulles*, 1958). These specifically include not only conditions that are by contemporary standards disproportionate to the offense (*Weems v U.S.*, 1910) but also those deemed excessive and unnecessary (*Gregg v Georgia*, 1976). But until the 1970s the Eighth Amendment was applied only to punishments inflicted against individual convicts rather than to deplorable prison conditions resulting from underfunding or poor management in general (Angelos and Jacobs, 1985).

With the *Pugh* decision and later rulings such as that in *Rhodes v Chapman* (1982) the U.S. Supreme Court extended the right to protection under the "totality of conditions" concept. In the latter, for example, the court held that even conditions that were less severe than the "unquestioned and serious deprivations of basic human needs" cited in earlier cases may, alone or in combination, deprive inmates of the minimal measures of the necessities of civilized life. By the middle of the 1980s most courts were holding that the sum of deplorable conditions may be unconstitutional even if the individual conditions taken alone are not (Angelos and Jacobs, 1985).

Conditions precluding exercise and recreation may be regarded as part of an unconstitutional "totality of conditions" in the event that such conditions are combined with others such as overcrowding or if inmates are subjected to the conditions for a prolonged period of time. Generally speaking prisoners are assumed to require a certain amount of exercise and recreation to remain in proper physical and mental condition. Deprivation of these "necessities" may be regarded as "cruel and unusual" when combined with other circumstances making up the "totality of conditions" in a particular facility or correctional system as a whole.

Crain v Bordenkircher

Developments in West Virginia have taken place within the national context described. Despite efforts to develop staff training, improve inmate classification, and implement a comprehensive correctional plan that had begun with the creation of a separate Division of Corrections in the late 1960s (Ball, 1968), West Virginia's correctional facilities had become by the early 1980s crowded, deteriorating institutions characterized by staffing problems and periodic upheavals. Faith in rehabilitation was hardly at a high point, and the correctional system was seriously underfunded. As in most other states, neither the legislative nor executive branches seemed willing or able to develop solutions.

Problems plagued the entire correctional system. The former juvenile correctional facility at Salem, formerly an institution limited to the confinement of adolescent females, was being used to house delinquent males. Although renovations had been undertaken, significant problems soon developed. The courts were intervening in the operation of the medium security facility at Huttonsville and the Penitentiary at Moundsville. Public debate continued as to the fate of the former facility for delinquent, adolescent males at Pruntytown. Considerable uncertainty existed about future directions.

Had these conditions appeared two decades earlier, it is unlikely that much would have been done. But the context of the 1980s was quite different, and judicial action, which had first become apparent in West Virginia during court interventions of the 1970s with respect to the treatment of juveniles, became more common. Court actions attempted to face more directly the issue of severe overcrowding, some inmates were screened for early release, and a number of legislators, judges, correctional officials and interested citizens tried in various ways to attend to prisoners' rights, relieve some of the pressure on the correctional system, and encourage general, systemic change.

The Habeas Corpus Action

Virtually everyone involved is well aware that the series of events that has finally turned the ongoing "crisis" into a public event had actually begun with a consolidated action for habeas corpus instituted by a group of inmates at the West Virginia Penitentiary at Moundsville in 1981. On June 10, 1981, The Honorable Arthur M. Recht of the First Judicial Circuit was appointed to conduct hearings on the issue as to whether conditions at the West Virginia Penitentiary constituted cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States and Article III, Section 5 of the Constitution of the State of West Virginia. Using the recently developed concept of "totality of conditions," the court ruled on June 21, 1982 that when *considered in the totality*, the conditions of confinement at the Penitentiary did indeed constitute a violation of the constitutional prohibition against cruel and unusual punishment.

The parties at issue had already agreed to a consent decree covering various prison policies and to the appointment of a Special Master to oversee change. This consent decree was made a part of Judge Recht's Final Order, which gave the Department of Corrections 180 days to submit a plan to bring the totality of conditions at the Penitentiary in line with constitutional standards.

Meanwhile, the West Virginia Supreme Court of Appeals had become more deeply concerned with correctional conditions and less willing to continue with a "hands off" policy. In *Cooper v. Gwinn* (1981), for example, the Court had become a part of the national trend embracing the accreditation process, ruling that the Department of Corrections had a statutory duty to establish and maintain rehabilitation programs for inmates which complied with the standards set by the American Correctional Association and the Commission on Accreditation for Corrections.

Upon the resignation of Judge Recht, the Honorable John Bronson became the presiding officer in the *Crain* case. On September 1, 1984, Judge Bronson approved the Compliance Plan submitted by the Department of Corrections. At this point the inmates appealed, maintaining that the Plan failed to meet the demands contained in Judge Recht's Final Order.

The Crain v Bordenkircher (1986) Ruling

On March 27, 1986, the West Virginia Supreme Court of Appeals issued its ruling. In *Crain v. Bordenkircher* (1986) the court ruled that although parts of the Compliance Plan could be approved, the Plan as a whole did not in fact meet the Recht requirements.

First, the court pointed to a number of "discrete violations" involving specific problems including (1) discipline and due process, (2) medical, dental

and psychiatric care, (3) the law library, and (4) conditions of administrative segregation. Beyond these specific violations, however, the court found that the Compliance Plan was inadequate in addressing the question of the "totality of conditions" at the Penitentiary, which according to the court had resulted in an overall atmosphere likely to lead to degeneration of both inmates and staff. Such conditions included (1) problems with a lack of satisfactory recreation and exercise and (2) deficiencies with respect to classification, education and rehabilitation. Above all the court insisted that the single most serious problem remained the deteriorated physical condition of a facility constructed in the 1860s and poorly manitained since then.

The Department of Corrections was ordered to develop a specific policy amendment that would insure a magistrate's decision on all disciplinary charges within three days of the conclusion of a hearing. The Department was also ordered to include in the Amended Compliance Plan the hiring of a full-time physician, abolition of reliance on untrained inmate staff to perform medical procedures, and development of a detailed protocol for receiving and screening inmates on a regular basis, along with plans for provision and delivery of adequate dental care, at least minimal treatment of mentally ill and retarded inmates, improved health care for segregated inmates, correction of deficiencies in medical facilities, and retention of all plans already approved by the court. The Court also directed the Department to include a plan for providing inmates with adequate time to use the law library and a policy recognizing the rights of inmates in administrative segregation to participate in the educational, vocational, recreational and other programs enjoyed by the general inmate population.

The Court ruling on the "totality of conditions" question was more complex. Beginning with the general conditions surrounding recreation and exercise, the court found that the Compliance Plan fell short of providing the "atmosphere that avoids physical, mental and social deterioration" stipulated in Judge Recht's Final Order, citing lack of equipment, the dilapidated and hazardous condition of the indoor recreation space and the fact that some inmates had no access to indoor recreation space at all. Turning to the general issue of rehabilitation, education, and classification within the "totality of conditions" prevailing at the Penitentiary, the Court directed the Department of Corrections to deal with the issue by specifying in the Amended Compliance Plan a detailed summary of procedures to be followed for entering into a contract with an independent expert every three years so as to provide for an evaluation and confirmation of continued compliance with American Correctional Association Standards as to academic and vocational education programs. Detailed procedures were ordered for providing personalized

instruction to segregated inmates and for revising plans for the Apprenticeship programs.

Finally, the Court ruled that the Compliance Plan was inadequate in failing to address such specific, central issues as that of cell size and in failing to face the necessity for massive renovation or new construction that would be necessary to bring the physical environment into compliance with the U.S. Constitution.

The Crain v Bordenkircher (1988) Ruling

The Amended Compliance Plan (West Virginia Department of Corrections, 1986) was submitted on September 6, 1986. It attempted to deal with the various "discrete violations" and to provide some means of addressing some of the "totality of conditions" issues but indicated that the Department did not have the funds available to deal with the physical facilities as necessary. In view of the situation, the Special Master appointed by the Court concluded that the Amended Compliance Plan as a whole showed no prospect of remedying the unconstitutional conditions, concluding that it was "hopelessly inadequate" and rcommending that the Penitentiary not be used to house any inmates after June 30, 1992 (McManus, 1988:1).

In its follow-up decision (*Crain v Bordenkircher*, 1988) the Court began by pointing to the national context described above, indicating quite clearly that if West Virginia did not act, the federal courts surely would, citing *Newman v Alabama* (1972), *Robinson v California* (1962) and *Campbell v Beto* (1972). Reviewing the situation, it then ordered that the West Virginia Penitentiary be closed by Jul y 1 ,1992. Acknowledging that this represented an extraordinary step, the Court pointed out that it remained a less severe action than the alternative under the inmates' petition. Then the Court noted that if the legislative and executive branches failed to act, the Penitentiary might have to be placed in receivership so as to allow for the construction of a new facility, citing *Alabama v Pugh* (1978), *Ruiz v Estelle* (1982), *Morgan v McDonough* (1976), *Inmates of Attica Correctional Facility v Rockefeller* (1971) and *Gates v Collier* (1974).

Finally, the Court required that all appellees in the case submit responses by May 2, 1989 to "show cause" why the Penitentiary should not be placed in receivership and why the Court should not proceed with an order of *mandamus* requiring the State Building Commission to provide for the financing of the new facility.

Acting with the initiative of the Governor, the Legislature responded with Senate Bill 389, which amended the already existing Regional Jail Authority legislation to alter the structure of the Authority and expand its mandate so as to bring the Penitentiary replacement into a high priority position vis-a-vis

construction of additional regional jails. The Court accepted this but directed appellees to submit a *specific plan* for the replacement of the Penitentiary.

Thus, to some the problem of "correctional alternatives for West Virginia" may be interpreted to mean, "What shall we do to prepare for the closing of the Penitentiary?" Seen this way, the various options consist of alternatives such as (1) renovation and/or construction of the facilities at Moundsville, (2) acquisition of property and construction of a new Penitentiary somewhere else, (3) acquisition of property and construction of a number of smaller, specialized facilities to handle the inmates currently housed at Moundsville, (4) a series of "bumping" moves by which prisoners at the Penitentiary are transferred to some facility such as the Huttonsville site while the latter "bump" others down the security chain with the lowest-risk inmates in the correctional system being released to make the necessary space, (5) some means of "privatization" by which the problems are turned over to the private sector, or (6) some combination of these and/or other options.

Actually, the "immediate options" listed are only a few of the "correctional alternatives" that should be considered by policymakers in West Virginia. Attention needs to be given to the larger issues of (1) controlling prison intake, (2) controlling length of incarceration stay, and (3) strategies for more effective management of total correctional system capacity. Otherwise, a new and expensive set of facilities replacing the current Penitentiary will still house problems of discipline and due process, medical, dental, and psychiatric care, access to law libraries, and issues of administrative segregation. And unless these larger issues are addressed, it is likely that there will be "more Moundsvilles" as actions are brought against jails and other correctional facilities in West Virginia. Nevertheless, this monograph will confine itself to the immediate problem, with the Penitentiary replacement issue to be considered in the next chapter, which will be followed by a chapter examining "privatization" options.

CHAPTER 2

PENITENTIARY REPLACEMENT OPTIONS

Perhaps the most important change in corrections construction strategy in recent decades lies in recognition of the principle that "bricks and mortar" work should be based on a philosophy of management (Misfud, 1984). In keeping with this recognition, recent correctional thought has led to the evolution of a "new generation" style of correctional facilities based upon the most recent developments in correctional management.

One of the leaders of the contemporary correctional movement has summarized the shift as follows:

> At the heart of the "new generation" institution is a particular style of inmate supervision reflected in both the design and management of the facility. Inmate supervision in a "new generation" jail or prison is the responsibility of staff who are stationed inside housing units. . . . Cells in a "new generation" institution are arranged around a central dayroom, permitting a single correctional officer to view all areas in the housing unit. This configuration is sometimes termed "podular" to emphasize its contrast to a linear arrangement of cells along a corridor (DeWitt, 1987:5).

One of the best examples of this arrangement is the new Ross Correctional Institution in Ohio. Housing units there are 126-bed buildings, but within each building inmates are divided into two pods of 63 single cells. Buildings have been planned according to the "unit management" concept, in which each housing unit is operated as an individual facility within the larger institution.

This new housing design was the outcome of a search for better correctional management. In the late 1960s and early 1970s the Federal Bureau of Corrections began to evaluate the effectiveness of bringing inmate counseling services into the housing units (DeWitt, 1987). The eventual result was a decentralization that included not only counselors but managers, clerical personnel and others in the unit, replacing the atmosphere of a huge, impersonal bureaucracy with a much more normal environment on a "human

scale." Buildings themselves can be designed to minimize escapes through high security windows, special building material, and sophisticated monitoring devices, but the interior environment can be relaxed.

Contemporary Housing Concepts

The more objective measures of correctional housing adequacy developed in recent years have defined capacity in terms of square feet of space and related measurable units, providing indexes of (1) spatial density, (2) social density, and (3) mobility (Mullen, 1985a). But although each of these is very important, none captures the essence of the totality of conditions comprising "institutional characteristics" (Mullen, 1985a). They are, however, useful when applied in concert with other indices.

Groups setting standards for prison capacity have tended to converge on a measure of *spatial density* calling for 60 square feet of confinement space per inmate—roughly the size of the average bathroom (Mullen, 1985a). This does not strike most observers as lavish waste of space. Yet according to a survey conducted in 1978, two-thirds of all state prisoners lived in space below this minimum standard (Mullen and Smith, 1980).

While simple measures of spatial density appear rather precise, they may tell less about the *social density* and the psychological aspects of crowding than is usually suggested. The problem is that the experience of privacy, although related to spatial density, does not bear a one-to-one relationship to it. One study, for example, found that once space per inmate exceeds 50 square feet, the number of people present and the arrangement of the space may be more important factors in the onset of illness, death, suicide and disciplinary problems than space per inmate (McCain et al., 1980).

The temporal factor is of as much importance as the spatial factor, so that the *mobility* factor enters the picture because the sheer amount of time spent in a given space may make it more or less stressful. Thus, for example, one measure of overcrowding refers to the amount of time inmates are confined to their cells. The manner in which problems feed on one another, however, is once again apparent in the fact that spatial density is associated with social density and both tend to lead to less inmate mobility. This tends to be the case because of the heightened tension, to which the staff responds by "locking down" inmates and restricting their movements within the institution even when they are allowed outside their cells.

The housing issue cannot, however, be judged merely in terms of these spatial density, social density and mobility factors, precise as they may appear. As Mullen (1985a) has pointed out, the use of these so-called "objective measures" may be deceptive, in that the housing experience is in many ways a

consequence of general *environmental factors* such as the age of the facility, its food service and sanitation practices, and its lighting, air quality, and availability of programs for exercise, work, recreation, and medical care. It is for this reason that the renovation/construction of new physical facilities alone may not prove sufficient to solve the prison housing problem.

Contemporary Construction Concepts

The new correctional construction methods have evolved from development in urban housing construction, with an emphasis on prefabricated concrete building components. They rest on a "systems" approach to construction (DeWitt, 1987). The use of a precast exterior wall permits less secure construction for interior walls and a more "liveable" interior that fosters a sense of "ownership" among inmates. This sense of "ownership," which leads the inmates to view the space as belonging to them for the period of incarceration, is widely regarded as creating a very positive attitude. It seems to contribute to inmate self-esteem and to the reduction of friction within the housing unit.

Despite the more "liveable" and "humane" appearance of these facilities, they can be made very secure. Newly designed perimeter security systems are both sophisticated and effective (Camp and Camp, 1987). Security devices can be prefabricated into the walls, windows can be designed so as to be both attractive and safe, and the entire facility can be designed with an appearance of openness and mobility combined with the tightest monitoring (Committee on Architecture for Justice, 1985).

Both the National Institute of Corrections (NIC) and the National Institute of Justice (NIJ) are monitoring the new construction strategies (DeWitt, 1986a). Concrete cell modules have been tested throughout Florida, Wyoming and Louisiana, and they also show great promise (DeWitt, 1986d). One of the chief problems with comparisons, however, lies in the fact that cost figures such as costs per square foot or cost per inmate can be very misleading, requiring a close examination of a variety of cost figures (Carter, 1984).

When California faced its prison expansion problem in the early 1980s, it had not constructed a new prison since before 1965. In 1985 the state began plans to build 25,000 additional bed spaces in 14 new institutions, with an estimated cost to exceed $1.8 billion between 1985 and 1990 (Allen and Simonsen, 1989). Having commissioned a major study to explore different possibilities, California eventually settled on a system of prefabricated concrete components (DeWitt, 1986c). The first units were installed in the California Medical Facility at Vacaville, a high security institution specializing in medical and psychiatric treatment.

The California Department of Corrections was able to construct and open a new 300-bed addition at Vacaville in only eight months and to add 900 more beds in less than a year (Allen and Simonsen, 1989). The entire work process rested on two related methods—"Fast Track" and "Value Engineering." The first is a procedure for acceleration of the building schedule by starting construction at the earliest possible moment, overlapping the phase design. The second proceeds by analysis of alternative systems, equipment and materials to identify the relative merits of each option. Both of these can be integrated into creative financial approaches (DeWitt, 1986b).

These construction approaches have opened up some new options. In South Carolina, for example, inmates themselves have been used successfully in the construction of new prisons employing some of the newly developed construction techniques (Carter and Humphries, 1987). In Oklahoma, successful prison expansion was undertaken in a remarkably short time, with much less expense than had been envisioned (DeWitt and Unger, 1987).

These new developments are important, and they form much of the foundation for the renovation/construction options suggested by consultants who were commissioned to study various alternatives for replacement of the West Virginia Penitentiary by a single facility still to be located at Moundsville. Once this is realized, however, it is possible to conceive of other construction options, including construction of several smaller, specialized correctional facilities. Likewise, the problem could be approached through some combination of "privatization" options in which the private sector assumed a major role. The latter approach could, for example, include various combinations involving contracting out services, contracting for inmate labor, ownership and/or operation of correctional facilities, or even construction and lease/purchasing plans. With these possibilities in mind, this chapter will examine options involving renovation/construction by the State while the next will explore some of the "privatization" options.

Renovation/Construction Options Under the Assumption of One Penitentiary Located at Moundsville

During 1986 the Special Master appointed by the West Virginia Supreme Court of Appeals, working in conjunction with the Commissioner of Corrections, requested technical assistance from the National Institute of Corrections to evaluate the West Virginia Penitentiary and outline potential development options. Completed the following year, the *Assessment of Development Options for the West Virginia State Penitentiary* (Budzinski and Carter, 1987) made a

point of stressing that its proposals had remained within certain specified limits. It was specifically addressed to developing various possibilities should the eventual policy decision confine itself to options involving renovation of the present Penitentiary, some combination of renovation and new construction there, or construction of a single, new Penitentiary at Moundsville. Thus, the report took the stance that, "Although the magnitude of the need for physical improvements at the State Penitentiary is substantial, this report is limited to defining, in conceptual terms, the potential capital and operational implications of three basic improvement approaches" (Budzinski and Carter, 1987:1).

One of the strengths of the study is that the various objectives of any such developmental plan were outlined with special care. Careful consideration of the objectives as outlined shows that they might be accomplished by an alternative siting of the Penitentiary or by construction of several smaller facilities at different sites. The objectives read as follows (Budzinski and Carter, 1987:11):

1. To develop improvements options that are in direct response to a comprehensive management and operational program that ensure the efficient and effective delivery of services to inmates while providing a safe and secure environment.
2. To develop space standards that are in keeping with the recommendations of the American Correctional Association and the National Institute of Corrections.
3. To define inmate living areas that house no more than 64 individuals in a single environment.
4. To explore opportunities through operations and design approaches that encourage the decentralization of management and services to the housing unit.
5. To provide for the separation of high risk and general population inmates through design and operational procedures.
6. To define cost-effective design and operational options for the facility.
7. To base the development of conceptual options upon the need to provide approximately 700 bedspaces in the following categories:
    a. 50 cells for punitive segregation
    b. 100 cells for long-term administrative segregation
    c. 150 cells for inmate cadre housing
    d. 50 cells for protective custody housing
    e. 350 cells for general male medium custody housing.

Following directions to examine what might be done with the Moundsville site, the *Assessment of Development Options* set forth three different alternatives.

These included (1) new housing or renovation of existing housing, (2) partial new housing with renovation of the existing facility, and (3) construction of a new facility. Although estimates of construction costs were provided along with staff estimates, the report made it very clear that these estimates would have to be confirmed by more detailed analysis in the event that a decision was made to proceed at the Moundsville site.

Option 1: New Housing/Renovation of Existing Housing

The major operating premise behind the option for new housing or renovation of existing housing at the Penitentiary was that the existing structure was not designed for the most cost-effective operation and does not provide the type of environment that is most conducive to managing inmates of varying classification levels. Built in the middle of the nineteenth century, the multi-tiered housing at the Penitentiary had been regarded as the latest in modernity at the turn of the century, when massive, Gothic structures were in fashion, labor was cheap, and management consisted primarily of shouting orders. Today it is something of a cumbersome dinosaur.

As the consultants have indicated, not only does the Penitentiary violate comtemporary correctional standards, but it is too staff intensive, and it does not permit separation of inmates into definable units so as to allow for an effective unit management approach. No matter what alternative is selected, it must break down the institution into subunits if it is to follow the best of contemporary correctional thought. The first option considered calls for *staged demolition* along with construction of up-to-date housing units.

This approach would allow the State to begin expansion of the penitentiary without relocating inmates to another site during construction. Although it would pose many security problems, Option 1 attempts to deal with them as well as possible, despite the fact that the transition would take many years. To minimize problems, Option 1 would proceed in five specific phases from (1) construction of a new 100-bed facility along the East Wall of the Penitentiary, to (2) construction of a new 200-bed unit in the area currently occupied by the Commissary, the Old Men's Colony, and North Hall, (3) demolition of the Inmate Cadre and gymnasium area and construction of a new 100-bed unit, (4) relocation of inmates currently housed in cell blocks "L" and "M" and construction of a new 100-bed unit there, and (5) demolition of the "J" and "K" cell blocks and construction of 200 new bedspaces (Budzinski and Carter, 1987).

Phase 1. The first phase of Option 1 could involve construction of a new 100-bed unit along the East Wall, a unit designed for "special management inmates," including maximum security and medical bedspaces. This unit could

have a separate entrance and a segregated outdoor recreation area. When completed, it would allow for relocation of inmates currently confined on the Second Floor of the Old Men's Colony as well as the high-risk inmates in North Hall. At that point, the part of the facility north of the Old Administration Building could be demolished, and the Old Administration building, rather than being renovated, could be demolished within five years.

Phase 1 of Option 1 could also include the remodeling of the first floor that housed food preparation and inmate dining through December 1986. This area was proposed as a space for badly needed program and visitation support. Any effort to use the Old Administration Building for program and administrative services could then be abandoned.

Phase 2. The second phase of the new housing/ renovation option could consist of construction of a new 200-bed unit in the area now occupied by the Commissary, Old Men's Colony, and North Hall, which would now be available. Construction was proposed to include a new "circulation spine" and outdoor recreation areas immediately adjacent to the housing units. As part of this phase, the existing laundry could be demolished and a new support building constructed adjacent to the recently opened food service and dining building.

Once the new 200-bed unit was completed, inmates currently housed in the Protective Custody, Old Men's Colony and Inmate Cadre section could be relocated there. The present Inmate Cadre housing area at the southwest quadrant could then be demolished, along with the Old Administration Building and the former kitchen/dining room and medical area, so as to allow space for construction of a new administration and support services building.

Phase 3. At this point, a new 100-bed unit could be constructed in the southwest quadrant. This new unit would provide space for inmates currently located elsewhere in areas requiring attention. By the end of this phase of Option 1, considerable relocating would already have been accomplished and more could begin.

Phase 4. In the fourth phase of Option 1, the inmates currently housed in cell blocks "L" and "M" could be relocated to the new housing constructed during the third phase. This would then make possible demolition of the "L" and "M" cell blocks, where another new, 100-bed unit would be constructed. The offices currently located in the New Administration wing of the existing building could be relocated to the newly constructed administration and support building and circulation spine completed that would link the entire correctional facility.

Phase 5. The final phase of Option 1 could involve demolition of the existing "J" and "K" cell blocks and construction of 200 additional bedspaces. In a total

master plan for a 10-year period, Option 1 in its entirety would result in the construction of a completely new facility, complete with 700 bedspaces, all within the present site. Although the West Wall would have had to be reconstructed, most of the walls to the north, south and east could be retained.

With demolition costs as a significant part of the total, and because of the complications resulting from construction within the confines of the existing facility, the rough cost estimate was set at $52,520,000, which is approximately $75,000 per bedspace. Major problems with Option 1 include the 10-year time period, security risks connected with construction inside a maximum security facility full of inmates, and the need for additional staff to deal with administrative and construction complications. On the other hand, the major advantage is that a 700-bed facility meeting American Correctional Association standards can be constructed on the present site, requiring no additional land. Furthermore, new jobs would be created in the community during the construction and in the form of new staff positions afterward.

Option 2: Partial New Housing

The second option suggested by the *Assessment of Development Options for the West Virginia State Penitentiary* combines some construction with an effort to generate improved bedspaces from the existing housing units by converting the existing 35-square-foot single cells to 70-square-foot single cells (Budzinski and Carter, 1987). Under this option, the present four-tiered cell blocks could be subdivided horizontally to create two-tiered dayroom spaces. This would occur in North Hall, New Wall Cell block and the existing "R" and "P" cell block, with the process to be accomplished in three phases.

Phase 1. The first phase could involve construction of a new, 250-bed facility. This facility could be constructed along the East Wall. It would have a separate entrance, and would feature four levels and be subdivided into five 50-bed housing units.

Phase 2. The second phase of Option 2 could see renovation of the present Commissary for dormitory use. It could also include renovation of North Hall for 86 single cells. During this phase, the New Administration Building could be renovated for program use, and the former kitchen/dining area converted into a 60 single cell housing unit.

Phase 3. The third phase of Option 2 could include renovation of New Wall for 144 single cells. Cell block "R" and "P" could be redone to create 80 single cells. Finally, this phase could see renovation of the Inmate Cadre area for 18 segregation cells.

In addition to the jobs provided to the community, Option 2 has several advantages of its own. First, it does not involve the demolition of any major

existing building. Second, the time frame for completion drops from six to eight years rather than the 10 years of Option 1. Finally, at an estimated cost of $26,100,000, this option is approximately 50% cheaper than Option 1.

There are, however, several disadvantages to Option 2 in addition to the security problems faced with Option 1. For example, when completed, this option would have generated only 35,000 square feet of newly renovated program space, which falls far short of the program space needed to support a 700-bed population. Also, the cells, although larger, would still be located in the interior of the institution, without natural lighting. Some natural lighting could be introduced to the dayroom areas, but this would hardly provide desirable living conditions.

Option 3: Construction of a Totally New Facility

The third option proposed by Budzinski and Carter (1987) involves the construction of a new facility. Under this option the State could select a site of approximately 50 acres for a modern correctional facility designed around the unit management approach. Based on the best experience available, the report suggested that the State plan for approximately 450 gross square feet per inmate.

Under Option 3 one housing unit of 96 beds could be dedicated to inmates assigned to punitive and disciplinary segregation. The remainder of the prison population could be housed in units of approximately 125 single cells each, in a configuration similar to the new construction approach used by South Carolina. Medium security inmates could be housed in five buildings of 125 single cells each, further subdivided into dayroom units of approximately 62 single cells. The entire plan is similar to the approach used by the Federal Bureau of Prisons in its new facilities constructed in Phoenix, Florida, and Otisville, New York and to the new 1,250 bed facility constructed at Chillicothe by the State of Ohio.

The facility proposed under Option 3 would include 721 bedspaces, requiring approximately 325,000 square feet. Calculations based on the average $95 per square foot costs for the South Carolina and Ohio facilities with a five percent construction contingency produce a total cost estimate of $32,500,000. As with each of the other options, there are advantages and disadvantages.

Such a facility would provide some major advantages over either of the plans set forth in the first two options. It would provide approximately 180,000 square feet of program and support service space. It could be constructed within a time frame of from 24–30 months using normal construction methods. Perhaps most importantly, it could be designed to meet the operational staff efficiency goals that have been achieved in other states with similar planning, allowing for the most up-to-date application of contemporary correctional management.

As for disadvantages, one involves the complications of site selection. Another involves actual site acquisition, which is not always a simple matter, although it might be simplified by the fact that residents in the Moundsville area have long experience with a maximum security facility in their midst. By far the major disadvantage of Option 3, of course, is obviously the total building cost, which is considerably higher than that offered by either Option 1 or Option 2.

Staffing Implications

The analysis of various possible options for the institution at Moundsville itself includes not only construction and renovation costs but also an attempt to provide estimates of differential staffing requirements under each of the three options. One working assumption is that housing components would have to be staffed by one correctional officer for each shift with the exception of the segregation and maximum security areas and dormitory housing. Another assumption is that escort officers would have to be assigned at the rate of one officer for each 100 beds for each of the three shifts, with the exception of segregation and maximum security where two officers per shift would be assigned.

Under these working assumptions, there are some major differences between the three options with respect to correctional officer staffing demands. Option 2, for example, calls for the utilization of existing housing units and the subdivision of these housing units into two-tiered dayroom spaces, which would require a minimum of 16 housing components, ranging in size from 20 to 36 beds, with one officer assigned to each dayroom for each of the three shifts. Option 3, on the other hand, requires only 12 separate housing units with a similar staffing assignment of one correctional officer per dayroom on each shift. The staffing variations across these options are revealing with respect to correctional management.

While Option 1 requires 95 housing unit officers and Option 3 requires 98, the configuration of Option 2 actually requires 134 officers to staff the housing units. While Option 1 requires 50 escort officers, and Option 2 requires only 45, Option 3 requires 60 officers. What this means is that Option 2 requires approximately 25% more officers to staff the facility, for a total of 194 officers as compared to the 145 required by Option 1 and the 143 required by Option 3. At an estimated annual average cost of $22,000 per staff position, including fringe benefit calculations, the difference between Option 3 and Option 2 on an annual basis is approximately $1,200,000. Over a 30-year time frame, the difference amounts to more than $36,000,000, the approximate cost of a new 721-bed facility.

As the consultants point out, their estimates for housing unit officers and escort officers represent only part of the differential staffing picture. Their estimates did not include, for example, additional security staff for control stations, outdoor recreation, interior corridors, and other positions requiring staff coverage. Such estimates could not have been made without much more specific designs. Nevertheless, they themselves conclude that because Option 3 can be designed with a specific staffing objective in mind while Option 2, for example, still ties staffing to the old prison configuration, staff savings under Option 3 are likely to be substantial.

Recommendation of the Consultants

Although not required under the conditions of the technical assistance contract, the *Assessment of Development Options for the West Virginia State Penitentiary* concludes its review of the three options by strongly recommending Option 3. Although the issue of whether the problems of the Penitentiary ought to be approached by continuing to consider it as one entity, as those contracting for the *Assessment* stipulated, it seems clear that Option 3 is the most advantageous of the three alternatives considered. The capital difference between Option 2 involving substantial renovation of the existing facility and Option 3 involving the construction of an entirely new state-of-the-art facility is only approximately $6,000,000 (Budzinski and Carter, 1987). The estimated staff savings in housing and escort staff alone will account for this difference in approximately five years. Thus, at the end of a five-year period following the opening of a completely new facility, West Virginia would have spent no more money than would have been expended following Option 2 and yet would have a vastly superior facility.

Options Under Other Assumptions

There are, of course, many alternatives to the construction of one large Penitentiary at Moundsville as a direct replacement for the historical facility. A large institution could be built somewhere else; several smaller facilities could be constructed, or some "privatization" arrangement could be negotiated. Under the unit management concept, there is no real need for all the subunits to be located within the same walls or for all of them to be operated by the State of West Virginia. Under unit management the ideal is that each subunit will be operated somewhat autonomously, and this is in some ways easier to achieve at separate locations with separate management.

Reserving the "privatization" possibilities for the next chapter, some of the alternative siting options can be considered here under assumptions that a single facility or several smaller facilites could be constructed and operated by

the State somewhere else in West Virginia. Construction of a single replacement facility in an area of West Virginia other than Moundsville has, for example, been suggested as one option. The bulk of the inmates housed at the Moundsville site are from areas much further south in West Virginia. The travel distance involved probably does make visitation somewhat more difficult, although no careful study of this problem has ever been made.

The unit management concept itself also suggests the alternative of several smaller, specialized facilities at different locations. Correctional authorities generally agree that this option may involve some disadvantage in initial construction costs, but the day-to-day operation may be greatly facilitated because different categories of imates are so completely separated. There is also some evidence that it may be easier to maintain a correctional philosophy aimed at, for example, mentally disturbed inmates when staff dealing with such inmates are operating in a facility separate from a maximum security institution for the most dangerous, high-risk prisoners. Unfortunately, this option may have some disadvantages associated, for example, with the need to maintain a law library at each separate facility so as to allow for inmate access.

Some possible alternatives include construction of separate facilities for the mentally disturbed, for geriatric inmates, for those in need of medium custody and for the most "hard-core" who must be housed in a "supersecure" facility. There may be some merit, for example, in housing mentally disturbed inmates in a facility near a mental institution. In such a location a significant pool of psychiatric assistance is only minutes away. Furthermore, mutual training programs and mingling of staff from the different facilities could facilitate movement away from a traditional "prison culture" to a more treatment-oriented approach.

There has already been considerable discussion about moving the "Old Men's Colony" from the present Penitentiary setting to another, perhaps more suitable location. Offenders assigned to geriatric quarters are often prisoners in need of special medical attention who pose no major security risks. Because they need not be housed in maximum security units, and in view of their medical needs, it may be appropriate to locate them in a separate facility with a special management philosophy and adjacent medical care.

One of the problems sometimes cited with respect to the correctional institution at Huttonsville is that although classified as a "medium security" facility, it is in many ways closer to minimum security. This leads to a situation in which prisoners seen as needing somewhat higher custody than that provided at Huttonsville tend to be transferred to the maximum security oriented Penitentiary at Moundsville. In view of this, one option worth considering is construction of a separate, medium security facility. Such a facility could serve to remove

many inmates from the Penitentiary location to a site conducive to amelioration of the traditional "prison culture" problem through specialized staff training and a management policy tailored to lower-risk inmates.

Any such options will still require construction of a maximum security facility. If at all possible, this should be preceded by a careful classification study. Some have suggested, for example, that perhaps as few as 10% of the prisoners currently serving time in the Penitentiary really require such expensive custody. If this is so, the new maximum security facility could be fairly small and highly secure, with escapes and internal incidents almost entirely eliminated. With maximum security cellspace costs so much higher than for lesser security facilities, the cost savings would be enormous. And with the truly "hard-core" isolated from other prisoners under such tight custody, exploitation of the more vulnerable inmates could be greatly reduced.

In considering these options, siting issues should be kept in mind. Community involvement in prison siting has become a highly sophisticated process (Travis and Sheridan, 1983; Travis and Sheridan, 1986). As a result of its own experience, the Federal Bureau of Prisons has developed several suggestions for consideration (Houk, 1987). Beyond endorsement by local officials and the general public and a site including some 200-250 acres with adequate visual buffers, it is suggested, for example, that the facility be located within 50 miles of a large population center so as to insure available community resources.

Based on the federal experience, Houk (1987) has recommended that any such facility be located within one hour's distance of a full-service hospital, with complete fire protection services, preferably by a public-service fire department. Adequate or expandable public utilities are considered critical. Accessibility to public transportation and major highway systems, along with nearby higher education facilities, are strongly recommended (Houk, 1986). Given the fact that the federal experience defines a "large population center" as an urban center of at least 50,000 people, siting in West Virginia should proceed with special care. It may not be necessary to meet all these criteria in such a rural state, but careful attention should be given to the local infrastructure.

Financing Options

States typically must finance prison construction by budgetary appropriations or by issuing general obligation bonds. Today there are serious problems with both approaches, and new options are sorely needed. Through Senate Bill 389, West Virginia has apparently moved into a financing approach that may deal with the costs of prison renovation and construction through the newly restructured Regional Jail and Corrections Facilities Authority. There are, however, some uncertainties here.

"Pay-as-you-go" budgetary appropriations work best where capital needs are steady and modest and financial capability is adequate (Mullen et al., 1985). This has the advantage of saving interest costs, which can exceed the original capital cost of construction. It also provides greater flexibility in the event of fiscal emergencies and avoids the sizeable costs associated with issuing bonds.

Still, pay-as-you-go has some major disadvantages, both philosophical and practical. Philosophically, there is the traditional principle that projects yielding benefits over many years should be paid for by the future users rather than by those who may receive no benefits over most of its lifetime (Musgrave, 1959). Practically, the major problem is simply that even if spread out over the two or more years it takes to complete construction without borrowing, the "pay-as-you-go" approach puts the entire financial burden on two or three annual budgets and is almost impossible in a state such as West Virginia. Thus, the need for an alternative has been quite clear.

At one time, the pay-as-you-go method was widely used to accumulate reserves in a "sinking fund" until enough had been accumulated to undertake construction. As fiscal pressures built, however, state and local governments began to dip into such funds, and this capital reserve method became less viable in practical, political terms. Only about 40% of state prison systems surveyed in 1985 were relying exclusively on the pay-as-you-go method of financing new construction or renovation, including Alabama, Arkansas, Florida, Georgia, Tennessee and Texas (Mullen et al., 1985). As with West Virginia, however, this method is simply not feasible for most states.

Thus, many states tend to turn almost automatically to bond issues. This alternative has major disadvantages in many states because general obligation bonds may be subject to voter approval or issuance may conflict with debt limitations. Still, as of 1985, 50% of the states surveyed, including Kentucky, Missouri, New Jersey and Rhode Island, were relying on bond issues (Mullen et al., 1985).

The trend seems to be moving away from this option, however, for a number of reasons. Among them is the increased difficulty of obtaining voter approval for bonds designed to support construction of correctional facilities. Like West Virginia, most states are in need of new schools, new highways and bridges, and a host of other high priority projects for which available funds are limited. At the same time, the "get tough" tenor of the times has produced a great deal of resistance to perceived "coddling" of criminals in facilities that, although constitutionally required, are often seen as "fancy country clubs." The result is that many referenda calling for such support have failed.

Even if voter approval can be obtained supporting issuance of bonds for correctional construction, the process may involve considerable delay. This

delay often results in a disintegration of the political consensus that took so long to build. Unforeseen problems may arise that can derail the best laid plans. Finally, the delay always tends to increase costs. All of this means that the traditional bond issue approach has encountered increasing problems.

As for debt limitations, the question has been whether to circumvent them when they restrict desirable and/or necessary projects, or to find an alternative to the traditional approach to general obligation bonds. By the middle 1980s, states such as Alaska, Nevada, New York and Ohio were combining current revenues with bond proceeds to finance most of their prisons (Mullen et al., 1985). These states were trying to handle as much as seemed feasible under the circumstances by a pay-as-you-go approach while resorting to bonds to fund the remainder of their needs. In this way, they hoped to save on interest charges and retain some fiscal flexibility by limiting fixed obligations and still avoid "budget busting" appropriations.

An increasingly common approach is to turn to various types of limited obligation bonds. Also known as revenue bonds, these are sold for purposes that produce revenue, such as airports or sewer systems. Not backed by the "full faith and credit" of the state but rather by various service charges and fees, this bond strategy is now being examined in many jurisdictions as a way of financing the construction of correctional facilities (Mullen et al., 1985).

Because of these problems, some jurisdictions have experimented with nonguaranteed bonds, but this seems to offer little hope in most cases. Other jurisdictions have tried to solve both the voter approval problem and the debt limit problem by creating special legal entities such as special districts or special authorities. The creation of special legal entities typically involves either (1) a joint powers authority, (2) a public works board, or (3) a nonprofit corporation (Mullen et al., 1985).

The first option for creation of the special legal entity requires two or more governmental entities to join together for the purpose of building, owning and operating a building that serves common statutory functions. The second is typically created to finance the construction of state office buildings. The third involves creation of a nonprofit corporation for the sole purpose of issuing lease/purchase bonds to finance construction. Time will tell whether the revisions of the original Regional Jail Authority provisions through Senate Bill 389 will solve these financing problems for West Virginia.

The National Construction Information Exchange Program

No matter what renovation/construction option is favored or how financing is arranged, it is important that West Virginia policymakers take advantage of the

Construction Information Exchange set up by the National Institute of Justice. It has become clear that the experiences of one state can be transferred to others and that even facility designs themselves can be shared. Advantages of sharing include (1) savings of time, (2) cost reduction, (3) operational facilitation, (4) adaptability, and (5) staff utilization (National Institute of Justice, 1989).

Time is the most obvious saving to be made through a cooperative approach. Time is saved because engineering and construction problems have already been worked out. For example, at one facility studied by the National Institute of Justice (1989), design time was only one-sixth of that required for a tailor-made institution. Not only is it unnecessary to complete the design all over again, but there are fewer surprises and delays in actual construction simply because of the previous experience. The conclusion that the ". . . dramatic difference is of critical importance to a jurisdiction under court order to relieve crowding" could have been aimed specifically at West Virginia (National Institute of Justice, 1989:6).

The so-called "site-adapt" process also saves money. South Carolina, for example, saved additional money by awarding one contractor contracts to build two facilities. Because of the similarity in design, the bid for the second could be some five percent lower, a significant sum when applied to program needs. Much of the saving results from the fact that if the facility is prefabricated, identical items such as doors, window frames and other security hardware can be mass-produced. Building materials such as roofing can also be standardized at a considerable cost savings.

The "site-adapt" process tends to facilitate operations because the likelihood of problems is reduced in that surprises are usually discovered and resolved before they are duplicated. This is important because design flaws usually require either new construction or additional staff to handle the problem spots, both of which can increase cost considerably and still not provide the operational smoothness desired. Using the clearinghouse approach, it is possible to observe operations in a sample of possible facilities so that planners can select a design in terms of the operational approach itself.

This process is also characterized by considerable adaptability. Designs need not be adopted in toto. Selected aspects can be adapted to the new site. Of course, savings in time and costs will not be as great, and one can be less sure that the design has been "debugged," but there are still major advantages over begining anew.

Finally, staff utilization may be greatly improved by cooperative efforts to examine previous work. Transfer of design, for example, provides a standardized environment, thereby reinforcing the guiding philosophy that was "built in" to the facility. In South Carolina, staff training for new institutions was simplified because staff could witness in the operations of prototype facilities an atmosphere similar to that in which they would later function (National Institute of Justice, 1989).

CHAPTER 3

THE PRIVATIZATION OPTION

Because of the possibilities latent in various "privatization" options, this monograph will now turn to an examination of some of the alternatives available in West Virginia. The decade of the 1980s has seen a rising debate over the concept of "privatization," i.e., the transfer of correctional functions from the government sector to the private sector. Legislative hearings have been held in many states as well as in the U.S. Congress (U.S. Congress, 1985, 1986) and by national organizations of state officials (National Conference of State Legislatures, 1985; Council of State Governments, 1986). While various private entities have been strong advocates, many attorneys, criminal justice planners and government employee unions have expressed either deep concern or outright opposition (Tolchin, 1986). Nevertheless, in February 1985, the National Governors' Association (NGA) gave its limited endorsement to contracting for prison operations (Hackett et al., 1987).

Since the early 1980s the federal government has considered significant legislation designed to facilitate prison privatization. In 1984, for example, Congress revised regulations making interstate markets more accessible to encourage the contracting out of prison labor. As the Heritage Foundation (1988:7) has put it, "By authorizing twenty states to trade goods across state lines, the Prison Industries Enhancement Program under the Justice Assistance Act of 1984 expanded and diversified the market of products manufactured by prison industries." More recently the President's Commission on Privatization (1988) recommended that the Bureau of Prisons commission a study on the feasibility of contracting out a federal correctional facility or even a U.S. penitentiary and urged the Department of Justice to continue its efforts as advisor on prison privatization for state and local government.

Forms of Privatization

Privatization can take many different forms. They include (1) contracting out services, (2) contracting out prison labor, (3) ownership and operation of

prisons, and (4) construction of prisons and lease/purchasing arrangements. Each of these has historical precedents in the sense that such arrangements were not uncommon centuries ago, where not only private groups but competing social institutions such as the church performed penal services, made use of prison labor, and constructed, owned and managed prisons. With the rise of strong central government, however, imprisonment became essentially a function of the state. The present search for private alternatives represents both frustration with correctional problems and renewed faith in the superiority of the private sector and the power of the profit motive.

Contracting Out Services

The most common form of prison privatization remains the tradition of contracting out services, and it has not been absent from West Virginia. It has been standard practice in U.S. corrections for decades. For example, few expect that prisons will have available or should hire staff expertise to offer specialized services such as college courses or to conduct certain highly sophisticated technical work. By the middle 1980s, however, 39 states had hired private firms to provide a variety of services usually offered by in-house staff, feeling that they could be delivered less expensively and more effectively through private concerns (Massachusetts Legislative Research Council, 1986). The services contracted out included medical treatment, mental health care, drug treatment, education, staff training, vocational training and counseling.

In a state the size of West Virginia, there are many advantages to contracting out for services. In fact, this option is almost the sole alternative in some cases. Several groups investigating the problems at the West Virginia Penitentiary have been led to suggest greater use of such service contracting, and the Special Master appointed by the West Virginia Supreme Court of Appeals has commented on the need at several points. Contracting out enables a correctional facility to provide services that may only be needed on an intermittent basis without hiring full-time staff. It allows the facility to seek the best expertise available, and because costs can be negotiated in the market, it offers an opportunity to hold down expenses. It is certainly an option worth consideration (Camp and Camp, 1987).

Contracting Out Prison Labor

It was once very common, especially in the South, for prisons to turn over their convicts to private parties that would "put them to work." This practice eventually fell into some disrepute due to exploitation of the convict labor and corruption in the awarding of convict labor pools. Today, however, there is widespread feeling that these abuses can be controlled, that private contractors can be compelled to pay a fair wage and treat the prisoners humanely, and that

much of the prisoners' earnings can be reclaimed by the state. Groups such as the Heritage Foundation (1988:3), for example, have published reviews taking the position that, "By putting prisoners to work and paying them competitive wages, many private companies are reducing prison costs for the government by witholding earnings for taxes, room and board, family support, and victim's compensation."

Some who have studied correctional privatization have concluded that contracting in prison industries ". . . may hold the greatest promise for changing current confinement practices" (Mullen et al., 1985:11). If so, this would amount to a return to the policies of the early nineteenth century, when wardens tried to make their prisons self-sufficient, either through contract labor, longer-term leasing out of inmates to private firms, or public account systems in which the state operated the industries and sold the products. Although these practices fell into decline because of the opposition of the rising labor movement, the political shifts of the past two decades have made their return a much more realistic possibility.

Beginning in the mid-1970s, the Law Enforcement Assistance Administration (LEAA) undertook to develop what were termed "Free Venture" demonstration projects that could solve the problems of inmate idleness and provide work experience as much like private employment as possible (LEAA, 1978). Key to these projects were the principles of (1) self-sufficient enterprises, (2) full working day, (3) productivity standards comparable to those in private industry, (4) wages based on productivity, which would be much higher than in standard prison industries, (5) final hiring and firing decisions to be in the hands of industrial management rather than, for example, prison classification teams, (6) active coordination between prison employment and post-release job placement, and (7) partial reimbursement by offenders for room and board and any restitution to victims. Although the results were mixed, these projects had caught the imagination of many by the end of the 1970s.

Recent years have witnessed the lifting of many restrictions once placed on private sector use of prison labor. In 1979 the Percy Amendment, marking the first major change in federal laws concerning prison industries since 1940, set up pilot programs exempting five states from the ban prohibiting interstate commerce in prison-produced goods and the ban on prison labor in government contracts of $10,000 or more (Mullen et al., 1985). At least 11 states are now contracting out prison labor (Heritage Foundation, 1988). Best Western International, Inc., the large hotel chain, employs over 30 prisoners to operate its reservation service, and Trans World Airlines, Inc. has hired young offenders from the Ventura Center Training School in California to handle

over-the-phone flight reservations (Heritage Foundation, 1988). In most cases the state correctional system provides the workplace, and the private firm trains and manages the prisoners. Wage rates are generally negotiated between the state agency and the private contractor.

Florida in 1981 became the first state to contract out the entire state prison industry to private management (Mullen et al., 1985). A Clearwater, Florida firm, Prison Rehabilitative Industries & Diversified Enterprises, Inc. (PRIDE), now manages all 53 Florida prison work programs on a for-profit basis. PRIDE sells its products, ranging from optical and dental items to modular office systems, to local and state agencies and pays 60% of the prisoners' wages back to the state government as fees covering part of the costs of imprisonment. As part of its "diversified" approach, PRIDE also operates the largest "house arrest" program in the U.S. (Lilly and Ball, 1987).

Contracting out inmate labor would represent a major step beyond the generally accepted practice of contracting out certain services. Indeed, it is unlikely to meet with much approval in West Virginia, with its unemployment problems and powerful labor union traditions. Nevertheless, it is one alternative that may be worth some exploration.

Ownership and Operation of Prisons

The major inroads made by private firms into ownership and operation of correctional facilities came with residential centers or minimum-security institutions, including halfway houses, detention centers, and juvenile homes. By the late 1980s, 28 states allow private firms to operate such facilities (Heritage Foundation, 1988). Indeed, private firms seem to some ideally suited to the operation of specialized facilities housing inmates whose problems fell within their area of expertise. Should West Virginia decide to build a number of facilities to "replace" the Penitentiary, options for privately operated prerelease centers or "mini parole" facilities might be considered.

In addition, more and more private firms have moved into certain highly specialized areas such as the operation of facilities for illegal aliens or certain types of juvenile or adult offenders. Behavioral Systems Southwest, for example, has converted four motels into detention centers for aliens awaiting deportation. Aliens convicted of committing crime during their undocumented stays serve terms in a 575-bed facility run by Palo Duro Detention Services for the Federal Bureau of Prisons on the site of a vacant U.S. Air Force Base (Donahue, 1988). Eclectic Communications operates a secure facility for young federal offenders in California, and RCA has operated the Weaverville, Pennsylvania Detention Center for "hardcore" cases since 1975 (Donahue, 1988).

Several states are interested in experimenting with the use of private contractors to operate more secure facilities with more problematic inmates. Incorporated in 1986, U.S. Corrections Corporation is the first private company to own and operate an adult state prison—the minimum-security prison at St. Mary, Kentucky. This facility, Marion Adjustment Center, is located on the site of a former Catholic college, housing inmates nearly eligible for parole (Virginia Secretary of Transportation and Public Safety, 1986). Estimates now indicate that by 1990 there will be about a dozen prisons of the "secure" type operated by private firms (Grant and Bast, 1987). The powers granted to the West Virginia Regional Jail and Correctional Facilities Authority seem to be quite broad, so that any resort to privatization may be unnecessary, but considering the various fiscal problems and the requirement for rapid mobilization in West Virginia, some such option may need exploration in the future.

As times change, competition in private sector corrections is ever expanding. Founded in 1983, Corrections Corporation of America (CCA) remains the largest private corrections firm in the U.S. CCA operates two juvenile centers and a county prison in Tennessee and contracts with Florida, New Mexico and Texas. Its Texas operations include a large alien detention center in Houston, which it built and operates under contract to the Immigration and Naturalization Service (Donahue, 1988). CCA is more than eager to submit proposals and could very likely provide several interesting options to West Virginia in a relatively short time.

In 1985 CCA proposed to operate the entire Tennessee correctional system for 99 years, a proposal supported by the governor but blocked by opponents (Heritage Foundation, 1988). The company offered to pay the state $100,000,000 for a 99-year lease on all 17 prisons in the Tennessee system, and then to incarcerate convicts for an agreed-upon fee. At five-year intervals Tennessee would have had the option of cancelling the contract and, upon compensating CCA for all it spent acquiring and improving the facilities, could have regained possession or turned the facilities over to another contractor (Donahue, 1988). "Basically, they want the Corrections Department budget of $170,000,000 a year," said a spokesman for the governor. . .; CCA claimed that, through superior management, it could run the system at lower cost and still make a profit (Donahue, 1988:7). Despite gubernatorial support, however, the skeptical Tennessee legislature rejected the offer.

West Virginia has already made inquiries into privatization and has even taken some tangible steps in the direction of using such facilities to reduce correctional pressures. In 1985, for example, Buckingham Security Ltd. of Pennsylvania, which manages the medium-security Butler County jail,

proposed to design, construct and operate a 720-bed penitentiary near Pittsburgh. This was to be a special-purpose institution to house special protective custody prisoners from prisons outside the state. Along with several other states, West Virginia presented a letter of intent to send prisoners to the facility. The Pennsylvania legislature, however, refused to approve the plan, putting a moratorium on prison privatization projects at the time, and the arrangement did not materialize.

Construction and Lease/Purchasing

Many states are now attracted to the option of private construction as a means of dealing with their overwhelming prison problems. In West Virginia there has been much public furor over a proposal by the Batman Corporation to construct one or two prisons in the state, with the largest of these to replace the current Lorton, Virginia facility housing almost 10,000 offenders from the District of Columbia (Gilmer County Mountain News, 1989a, 1989b; Glenville Democrat, 1989). While some counties in the state have rejected approaches from this private developer, others have welcomed what they perceive as an infusion of jobs and related benefits.

There are, of course, some precedents. In 1987 Texas passed legislation authorizing privatization of minimum-security and medium-security prisons. By the following year that state had signed a contract with Becon-Wakenhut, Inc. of Florida to construct and operate two 500-bed minimum security facilities. Wackenhut will charge the state a per diem of $34.79 per inmate, which is more than a 10 percent saving from what the operation would cost Texas (Heritage Foundation, 1988). At the same time, the state continued negotiations with CCA for construction of two 500-bed pre-parole facilities.

The various alternatives by which West Virginia prisoners could be handled in the facilities that the Batman Corporation proposes to construct seem to involve many combinations of cooperative arrangements between not only different governmental jurisdictions but private sector firms. These alternatives cannot be explored here primarily because of insufficient information at this time. As a result, this monograph will confine itself to a review of general principles with respect to privatization options.

One of the major developments with respect to private construction has come because of the increasing interest of some corporate giants with enormous capital resources and deep talent pools. A $40,000,000 medium-security prison is being built in Colorado, for example, as a joint venture of American Correctional Systems, Inc., the huge Bechtel Group, Inc., South Korea's Daewoo International Corporation and Shearson Lehman Hutton, Inc. (Heritage Foundation, 1988). Under this cooperative umbrella, American

Correctional Systems will do the designing and provide management expertise, Bechtel will handle construction, Daewoo International will support the project with financing, and Shearson Lehman Hutton will underwrite.

Under the usual lease/purchase option, a private firm builds the prison with an agreement by the state to sign a long-term lease (Chaiken and Mennemeyer, 1987). When all payments including finance charges are completed, the state takes possession. The private firm must provide substantial initial funds, but the lease payments help it to recoup, and it benefits from tax advantages and assurance of a steady cash flow (Heritage Foundation, 1988).

Some states find lease/purchase an advantage in that it avoids the necessity of seeking voter approval for a bond issue and sometimes allows a means of circumventing debt limitations (Chaiken and Mennemeyer, 1987). By the middle 1980s, 14 states had passed legislation permitting construction by lease/purchase agreements (Mullen, 1985). One example is a cooperative effort involving the Corrections Development Corporation (CDC) and Kidder, Peabody & Company, Inc. in which CDC will design, construct, finance and lease a prison in Missouri on a 30-year lease/purchase basis with Kidder, Peabody underwriting the project (Heritage Foundation, 1988).

It may be that exploration of these options is really unnecessary and that the West Virginia Regional Jail and Corrections Facility Authority can solve all the problems quickly enough. Nevertheless, it may be useful to outline such alternatives. West Virginia policymakers may find some of them more appealing at a later date.

Possible Advantages of Privatization

There are major disputes about the relative advantages and disadvantages of privatization, and the truth is that it is still difficult to judge the possibilities. First, the issues are clouded by the ideological fervor that tends to characterize many of the proponents and opponents of privatization. Second, the privatization movement is still relatively new, and many apparent successes or failures may prove otherwise with the passage of time. Finally, one must recognize that there are new ideas surfacing almost every day some of which may offer possibilities worth consideration even among those not favorably impressed by privatization to this point. In short, it is necessary to keep an open mind here.

Among the reasons for considering privatization are (1) possible cost savings, (2) the likelihood of more rapid mobilization, (3) avoidance of capital expenditures, (4) the possibility of greater flexibility, (5) management considerations, and (6) political considerations (Mullen et al., 1985; Hackett et al., 1987). Each of these is the subject of considerable debate. Together they offer powerful arguments in favor of privatization.

Cost Savings

Private contractors may be able to construct new facilities less expensively than can government. Fewer levels of management may allow private contractors to provide correctional services at a lower cost. Private purchasing may reduce expense because it is not necessary to proceed through cumbersome governmental purchasing procedures. Private contractors constructing and managing multiple facilities across a number of states can amortize expenditures and operate with economies of scale as a result of the sheer size of their enterprise.

Rapid Mobilization

One of the strengths of the private contractor is the speed with which it is possible to proceed. Indeed, this has been one of the major attractions of privatization in an era when so many states are under pressure to solve in a matter of months problems that have built up over decades. Private contractors may be able to raise private capital quickly and move much more rapidly than can governmental entities. Those with available facilities may be in a position to accept inmates immediately through a contracting process, relieving overcrowding pressures almost overnight in lieu of the years it might take to construct new facilities.

Private firms are able to respond rapidly in part because they may not have to hold the public hearings required of governmental agencies. The very accountability of public bodies tends to slow things. Of course, it may also be that the profit motive does provide a spur to action that is sometimes lacking elsewhere.

Capital Expenditures

As more and more states have encountered problems with correctional financing, they have considered turning to the private sector. This not only avoids any "budget busting" attempt to pay-as-you-go, but it has proved a means of dealing with stalemates over bond issues. Construction and lease/purchase may become a more attractive option should policymakers encounter too many difficulties with standard approaches.

Flexibility

Private correctional facilities may also represent an attractive alternative because they may be able to develop greater flexibility in responding to changes in the size and composition of the prison population. Temporary increases or decreases in the number of inmates pose less of a problem for private contractors, who may find it easier to respond by subcontracting, renting or hiring/firing employees. And in the event that there are shifts in the needs of the inmate population, private firms may find it easier to subcontract with many different jurisdictions to obtain specialized services for different lengths of time.

Management Considerations

One of the most widespread beliefs among the proponents of privatization is their faith in the superior management said to characterize the private sector. Those supporting privatization see government as too often hidebound and resistant to new ideas. They tend to perceive the private sector as an arena of higher energy and greater creativity operating under the spur of competition. Thus, it is possible that the privatization option may serve to provide new ideas for corrections, along with the energy that comes with fresh involvements.

Some of the new management approaches have to do with "leaner" operations said to be the result of cutting "bloated bureaucracy." There is also a great deal of emphasis on different hiring practices, incentives, and promotion policies that could not be accomplished by governmental agencies. While job security may be less, wages may actually be higher, allowing for attraction of superior employees and reducing turnover. Research has shown that at least some private firms may provide better counseling and training than that provided by governmental agencies (Hackett et al.,1987)

Political Considerations

One of the chief attractions of privatization lies in the political tenor of the times (Heritage Foundation, 1988). The general distrust of government, combined with the resurgence of the ideology of "free enterprise," means that it is relatively easy for state agencies to justify turning the problem over to the private sector. The option has real political appeal as a "dramatic new alternative" for dealing with apparently intractable problems, and it gives the appearance that governmental officials have finally surrendered their "turf interests" for the good of the community. Finally, it is certainly true that shifting responsibility to private contractors will permit officials to assign at least partial blame for any failures to the contractors themselves.

Possible Problems With Privatization

Any consideration of the various privatization options will encounter possible problems, both philosophical and practical. Perhaps the principal philosophical issue surrounds the question of delegating social control functions to the private sector. Beyond this, however, there are complex legal problems that must be addressed. Some have insisted that the enthusiasm over the possibility of cost savings is entirely misplaced and that in fact there is every likelihood of a real escalation of costs once privatization takes hold. Many have stressed the lack of accountability that they associate with privatization, while others have argued that private management is likely to produce problems rather than solve them. Finally, it must be admitted that there are perhaps as many political

considerations militating against privatization of corrections as there are political considerations in favor of it.

Philosophical Issues

Correctional facilities represent an enormous concentration of power in the hands of the state, analogous in many ways to that placed in the hands of the police. To what extent is it proper for the state to turn over these powers to private interests? Under a system of representative government, the people retain a great deal of power over the authorities. Is not this power eroded by the delegation of social control functions, backed by force if necessary, to private organizations, especially if their stated goal is not public service but profitmaking?

Is not the contractor's first loyalty to his or her firm? Some doubt that it is possible to "serve two masters" equally. When strategy has to be conceived, will not the long-term interests of the private firm tend to take precedent over the long-term interests of the state and the people in general? When short-term tactics must be determined in order to achieve strategic goals, will not the economic interests of the company take priority?

Even if the private firm begins with the best of intentions, how can those involved fail to lose perspective on the public mission during the day-to-day operation of the company? With pressing daily problems to face and stockholders to please, will not the larger public mission become a mere abstraction to be given formal lip-service and little else? It is a commonplace to note even the best bureaucracies tend to lose their focus on the mission in concern for internal politics and institutional survival. Is it not likely that this pattern will become even more prevalent when the company is one in which it was the profitmaking goal and not the correctional mission that drew it to its endeavor in the first place?

Some believe that privatization will result in a decline in public interest in corrections and a limitation of public input into correctional policy (Virginia Secretary of Transportation and Public Safety, 1986). This is certainly one possibility. When there are no longer legislative debates over many correctional issues and any such debates that do emerge are confined to stockholders meetings, where will be the forum for discussion? When escapes or other dramatic correctional failures no longer call down the wrath of the public on elected officials but upon faceless functionaries in some out-of-state office, what will be the caliber of response?

Others insist that opening up corrections to the private sector will actually make the system more responsive. Their position is that the competition among potential vendors will make for the greatest efficiency, and that there will be

eager exposure of any failures by competitors hoping to get the contracts themselves. In this view, government is part of the problem, not part of the solution (Heritage Foundation, 1988).

In any case, there is consensus in the literature on the privatization of public services that contracting increases the political power of the private sector (Mullen et al., 1985). Is this good, or is it bad? There are those that argue that the entry of private interests and their increased influence in the performance of crucial social functions can only serve to invigorate social life, adding competition, innovation and clarity of vision. They often favor the expansion of the private over the public, viewing government as a necessary evil that ought to be limited as much as possible, except perhaps with respect to its national defense functions. Others maintain that cost, corruption and many other problems will only tend to increase when public agencies surrender to the lobbying power of the private sector, motivated as it is by visions of profit.

Should this latter view be accurate, many feel that the very success of privatization would represent a real danger. Indeed, the 1980s witnessed the highest rate of incarceration ever seen in the U.S. while the crime rate was actually declining. For some, one of the hidden virtues of the "prison crisis" is that it has led to reconsideration of the need to incarcerate such a large proportion of the population. If privatization provides a "cheap and easy" way to continue to "lock 'em up," some fear that both the public and government officials will lose their incentive to seek alternatives (Virginia Secretary of Transportation and Public Safety, 1986).

Legal Issues

Another set of problems facing the privatization option lies in the fact that the body of law on correctional contracting is far from clear (Hackett et al., 1987). For example, there is considerable argument over the question of a contractor's employees' right to strike. While it may be illegal for a state correctional officer to strike, private prison guards appear to retain this right. The situation has been summarized as follows:

> This problem is conceded by those hoping to be on the receiving end of corrections contracts. They only seem to be able to respond by noting that they will be paying higher wages and offering better benefits to corrections officers than the states currently provide, thus discouraging strikes. In the unlikely event of a strike, they generally contend that an emergency preparedness agreement with the state will enable the national guard to intervene in a timely manner. States should include special provisions in their contracts that require sufficient advance notice of the end of a contract period, the onset of labor difficulties or major grievances that could result in a work stoppage or slowdown (Hackett et al., 1987:11).

Some have raised questions about whether, in view of the fact that "...the actions of one legislative session are generally not considered binding, but rather serve merely as precedent" (Hackett et al., 1987:11), it is appropriate for certain states to enter into many of these contracts. Others have pointed to areas outside corrections in which legislators have not hesitated to "bind" successive sessions. Nevertheless, this question remains unsettled, as does the question of a contractor's right to discriminate in acceptance of certain inmates, such as those with Acquired Immune Deficiency Syndrome (AIDS). Resolution of such issues is likely to depend upon careful drafting of contractual language (Virginia Secretary of Transportation and Public Safety, 1986).

There are also many unresolved questions surrounding liability, handling of escapes and use of deadly force, provisions for protecting inmates rights to due process, and privacy issues (Levinson, 1985). Many of the legal questions are associated with provisions of civil rights legislation. One central question running through all these issues is the question of how "public" are the functions being performed by the "private" firm.

Some opponents of privatization insist that delegation of authority to deprive a person of liberty constitutes in itself denial of due process. Some claim that that because private firms tend to contract on a per diem basis, with profits depending on the size of the inmate population, there is special incentive to interfere with due process, perhaps even to provoke infractions that can allow for lengthening of the incarceration. Many opponents have pointed out that private contractors may not have legal access to state and federal criminal records that are necessary to proper management, and that they may have an incentive to release information in violation of personal privacy in order to gain some economic advantage in the marketplace.

The National Institute of Corrections completed an extensive evaluation of the privatization of selected facilities in the middle 1980s. The following excerpts from the report give some flavor for the legal concerns:

> Throughout this report reference is made to a number of incidents which clearly bend the rules: use of a government WATS line by a private sector corporation; use of government vehicles by a private corporation; serving... staff free meals; requiring a workweek of more than 40 hours without overtime payment or compensation; nonreturn of school lunch program funds to HRS...
>
> The second aspect of this issue focuses on a broader area. The American Bar Association's Criminal Justice Section and its Committee on Jail and Prison Problems prepared a draft concept paper... What are the legal and policy implications? What should model legislation look like in this area? What standards should be used...? (Levinson, 1985:97).

Likelihood of Higher Costs

Despite all the talk about lower costs, many suspect that privatization actually will tend to increase costs. It must not be forgotten that contracting to a private firm will require monitoring and administrative resources on the part of the state. In effect, a new level of bureaucracy must be created to protect the public interest by insuring that the terms of the contract are being met. This in itself can consume considerable resources even when things are going smoothly. And when problems occur, officials of the state agency can no longer give corrective orders to subordinates but must enter complicated negotiations with the contractor in an effort to resolve matters (Virginia Secretary of Transportation and Public Safety, 1986).

In some correctional contracts, hidden costs only become apparent much after the contract has been signed (Levinson, 1985). Sometimes this is because of "contingencies" built into the contract. Sometimes it is the result of failing to make all the necessary calculations, or because verbal assurances were not put in writing. Thus, "contract specificity" is often cited as a central concern to be addressed by anyone considering this option, and those investigating privatization constantly caution that every aspect of the contract be examined in minute detail (Virginia Secretary of Transportation and Public Safety, 1986).

One private enterprise strategy of great appeal is an opportunity to "corner the market." It is possible, for example, for a private firm to "lowball" a bid so as to get their first contract and then greatly increase their costs in later years (Hackett et al., 1987). Such a possibility is real in a specialized market with so few vendors. It requires no nefarious intent on the part of the contractor but can be simply the outcome of an overly optimistic "buy-in." In this scenario, the private firm offers a low bid but later discovers that the company is losing money. Having already obtained a marketing advantage, the firm will surely consider recouping its losses and perhaps adding some profits by now insisting on a much higher price for the needed services.

Lack of Accountability

Still another problem with the privatization alternative is that private correctional firms may turn out to be much less accountable to the public than governmental agencies. It does seem clear that there is real potential for reduced public input (Hackett et al., 1987). Members of the public making inquiries or coming with complaints may be forced to approach the private firm indirectly, through the public agency that is administering the contract. Not being involved in the actual operation of the correctional program or facility, officials in the public agency will have to rely upon reports from the contractor (Levinson, 1985).

Some opponents of privatization have stressed that it will be impossible to remove private firms through the elective process. They may not be required to hold the open hearings required of government agencies. When there are scandals, they may be tempted to approach them by scapegoating some lower-level employees while protecting the interests of the company. Of course, public agencies are not immune to some of these practices, but opponents of privatization point out that they do not have the additional "coverup" incentive of a profit motive.

Management Considerations

Some opponents of the privatization option have argued that the allegedly superior management skills of private firms are a myth. There is an old saying in corrections to the effect that management would go much more smoothly "if we only had a better grade of inmate." Although this is usually intended as a humorous remark designed to take a little pressure off management by stressing the difficulties of operating a correctional facility, it points to one of the reasons why private firms often seem so effective.

Through a process called "skimming," private firms have tended to take the "cream of the crop" of inmates, leaving the hard-core prisoners to be handled by public correctional agencies. Managing illegal aliens or short-term offenders close to parole is not nearly as difficult or expensive as managing hardened convicts. Opponents of privatization fear that if private contractors continue this policy, public institutions will end up with a higher concentration of the worst inmates, thereby increasing costs (Hackett et al., 1987). Politically, this would tend to make private contractors look remarkably effective in contrast to the apparent ineptitude of the public corrections facilities, thus supporting the ideology of privatization on false grounds.

Because of the profit motive, some opponents of privatization have charged that private firms may tend toward management tactics designed to eliminate unprofitable services not legally protected. They maintain that the entire privatization concept will tend to compromise correctional standards. Rather than to focus upon meeting professional standards, private contractors may be tempted to keep an eye on the "bottom line." This might mean reduction of programs to a minimum and staffing with the fewest number of correctional officers necessary to control the facility, resulting in an even more dehumanizing environment in which prisoners have very little contact with other human beings.

There is also the possibility of bankruptcy. Although this posssibility should have little impact on contracting out for services, it poses real dangers for privatization ventures such as operation of correctional facilities or construction

of correctional facilities. These ventures are still relatively new, and they remain in the experimental stage in many ways. As with any private profitmaking concept, there are risks. The state agency that stakes a great deal on a private contractor is participating in the risks and must face the implications of failure.

Political Considerations

While some political considerations tend to make privatization alternatives attractive, others tend to discourage such a direction. Some have noted that the public may be be worried about security issues when a facility is in private hands (Hackett et al., 1987). In some instances, this has led to considerable community resistance to a program or facility. The issue of locating correctional programs and facilities often poses many problems in terms of community acceptance in any case, and suspicions may run higher when the program is to be managed by some mysterious, private entity. This is apparently one of the suspicions surrounding the proposal of the private Batman Corporation for relocating the D.C. correctional facility from Lorton, Virginia to West Virginia.

Sometimes a problem arises over site acquisition. Private firms do not have at their disposal the "eminent domain" powers of the state. They cannot seize property in the public interest. And if some procedure is adopted by which the state seizes the property and then, for example, leases it to a private contractor, the political ramifications can be extreme.

In some instances, there may be a political backlash as the public gets the impression that public officials are trying to avoid their responsibilities. For some, there is the impression that the public official is elected or employed to solve these problems and yet is continuing to hold office and draw a salary while a private corporation is hired to do much of the job. For others, the surrender of corrections to the private sector may be taken as an admission of governmental failure, leading to further alienation from government itself.

Still another problem with privatization has to do with the perception of possible corruption. A suspicious public may consider privatization just another means by which public officials can reward their friends (Mullen et al., 1985; Hackett et al. 1987). Because there have been occasions where those contracting for the correctional programs have been friends or colleagues of public officials involved in the negotiations, suspicions can run high.

Perhaps the single most powerful political consideration leading some to take a position against privatization alternatives, however, is resistance from a number of influential groups. The American Bar Association (ABA), for example, has passed a resolution recommending that privatization of prisons be

stopped until the many complex legal questions are resolved. The American Civil Liberties Union (ACLU) has argued that privatization raises too many accountability and liability problems. The American Federation of State, County, and Municipal Employees (AFSCME) has been a leading force against privatization, dropping out of the American Correctional Association in 1986 over just this issue. Privatization is even opposed by such groups as the National Association of Criminal Justice Planners (NACJP) and the National Sheriffs' Association (NSA), although the latter group is split with some chapters for and some against.

Privatization and the West Virginia Context

Except in terms of contracting out for services, privatization may be an option of greater viability in states other than West Virginia. In West Virginia, on the other hand, contracting for selective correctional services may be even more attractive than in many larger states with sizeable correctional bureaucracies. Given today's litigious context, it is no longer possible, for example, to regard token medical, dental, vocational, technical, educational, counseling, and mental health staff as sufficient. Instead, it is very likely that staff members who are less than completely competent will produce lawsuits (Herman, 1984; Braken, 1987; Nay, 1987). Under these circumstances, the best option often lies in contracting out needed services.

Other privatization options should be explored, but they should be explored with considerable caution. Contracting out prison labor has some possibilities, but there are still many problems to be addressed (Camp and Camp, 1987a). Any effort to move in that direction should be preceded by careful study. It may be that further investigation could disclose opportunities that have so far been ignored, but those involved must be willing to assume the inevitable risks.

As for ownership and operation of correctional facilities or the even more complex processes of private construction or lease/purchase, events are moving too rapidly for informed comment. Only a few years ago, West Virgina remained fairly insulated from these possibilities, with the chief cooperative correctional agreements involving the housing of women inmates at the federal institution at Alderson. With a number of private firms now interested in negotiations, these options might be explored even further than they have been to date. Without a knowledge of detailed proposals, it is difficult to assess the viability of such options. In any case, it is clear that the impact upon adjacent communities is much more complex than is usually assumed.

CHAPTER 4

CONCLUSIONS

The foregoing has represented an attempt to provide at least some preliminary groundwork for coming to grips with the current "correctional crisis" in West Virginia. Unfortunately, time and resources have been too limited to allow for the sort of systematic study of the overall correctional system made possible by the work of task forces and cooperative ventures in many other states. Thus, the examination of the "crisis" in West Virginia has focused sharply on the "Moundsville problem." This approach has been taken in this monograph with great reluctance because of the fear that it might contribute further to the tendency to deal with our correctional issues in a piecemeal manner. Some attention to the broader aspects of correctional policy will be dealt with in a second monograph in this series.

A program of renovation/construction to replace the Penitentiary alone will not address the critical issues with respect to more efficient utilization of the existing correctional system. Nor will it do anything to assist with intake control or policies controlling length of stay. In fact, there is some danger that additional construction will simply provide more bedspace, leading to an increase in intake and longer periods of incarceration.

Nevertheless, the immediate "Moundsville problem" is so critical that some of the various renovation/construction options have been explored at length. Again it must be emphasized, however, that this examination of policy alternatives was not intended to be exhaustive. The principal obstacle to an exhaustive review is lack of information. One of the most useful of all policy options here would simply be the creation of a Correctional Information System that could provide a clear picture of the total system and generate the projections necessary for planning.

The body of this monograph has included a look at various "privatization" options for several important reasons. On the one hand, these alternatives do in many instances offer possibilities for improved services. On the other hand,

there are some serious drawbacks of which policymakers must be very aware. Perhaps the most important reason for addressing "privatization" options, however, is the fact that, like the "Moundsville problem," recent developments have brought the issue into special prominence. These developments include not only the proposals of the Batman Corporation but also many expressions of interest on the part of other private firms.

Such an abbreviated treatment as that undertaken here cannot hope to provide "solutions" to correctional problems in West Virginia. Yet it is the author's sincere hope that policymakers in this State will derive some benefit from these efforts. Little if any of what has been presented is particularly revolutionary. Indeed, the strength of this monograph may lie in its constant reference to the policy experiments undertaken elsewhere that provide such successful examples. Many "correctional alternatives" are available for West Virginia. It is up to policymakers both inside and outside State government to select from among them.

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