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Private Prisons

ABSTRACT

Private prisons have become integral to penal administration in the United States, Australia, and the United Kingdom. The principal debate revolves around such tangible matters as regime quality, value for money, public accountability and the efficacy of regulatory procedures, and whether the private sector has improved standards and outcomes in the prison business as a whole. There is clear evidence that the advent of the private sector has stimulated system-wide improvement but also evidence that the private sector can succumb to the same failures as the public sector. When this has happened, it is usually because public authorities have, through neglect or naïveté, been in a sense complicit in the failure. The future of privatization will revolve around the ability of contracting states to achieve effective public accountability and the ability of the private sector to continue to deliver high-quality correctional regimes that provide excellent value for money.

A private prison is one managed by a nongovernment entity on behalf of the state. As Logan states (1990, p. 13), it is "a place of [involuntary justice system] confinement managed by a private company under contract to government." The inmates would otherwise be incarcerated in government operated prisons. The U.K. chief inspector of prisons has said that "so-called 'private prisons' are not private sector prisons but [state] prisons run on contract for the [responsible government department] by a private sector company" (Ramsbotham 1995/96, p. 8). This

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observation remains true whether the private company manages a state-owned prison or also owns the physical structure itself.

These definitions bring out two crucial points: that authority to hold and deal with prisoners is derived from public law, not private arrangement, and that private prisons are an integral component of the jurisdiction's prison system. It is crucial to emphasize the first point so as to contrast contemporary privatization with the statutorily unregulated deals relating to the leasing of convict labor that first emerged in the United States in the early nineteenth century. The second point highlights that the state, in outsourcing or delegating service delivery, has not in principle surrendered any part of its overall responsibility for system objectives, standards, legality, or equity.

In the jargon of organizational theory, the notion of a "purchaser-provider" relationship is also superimposed—the public sector agency purchasing services and the private sector providing them. However, this terminology tends to obscure that the state, as "purchaser," cannot and does not, by choosing to discharge this function in that way, evade ultimate political, moral, and legal responsibility for what the provider does. The prisoners remain prisoners of the state.

One pressing issue is whether the model actually works that way—whether the accountability mechanisms and regulatory structures are properly designed and effectively applied. Can one say with confidence that the state remains actively and effectively involved as regulator, that the private prisons continue to be part of the dynamic responsibility of the state apparatus, that the companies are fully accountable?

There is a view that, however well regulated, accountable, and successful the particular regime turns out to be—even if its outcomes are better for prisoners and its standards more equitable and its processes more transparent—prison privatization is nevertheless unacceptable. This is the fundamental moral criticism that imprisonment is an intrinsic or core state function that by definition cannot legitimately be delegated in any of its aspects to a nonstate agency without undermining the very notion of the state and its responsibility to and for its citizens (Jung 1990; DiIulio 1991; Christie 1993; Sparks 1994; Ryan 1996). For the proponents of this view, no data or evidence can ever be sufficient to justify privatization.

In this context, however, it is unfortunate that some commentators and operators not infrequently ride roughshod over this sensitivity by describing the two dominant companies—Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation (WCC)—as

running prison systems. For example, industry analysts Scott and Stringfellow stated in 1998 that "CCA's prisons now form the sixth largest correctional system in the United States, behind California, Texas, Florida, New York and the Federal Bureau of Prisons" (Prison Privatisation Report International 1998, no. 17, p. 4). This is fundamentally erroneous, suggesting that the company has status and autonomy as principal. Both CCA and WCC and each of the other operators are contracted service providers for the state in the various jurisdictions both within the United States and in other countries where management of prison services has been contracted out.

Since the demise of convict leasing, direct administration of adult prisons by the state was the norm until the late 1970s. That position, however, was quite different in relation to juvenile detention. McDonald et al. (1998, p. 5) state that "private, mostly not-for-profit charities and organizations had played a long and distinguished role in operating facilities for juvenile offenders." McDonald (1992, pp. 370–71) has tabulated the numbers and the populations of both public sector and private juvenile correctional facilities in the United States for the period 1969–89. This revealed increasing private sector penetration, to two-thirds of institutions and two-fifths of the population—a position that subsequently has been maintained and is proportionately far in excess of anything likely to be reached with adult imprisonment.

However, the privatization of adult prisons is numerically far more significant, and it is truly private and for-profit rather than nongovernmental organization or voluntary sector. It is thus a more important criminal justice system issue. When privatization started to re-emerge in its new form in the seventies, it related at first mainly to halfway houses. Later, the Immigration and Naturalization Service began to contract out detention of illegal immigrants to the private sector (McDonald 1992, pp. 381–82). This was little more than short-term warehousing. At this stage the private sector had not yet broken into the serious end of detention—adult prisons. Gradually, however, private sector participation began to spread across the penal continuum (McDonald 1992, pp. 383–84). The breakthrough came in Texas in 1988, when the Department of Corrections announced that it would let contracts for four 500-bed, medium-security prisons for adult males. Two of the contracts were won by CCA, the other two by WCC. The prisons opened in 1989. With these contracts the private companies could be said to have started to establish their "penal legitimacy"—status as operators of "real" prisons.

Thereafter, expansion within the United States has been rapid. By the end of 1989, procurement contracts were in place for forty-four secure adult prisons or jails; they were to be located in fourteen states, and their rated capacity would be 15,000 prisoners. By the end of 1996, the comparable figures were 118 prisons or jails in twenty-five states with a capacity of 78,000 (Harding 1998*a*, p. 633). As of November 1999, these figures had increased further to 162 prisons or jails in thirty-one states, with a capacity of 125,000 (http://web.crim.ufl.edu/pcp/). If all this capacity were filled (and these figures relate to procured capacity), that would mean that about 6 percent of the total incarcerated population of the United States would, at the beginning of the new millennium, be held in private prisons.

In terms of types of prisoner and security ratings, private prisons have still not quite caught up with the public sector. Prisons being a major political risk, governments understandably and prudently had been reluctant to throw operators into the deep end of the pool—maximum security. Thus, although private prisons now cover the whole range of imprisonment situations, in comparison to the public sector, they are underrepresented in terms of maximum security prisoners held and overrepresented in terms of medium- and minimum/low-security prisoners. Some very large facilities (1,000–2,500 prisoners) are now privately operated, however, and the racial mix of prisoners is representative (Austin and Coventry 2000). Private prisons are thus now playing a mature and integral part in American penal administration. They are certainly here to stay (McDonald et al. 1998, pp. 29–32).

The United States having led the way, other nations have followed. To date they are Australia (1990), England and Wales (1992), Scotland (1997), New Zealand (1998), Canada (New Brunswick 1998), the Netherlands Antilles (1999), and South Africa (1999). Australia has the greatest proportion of its prison population in private prisons (about 20 percent); indeed, in one state, Victoria, almost 50 percent of prison accommodation is private. Of course, the numbers in Australia (ca. 4,000) are trivial by U.S. standards. The other most-developed jurisdiction, the United Kingdom, has about 10 percent of its inmates in private prisons.[1]

Active consideration is being given to privatization in other provinces of Canada (particularly Ontario), the remaining Australian states,

[1] The "United Kingdom" as used here refers to England and Wales. Scotland is a separate legal jurisdiction.

the Republic of Ireland, Serbia, South Korea, Taiwan, Tanzania, Thailand, the Philippines, Malaysia, Latvia, Jamaica, Costa Rica, Panama, and several South American countries, including Colombia. The extent to which privatization is likely to spread more widely is discussed later, but it is already apparent that it is taking root. Privatization would now seem to be one of the most important developments in penal administration in the second half of the twentieth century.

Six factors came together to act as catalysts for this new wave of privatization. They were

- exponential increases in incarcerated populations,
- overcrowding and federal court intervention,
- legal and political inhibitions upon capital expenditure by governments,
- concern about recurrent costs,
- growing impatience with the perceived obstructionism of unionized labor, and
- some concern for regime improvement.

The relative weight of these factors has varied across privatization jurisdictions.

A. Incarcerated Populations. The growth in the use of imprisonment in the United States during the last two decades of the twentieth century is a well-known story. In the mid-1970s the rate per 100,000 was still only about 110 (today's mean rate across Europe); by 1985, it was 310 (740,000 inmates); by 1990, 447 (1,150,000 inmates); and at the century's end, it is approximately 700 (1,950,000 inmates). From 1985 onward it would have been necessary to construct three new 500-bed prisons per week merely to keep pace. At a capital cost of $50,000 per bed, that would have involved expenditure of $58 billion.

B. Overcrowding and Federal Court Supervision. Accommodation soon became stretched to the uttermost. With overcrowding came acute difficulties in maintaining tolerable regimes or minimum standards: for example, deteriorating prisoner health; increased death rates, including suicide; partial surrender of management control to the strongest groups of prisoners; and conditions that were inimical to prisoner correction (Paulus 1988). The Civil Rights movement had already succeeded in turning the spotlight onto prison conditions (American Friends Service Committee 1971; Davis et al. 1971; Jackson 1971; Mitford 1971), and there it remained as populations continued to increase.

As the impact of overcrowding became more apparent, challenges under the Bill of Rights (particularly the Eighth Amendment relating to "cruel and unusual punishment") became more frequent. By mid-1988, thirty-nine states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands, were currently subject to court supervisory orders or consent decrees in relation to some or all aspects of their prison system (McDonald et al. 1998, p. 8).

C. Inhibitions on Capital Expenditure. Throughout the industrialized world, the voters of the 1980s and 1990s wanted more services for less tax. In the criminal justice field, resistance to "big-spending big-government" was exacerbated by other factors: public disillusionment with the notion of rehabilitation or improvement, increasing fear of crime and calls for tougher penalties, and the consequential dehumanization and demonization of offenders.

In many U.S. states, governments reached their constitutional debt ceilings, with the consequence that additional capital expenditure on infrastructure projects could only go ahead after voter approval for the issue of state bonds. Prisons were not high on voters' priority lists, and prison construction bond proposals were voted down. The point was reached where politicians, valuing their political skins, were reluctant even to put up such proposals.

A way out was to shift capital expenditure into the recurrent or operational state budget, where no constitutional barriers stood in the way. This could be done if a private sector operator was contracted to design, construct, finance, and manage (DCFM) a prison. The contractor could then recover construction costs by way of a lease/buyback arrangement spread over a long period, typically about twenty years.[2] Although there were complex variants on this, usually designed to attract taxation benefits, the essence was usually the same—that the state would buy the capital asset now and pay for it later. Accordingly, although some of the very earliest private prison arrangements—for example, the Texas ones referred to above—involved only private sector management of prisons built and owned by the state, the typical U.S. situation soon became that of a DCFM contract. McDonald et al. (1998, p. 20) report that fifty of the eighty-four facilities in their 1997 inventory were privately owned and subject to DCFM contracts. This trend is consolidating.

[2] In other jurisdictions, particularly some Australian states and South Africa, this is sometimes described as a "BOOT" contract—build, own, operate, and transfer. However, the DCFM terminology is the most widely used.

However, the DCFM model was not initially adopted in either Australia or the United Kingdom—the states that followed the United States most quickly down the privatization path. Neither jurisdiction was constrained by constitutional considerations from drawing upon the public purse nor yet so inhibited by the prevailing sociopolitical culture. In each case the main leverage they wished to exert by way of privatization related to recurrent costs and labor union control of the workplace. The earliest contracts—at Borallon in Queensland (Australia) and The Wolds in the United Kingdom—were thus management only contracts, relating to prisons designed, constructed, and financed by the public sector (Harding 1992). This pattern continued for the first few contracts in each country, but by the mid-1990s the notion of shifting capital infrastructure costs had taken hold, and the DCFM contract had become standard. This is also the predominant model with newer privatization states, such as South Africa.

D. Recurrent Costs. Operational expenditure was also a matter of concern. The temper of the times was belief that the private sector could almost always carry out service tasks more cost-effectively. Some states embedded this value in legislation so as to make cost reduction a specific objective of privatization. For example, Florida (Fl. Stat. 957.07 [1993]) provided that "the [Correctional Privatization] Commission may not enter into a contract . . . unless [it] determines that the contract will result in cost savings to the state of at least seven percent over the public provision of a similar facility."

A consequence is that an extensive literature has been spawned around the issue of comparative public/private costs. Indeed, there seems to be more debate about this than any other single aspect of privatization. The reports and evaluations have become technical, pedantic, arcane, and self-serving. They have also tended to distract attention from more important aspects of the privatization debate, such as accountability and the overall quality of the regime.

By the standards of other Western democracies, the expenditure per prisoner per day in the United States is quite small. Broadly speaking, for every dollar spent per prisoner per year in the United States, $2 are spent in the United Kingdom and $2.50 in Australia. It could be argued that the United States should really be seeking to spend more, not less, on its prison systems while also obtaining better value for money. To the extent that privatization has insulated governments from having to acknowledge and act upon what seems to be acute underfunding, privatization could perhaps be said to have been a socially

regressive development. However, there is nothing in recent history to suggest that this alone is holding back a quantum leap in expenditure and regime quality.

E. Union Labor. The relative weakness of American unions, even in public sector employment, meant that this issue never became as important as in Australia, New Zealand, and the United Kingdom. Obstructionism was well documented there, not merely in terms of workplace practices that artificially enhanced overtime payments and shift penalties but also through resistance to the introduction of rehabilitative and vocational prison programs (Harding 1997, pp. 20, 134–36). Even in the United States, however, the factor of cutting out "management from below" was significant. McDonald's 1997 survey of contracting state agencies found that "the desire to gain operational flexibility" (code for controlling the labor force) was the third most cited reason for a state to have embarked upon privatization (McDonald et al. 1998, pp. 15–16).

F. Regime Improvement. The notion of improving prisons and correctional regimes was not overtly prominent in U.S. debates about privatization. Improvement was seen as a possible and desirable, but not essential, by-product of better and more cost-effective management, getting away from the input-based model of public sector corrections. This model, becoming more entrenched after the "nothing works" philosophy (Martinson 1974) had taken hold, seemed to treat the very existence of the prison system as sufficient justification for everything that happened within it. The output-based model of public administration, on the other hand, required prison systems to identify key performance indicators, measure them, adapt regimes to achieve them, and use human and financial resources in ways that best facilitated these outputs. Privatization was thus "principally an issue of fit between the strategic purposes that society seeks to achieve through imprisonment and the currently available means to do so" (O'Hare 1990, p. 128). Achieving that fit might well improve prisons and conditions, but that was not the main point.

Neither, with one exception (McConville 1987, p. 240), did system-wide improvement seem to enter into calculations, that is, the notion that different and perhaps better private sector regimes might cause beneficial change in the public sector. Yet this is, ultimately, the most cogent justification for privatization.

In summary, prison reform was never a prominent aspect of the U.S. privatization agenda. In other countries—notably Australia, the

United Kingdom, and South Africa—it has been much nearer the surface. Indeed, the 1999 procurement in Western Australia explicitly made system-wide prison reform a principal objective (Harding 2000).

Public sector imprisonment practices, processes, and outcomes do not constitute one of the triumphs of twentieth-century civilization. Nevertheless, because privatization is a departure from the previous norm, any meaningful description or valid evaluation requires that privatization be measured against the known characteristics, strengths, and deficiencies of the public sector.

The remainder of this essay discusses these issues, highlighting the following: Is imprisonment a nondelegable core state function that thus always must be managed directly by the state (Section I)? Is there a danger that the commercial opportunities that imprisonment henceforth may provide will lead to the creation of a powerful penal lobby whose views may distort criminal justice policy (Section II)? Will imprisonment costs really be reduced, and, in any case, will private prison regime standards deteriorate (Section III)? Can the private sector manage the risks of imprisonment as effectively as the public sector (Section IV)? How effective is contract as a mechanism to secure enhanced performance in this complex area of human service (Section V)? Above all, what sort of regulatory systems and accountability mechanisms are required, and what assurance is there that they will be effective (Section VI)? And, will privatization work in such a way as to provide a stimulus for improvement in prison regimes generally (Sections VII and VIII)?

These questions are answered in the remainder of this essay. Apart from the first, they cannot really be kept absolutely distinct from each other. Often one bears upon another, for they all involve the same pivotal question: In terms of penal administration, is privatization progressive or regressive? In broad terms the conclusions are that, fully accountable and properly regulated, the private sector can and does stimulate system-wide improvement; however, there is a real danger of slippage when the public authorities reduce regulatory resources and as cost reduction becomes an increasingly predominant motive for privatization. Finally, (Section IX) the future of prison privatization, both in the present participating states and globally, is briefly considered.

I. A Core State Function?

Many European and American commentators have argued that the imprisonment function is, or should be, nondelegable. For example, in 1988, as privatization got under way, Radzinowicz stated: "In a democ-

racy grounded on the rule of law and public accountability, the enforcement of penal legislation . . . should be the undiluted responsibility of the state" (letter to the *London Times* [September 22, 1988], quoted in Shaw 1992). The Norwegian scholar, Christie (1993, p. 102), sees the issue as one of communitarian responsibility and democratic participation:

> The prison officer is my man. I would hold a hand on his key. . . . He could be a bad officer. And I could be bad. Together we made for a bad system, so well known from the history of punishments. But I would have known I was a responsible part of the arrangement. Chances would also be great that some people in the system were not only bad. They would more easily be . . . mobilized. The guard was their guard, their responsibility, not an employee of a branch of General Motors, or Volvo for that matter. *The communal character of punishments evaporates in the proposals for private prisons.* (My emphasis)

Both Radzinowicz and Christie epitomize a quintessentially European approach to the role of the state, one where "in the continental culture the state is seen as much more than a 'service institution'" (Rosenthal and Hoogenboom 1990, pp. 20–21). It is no surprise that the European state that has come nearest to implementing privatization, France, has adopted a model of prisons *semi-privées*—where the custodial functions remain in the exclusive domain of state authorities and only the "hotel," health, welfare, and program activities have been privatized. It is an awkward model but conforms in the letter if not the spirit with the strict European approach.[3]

Various American commentators endorse the nondelegable core function approach. DiIulio's views (1991, p. 197) are representative: "To remain legitimate and morally significant, the authority to govern behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities. Regardless of which penological theory is in vogue, the message that those who abuse liberty shall live without it is the brick and mortar of every correctional facility—a message that ought to be conveyed by

[3] It is not unique, however. The Mansfield Community Corrections Facility in Texas (which despite its name is a place of incarceration) operates with the same division of functions. For technical legal reasons rather than administrative choice, a somewhat similar model exists in South Australia.

the offended community of law-abiding citizens through its public agents to the incarcerated individual."

Is there a convincing answer to these arguments? The standard one is that there is a distinction between the allocation and the administration of punishment. The first function is irrevocably nondelegable; in the sovereign state, private criminal justice systems are a contradiction in terms. However, the second is delegable, with appropriate safeguards, for it does not involve the imposition of additional state-authorized punishment but, rather, a technical and morally neutral process to ensure that the allocated punishment is carried out according to law and due process.

Sparks (1994, p. 23), among others, finds this argument specious because "it serves rhetorically to insulate the two areas" (the legitimacy of imprisonment and how to carry it out) from one another. In Sparks's view, fundamental issues as to the proper scope and utilization of imprisonment, questions that should never be put aside by society, are inextricably linked with questions of delivery; accordingly, any arrangement should be opposed that permits them to be discussed and implemented as if they were discrete issues. That view seems rather contrived, however. There does not seem to be any insuperable intellectual or practical difficulty about challenging the depth and the scope of imprisonment and pursuing vigorously the question of prison conditions, regimes, and reform.

A more productive line of analysis is whether some of the tasks delegated to the private operators, while purporting to be merely the administration of punishment, are in reality its allocation. In that regard, two areas stand out: disciplinary matters and prisoner classification.

A. Disciplinary Matters

Formally, sanctions for misconduct within prisons are not the allocation of punishment for offenses against the criminal law. In abstract terms, the distinction between the allocation and the administration of punishment is not breached. However, the citizen's status as a prisoner means that he is in a situation where he is subject to greater sanction-backed regulation than are other citizens. New deprivations of liberty, such as loss of remission/good time or restrictions upon privileges or stricter levels of incarceration, are tantamount to the allocation of punishment within that particular sociolegal microcosm.

Accordingly, if the allocation/administration dichotomy is to be preserved, disciplinary matters should be dealt with directly by state au-

thorities. In the United Kingdom this is in fact what happens. In all private prisons, disciplinary charges laid by custodial officers are adjudicated by Home Office (i.e., prison service) "controllers"—governor-grade public sector officials—who work on-site (Harding 1997, p. 90). Adjudications affecting intraprison rights are thus made and internal sanctions allocated with the authority and in the name of the state, according to the same criteria as in every other prison and prisoner within the U.K. system.

This rigorous approach is not widely followed in the United States. In many jurisdictions disciplinary functions for breach of prison rules are carried out directly by the private operator. However, the rules themselves generally replicate those applicable in the public sector prisons or, where they differ in some detail, must be approved by or conform with the standards set by the state authorities. For example, Texas contracts generally contain clauses along the following lines: "Contractor shall impose discipline through rules, regulations and orders pursuant to an offender disciplinary system meeting or exceeding ACA standards, court orders and Texas Department of Criminal Justice policy."

There are a few jurisdictions that maintain the strict allocation/administration dichotomy: for example, Florida. The enabling statute has laid down the abstract principle that state Department of Corrections classification officers should have overall responsibility for adjudications, and the contracts have brought it alive with site-specific applications (Harding 1997, p. 91).

Of course, the operator has to manage the prison in a day-to-day sense and cannot constantly be second-guessed by the public authority. Inevitably, this will involve imposition of minor management sanctions, such as temporary segregation of prisoners, limitation upon visiting rights, suspension of work privileges, withdrawal from a program, and so on. For practical reasons, the operator must be able to impose such sanctions directly. There may be, philosophically, a fine line between such matters and the allocation of punishment, but in practical terms the distinction is evident enough.

In Australia also the full significance of this dichotomy has become blurred. Two states, Western Australia and South Australia, require that disciplinary charges be externally adjudicated. In the other states, the working of the disciplinary system is simply one of the regular reporting items required from the private operator as part of the overview of the contractual arrangements.

B. Prisoner Classification

Prisoner classification and its corollary, sentence planning, drive the prison experience for prisoners. There can be a world of difference between the quality of life in maximum security and at a prison farm, and the rate of progress through the custodial continuum is a crucial matter. That being so, systems that delegate initial or follow-up classification to the private sector would seem to be flawed. The principled position is that the private sector supplies a regime of a particular custodial type and the public authorities assign and subsequently reassign prisoners to and from that prison, according to classifications done by and in the name of the state.

By and large, in the United States and elsewhere this point has been recognized. However, there are some striking exceptions. In Queensland (Australia) the initial classification and sentence planning of sentenced prisoners is carried out by the private sector (Moyle 2000), though subject to the nominal supervision of the public sector. And in the United States there are examples where private prisons have been allowed in effect to select their own prisoners through carrying out their own classifications. The most common criticism is that private prisons have managed to influence procedures so that they receive prisoners who are easiest to manage. The example that follows is peculiar through being the converse—choosing to receive prisoners who are the most difficult to manage.

This came about as follows. The Northeast Ohio Correctional Center (NEOCC) at Youngstown is a 2,000-bed medium-security "spec" prison (i.e., one built without any prior commitment by or contractual arrangement with a governmental authority that prisoners will be supplied to the operator) built and owned by CCA. The company entered into a contract with the Department of Corrections of Washington, D.C., to accommodate medium- to medium-high security prisoners. However, maximum-security prisoners were also sent, including many who required segregation. These assignments were initially an error on the part of the D.C. Department of Corrections, but under the contract CCA had the right and the obligation to screen out unsuitably classified inmates. In other words, the determinative classification was carried out by the CCA itself. For whatever reason—and the financial incentive cannot be entirely discounted—the company chose to treat these prisoners as if their security classification were medium high. Subsequently, there were many violent incidents, including the murders of two inmates by other prisoners. An official inquiry (Clark 1998)

found that this was substantially attributable to the inappropriate mixing of different security level prisoners, a finding confirmed by the outcomes of subsequent litigation against CCA (Prison Privatisation Report International 1999, no. 29, p. 4).

In summary, the debate about "core state functions" relates above all to values. No amount of debate or evidence will change the minds of those who see privatization as fundamentally objectionable on this basis. However, in the United States this debate has been lost; indeed, it has barely got off the ground. A more productive line of analysis revolves around the question of the allocation and the administration of punishment, where the issues are tangible and improved accountability is attainable.

II. The Creation of a Penal Lobby

It is said that prison privatization is irredeemably expansionist. "It is unconvincing, indeed even inconsistent, for advocates of privatization to argue that their position is not wedded to growth in the prison system" (Sparks 1994, p. 24). This is a superficial observation. There is no documented case of any jurisdiction contracting for a private prison in order to enable it to expand its prisoner population. Quite the contrary: in the United States privatization has almost invariably been a response to increases in prisoner numbers that have already occurred. This response is also driven by other factors such as fiscal constraints, the existence of court orders, and so on, but the key point remains that it is only after the state's criminal justice policies and practices have put the prison situation under stress that privatization has occurred.

In some jurisdictions, other motivations have been at work. For instance, in Victoria (Australia) the three-prison privatization program that commenced in 1994 had as one of its explicit objectives the facilitation of the closure of a fetid and decrepit institution (Pentridge) and a deeply demoralized women's prison (Fairlea). These closures actually occurred.[4] In Western Australia, privatization of a new prison avowedly proceeded on the basis that, as well as relieving chronic overcrowding in prisons whose security ratings were out of kilter with prisoner needs, the new regime would act as a lever for prison reform

[4] Motives are seldom straightforward. The government of the time had a pathological distaste for public sector activity of almost any kind, leading it to pursue privatization uncritically and without adequate regard for regulatory balance. The ideological drive happened to coincide with a correctional imperative.

(Harding 2000). This had also been the case in Queensland (Kennedy 1988).

In South Africa, privatization has been initiated by a cabinet virtually all of whose members had spent time behind bars during the apartheid era. They, above all, were in a position to recognize the deplorable conditions of existing prison accommodations, amounting to an abuse of human rights standards. Coming to office, they realized that public expenditure on the infrastructure needs of the nation in relation to education, housing, and health were entitled to priority over prison infrastructure. Yet a beginning simply had to be made—particularly in light of the burgeoning prison population—to the business of improving prisons. Realistically, this could only be achieved by involving the private sector.

Nevertheless, there are four areas where private sector operators sometimes behave in ways that give cause for concern. These areas are "spec" prison construction, the related notions of exporting prisoners and "bed renting," offers to take over whole systems, and stock market factors.

A. "Spec" Prisons

The normal pattern of privatization is as follows: the state identifies the need for new prison accommodation; decides whether to utilize public sector resources or to invite the private sector to bid; if the latter, sets in motion all the usual procurement processes and draws up a request for proposals (RFP) that specifies the type of structure and regime it requires; evaluates RFPs; selects the successful bidder; negotiates the fine details of the contract; and brings into operation an effective regulatory and accountability system. With that sort of sequence, a new prison does not get built on a whim; it is tied in with the ascertainable penal needs of the state.

"Spec" prisons are quite different. Although McDonald et al. (1998, p. vi) note that in the early stages of privatization "some small firms that speculated by building facilities in the absence of contracts with an agency" went bankrupt, the bigger operators have not been vulnerable in this way. To some extent this has been because they have carefully identified both a need and a potential contracting agency; in other words, they have anticipated the procurement process. For example, CCA has followed this practice in relation to the prison at Youngstown, Ohio, mentioned above, as well as a prison at California City, near Los Angeles, California. This 2,300-bed "spec" prison has subse-

quently received a contract from the Federal Bureau of Prisons (FBOP). Nevertheless, the ultimate user's correctional needs are something of an afterthought, having to be fitted within the architectural design or correctional strategy of an already existing prison structure.

A recent variant of this is the development of "spec" prisons offering niche services, in particular for sick or geriatric prisoners, who are now a burgeoning component of the U.S. prison population. For example, in 1998 Just Care Inc. of Alabama opened a 326-bed private medical prison in South Carolina. The company has marketed itself across the United States with local, county, and state authorities. However, in its first six months of operation it received only a dozen prisoner-patients, well short of the 100-bed occupancy per day average required to break even.

In Australia, the United Kingdom, New Zealand, Canada, or South Africa, "spec" prisons simply could not spring up. Whatever the correctional arguments, it is the land-use planning issues that would prevail. In none of those countries would the applicable governmental body permit a prison to be built except by governmental endorsement. "Spec" prisons do seem to distort somewhat both privatization and prisonization policy in the United States. This is starting to be recognized; for example, in 1997 Texas legislated that companies must have in place a contract with a city or county or the state Department of Corrections before building a prison.

B. Exporting Inmates and "Bed Renting"

Northeast Ohio Correctional Center at Youngstown accommodated out-of-state prisoners. Other documented examples of out-of-state imprisonment include the following: Washington, D.C., prisoners to Minnesota and Ohio; North Dakota and Hawaii prisoners to Minnesota; Montana and New Mexico prisoners to Texas and Arizona; Oklahoma, North Carolina, Utah, and Missouri prisoners to Texas; Wisconsin prisoners to Oklahoma and Tennessee; Alaska prisoners to Arizona. These arrangements are not only inimical to prisoners' best interests in terms of family visits, but they also stretch the chain of accountability beyond breaking point. The state of origin of the prisoners has no standing to regulate or supervise what happens within the private prison. Five such contracts have been cancelled by "exporting" states (McDonald et al. 1998, p. 53), and in each case belated recognition of their own regulatory impotence has been a factor.

But at least in such arrangements there is some structure, there has

been some direct negotiation between service provider and inmate supplier. More worrying than this, however, is the U.S. practice (again, found nowhere else) of "bed renting" or "bed brokering." This practice involves finding a prison bed somewhere, anywhere, for prisoners whom the home state cannot accommodate. Several agencies have sprung up, such as Inmate Placement Services of Nashville—motto, "a bed for every inmate and an inmate for every bed"—and these agencies negotiate space on a flat-fee-per-bed basis.[5]

The structure of the private sector is particularly well adapted for involvement in this commerce, but it should be emphasized that the public sector is no less involved as both exporter and importer of inmates. Out-of-state bed renting is a misconceived concept of imprisonment, weakening the concept of state responsibility. To the extent that prison privatization facilitates this practice, the U.S. model seems flawed.

McDonald et al. (1998, pp. 66–67) rightly identify both of these areas as ones of major legal risk. They cite Texas and Ohio as desirable 1998 examples of legislative regulation, such as the right of the state of location to prescribe minimum standards, carry out inspections, and so on. However, this does not really address the problem, identified above, of the stress on the chain of accountability to the state by whose authority the prisoner is serving a sentence. The authors presciently suggest that "more such legislation can be expected in coming years." In 1999 California enacted a statute entirely prohibiting, not merely regulating, the housing of out-of-state prisoners in private prisons within the borders of California (Bill 1222 of 1999). The passage of this legislation seems to have been one of the factors that caused CCA to cease construction of a "spec" prison that it had already commenced at Mendota, California. North Carolina enacted similar legislation—"prohibition on private prisons housing out-of-state inmates"—on June 30, 2000.

C. System Takeover

Privatization began with a bid by CCA in 1985 to take over the whole of the Tennessee prison system. This offer was repeated in 1997, with a promise that the state would thereby be enabled to save $100 million per annum. In neither case did the legislature let the of-

[5] The main source for this information is the regular reports found in Prison Privatisation Report International; see also McDonald et al. 1998, pp. 10–12.

fers get far. But the fact that a private company was prepared to make them arguably shows a lack of sensitivity to the principles that lie behind a politically appropriate model of privatization. The state must retain and be able actually to exercise "step-in" rights—that is, to reclaim any privatized part of its prison system—and to do this it needs to have ongoing capacity and skill levels of its own. This can only be done if it remains a direct service provider in relation to some part, at least, of its prisoner population. Also, a totally privatized system would cut across the allocation/administration of punishment dichotomy.

D. Stock Market Factors

A prominent strand of the antiprivatization movement is encapsulated in the phrase, "no profit from punishment." This argument is in many ways a naive one, for there is no aspect of the public sector prison system that is somehow quarantined from monetary exchange. Workers earn their wages, service providers (e.g., food suppliers) earn revenues from which they pay wages to their employees, construction companies pay dividends to shareholders from profits partly derived from building and maintaining prisons, and so on. However, the legitimate thrust of the argument is that a selfish profit motive should not be allowed to distort and degrade regime standards, as was the case with the leasing of convict labor. But safeguarding that is a matter for contract, regulatory arrangements, and accountability mechanisms, rather than a decisive reason for not privatizing at all.

For better or worse, the commercial side of private prisons is now irreversibly part of the agenda. The whole paraphernalia of big business—mergers, takeovers, executive stock options, making lazy assets work harder, splitting off noncore activities, downsizing administrative staffing levels, tax minimization schemes, and so on—is now part of the scene. With hindsight, this was inevitable. But it does not stop it from being somewhat disturbing to those who are more used to the context where, conventionally, penal administration decisions have been made within a closed box of supposedly abstract and altruistic principles relating to correctional policy.

If the private sector companies do not constitute a penal lobby (and it is still my view that as yet they do not), it is not difficult to see how they might already be perceived this way or might evolve into such a role. Of course, the public sector itself is a remarkably powerful lobby for certain types of penal policy or practice—something that tends to get overlooked in the lobbying debate.

III. Costs

United States privatization avowedly set out to switch capital funding into the private sector, as well as to reduce recurrent costs. However, when surveyed subsequently, agencies rated the cost factor as only the fourth most important motivation (McDonald et al. 1998, p. 16). This is not entirely reconcilable with the contemporaneous rhetoric and may represent a retrospective attempt to put a better public face on things.

Be that as it may, an enormous amount of time and energy has gone into essentially accountancy arguments. Protagonists on both sides (but especially on the antiprivatization side) seem to think that if they can demonstrate that private prisons are more expensive/cheaper, then ipso facto they have won/lost the debate.

McDonald et al. (1998, p. iv) have cogently stated the difficulties and ambiguities inherent in evaluating true costs on a prison-to-prison basis:

> Comparing public and private prisons' costs is complicated for a variety of reasons. Comparable public facilities may not exist in the same jurisdiction. Private facilities may differ substantially from other government facilities in their functions (e.g., the private facility in Arizona houses men and women, or some in Texas are used for drug abuse treatment services or for pre-release populations [who] are placed in halfway houses by other jurisdictions). Or they may differ in age, design, or the security needs of inmates housed, all of which affect the cost of staffing them. Cost comparisons are also difficult because private and public accounting systems were designed for different purposes; that is, public systems were not designed principally for cost accounting. Spending to support imprisonment is often borne and reported by agencies other than the correctional department, and computation of these costs is often difficult for lack of data. The annual costs of "using up" the physical assets are not counted in the public sector, as capital expenditures are generally valued only in the year that they are made, rather than being spread across the life of the assets. Nor is the cost to the taxpayer of contracting readily apparent from tallies of payments to contractors. Governments incur expenses for contract procurement, administration and monitoring; for medical costs above amounts capped by contracts; and for sentence computation, transportation and other activities performed by governments. Cost comparisons often fail to account for such expenditures.

Nevertheless, many prison-to-prison cost comparisons, purportedly controlling for these factors, have been attempted. Nelson (1998) has reviewed the five most detailed of these studies.[6] Her conclusion is as follows:

> In every study that itemized expenditures and adjustments, much of the *reported* difference between public and private sector cost estimates can be traced to differences in the allocated burden of state-allocated overhead costs. If this reported difference is to reflect *actual* cost savings, the privatization must induce cutbacks in state spending on central office operations before taxpayers realize this benefit. (P. 3)

Later she states:

> It is possible to draw some preliminary conclusions. There do appear to be some consistent differences between the public and private facilities. . . . It appears likely that, in privately managed facilities, the wage-bill for non-administrative staff will be lower and prison-level administrative expenses will be higher; that health care costs will be lower; and that the imputed cost of state overhead will be lower. (P. 17)

Pratt and Maahs (1999) ranged more widely, conducting a meta-analysis of thirty-three U.S. cost-effectiveness evaluations. Some derive from a time when costing information was decidedly primitive and were consequently crude methodologically. Nevertheless, reviewing such a large body of literature, the authors felt able to conclude (Pratt and Maahs 1999, p. 367):

> Overall, the results indicate that, regardless of the owner of the facility, it is the economy of scale achieved by the prison, its age, and its security level that largely determine its daily per diem cost. . . . These conclusions have important implications for both correctional policy makers and researchers. First, this analysis provides policy makers with a more realistic and cautious assessment of the relative efficiency (or lack thereof) of private prisons. Although specific privatization policy alternatives may

[6] There is some overlap between her work and the earlier and frequently cited report of the U.S. General Accounting Office (1996), but Nelson's work is more thorough and more recent.

result in modest cost-savings (e.g., private prison construction and private contracts for specific services such as rehabilitation and medical programs), relinquishing the responsibility for managing prisons to the private sphere is unlikely to alleviate much of the financial burden on state correctional agencies.

Studies such as these have their limitations. The most significant is that they do not draw upon aggregated data analyses, particularly from non-U.S. jurisdictions. What is meant by "aggregated data" in this context is an approach that calculates the overall cost of running prisons or a category of prisons of a comparable type, as opposed to item-by-item and prison-to-prison comparisons. The aggregated data approach epitomizes the United Kingdom and to some extent the Australian approach to cost comparisons.

A sequence of U.K. studies (H.M. Prison Service 1997, 1998*a*, 1998*b;* Woodbridge 1999), each replicating a robust methodology, reveals a picture of gradually decreasing cost savings in the private sector, from a range of 13–22 percent (depending on the measure used) in 1994–95, to 11–16 percent the following year, to 8–15 percent in 1996–97, to minus 2–11 percent in 1997–98. This sequence is important, for it brings out the dynamic public sector response to private sector efficiencies. This in turn emphasizes that the savings we should really be looking for to justify privatization economically are savings in the public sector. Most of the U.S. work misses this crucial point, being stuck at the stage of lining up passive models against each other.

However, the dynamism that is even more important relates to the nature of the prison and correctional regime. This never shows up in the passive costs model. Quality of the correctional regime is a concept that could only be reflected in a "cost-effectiveness" or "correctional value for money" model. It is the most important aspect of the whole privatization debate.

IV. Risks of Prison Regimes

Politicians and administrators still seem to see risks primarily in terms of security and control issues—escapes, riots, assaults, drug use. However, failures in care and well-being are increasingly acknowledged as important risk areas—for example, deaths and self-harm, other health issues such as HIV+ or hepatitis B or C, overcrowding, and equity issues. The question that arises is whether private prisons are more

susceptible to such risks and, in any case, how effectively they respond to them.

A threshold problem is the paucity of systematic data. To a large extent information is anecdotal—and story selection criteria operate in such a way that the anecdotes mostly relate to the private sector. This derives from the fact that privatization is still controversial, still under active challenge. For example, a U.K. serial publication, Prison Privatisation Report International (see also http://www.penlex.org.uk), covers the "bad stories" of U.S., as well as international, privatization thoroughly (and, it must be said, very evenhandedly), while never mentioning public sector "bad news" stories nor good news about the private sector. Also, for several years Private Prison Watch News Briefs, covering exclusively U.S. privatization issues and problems, were available on the Internet (ppwatchhotmail.com); a labor union Web site (http://www.cusa.org) also concentrates on "bad news"; and another Web site explicitly identifying itself as "antiprivatization" can be found at http://www.oregonafscme.com/private/.[7]

The real need is for methodologically robust comparative studies of key risk events. A good model is the study of Junee Prison in New South Wales, Australia (Bowery 1999). This private prison, managed by Australian Correctional Management (ACM), a subsidiary of WCC, commenced operations in 1993. A longitudinal study was carried out from the outset with three main objectives: to provide a historical record of how Junee developed from the time it became operational; to identify and illustrate differences in the way it operated compared to the public sector prisons in the state; and to identify those aspects of its operations that were or were not innovative. Key elements involved recording events in custody relating to security and to care. Three public sector prisons were also measured for the same events, with variables being controlled and reliable comparators identified. Aggregated statewide data were also available for comparison, though they were obviously of lesser significance.

With the publication of the four-year (1993–97) overview, data are available that take discussion beyond the point of anecdote. These data relate to such matters as deaths, escapes, self-harm, assaults and fights, disciplinary offenses, prisoner grievances, use of force by officers, posi-

[7] See also http://www.mgl.ca/sroberts/index.html and http://donnasdoc.webjump.com/.

tive urinalysis tests, discovery of home brew alcoholic beverages, time out of cells, and program participation. The availability of such data thus provides a solid basis for making comparative judgments, and in broad terms the private prison emerged creditably by each of the measures. However, the immediate point is not to record conclusions so much as to identify the value of commencing from the outset a reasonably robust evaluation, thus facilitating meaningful analysis.

A. Escapes

Data are patchy and unsystematic. As with all prison bad news, the private facilities tend to receive fuller coverage than the public ones. Thus the escape of six dangerous prisoners from the Northeast Ohio Correctional Center, Youngstown, in July 1998 (all subsequently recaptured) received a great deal of media attention. So have other incidents, such as the escape of eight juveniles from a CCA detention center at Columbia, South Carolina, in 1997. Nevertheless, nothing has so far emerged to suggest that the private sector prisons are generically more porous than public sector ones of a comparable security level.

Some debate has arisen as to whether the private sector should be charged by the state for the expense involved in catching escapees—for example, whether the Bobby Ross Group should pay $1,200 for the cost of a dog team used to track two 1996 escapees. That is hardly a first-order issue. However, it is now starting to be standard practice in some jurisdictions (such as Western Australia and Queensland) for management contracts to contain clauses, akin to exemplary damages, imposing a fixed amount penalty for an escape. An escape symbolizes some presumed misfeasance in the execution of the contractual obligations, and the exemplary penalty is aimed at both deterring the operator and reassuring the public.

B. Riots

There have been several major riots in U.S. private prisons. Youngstown is, once more, the best-known example. The highly accelerated start-up pace was the catalyst for the problems (Clark 1998, pp. 14–15). The start-up schedule is, of course, the responsibility of the public sector purchasers. Officials never seem able to learn from the experience of others (Harding 1997, pp. 123–27), and there is no discernible difference between first-year operations of public sector and private sector prisons. With Youngstown, the public officials (the Washing-

ton, D.C., Department of Corrections) had an incentive to export inmates as fast as they could to relieve local political problems, and the company was not reluctant to fill up a "spec" prison so as to increase the flow of occupancy fees. It was an explosive mixture for which the public authority purchaser was no less at fault than the private sector provider.

A similar comment can be made about the 1995 riot at the Immigration and Naturalization Service (INS) detention center at Elizabeth (New Jersey) run by Esmor Correctional Services, Inc. (subsequently reincorporated *sub nom.* Correctional Services Corporation, Inc.). The contract specified that the facility would be occupied and the regime run for short-term (less than thirty days) detainees. Thus the architectural design, the provision of recreational and program opportunities, and the pricing reflected this—little more than human warehousing. At the time the riot occurred—eleven months after the center had first opened—many of the inmates, because of bad planning and resource management within INS, had been there for more than six months; some indeed from the very beginning. A specification that explicitly had acknowledged this possible eventuality would have attracted a quite different bid. So the public authorities were the major contributors to the problem. The *Wall Street Journal* report (July 11, 1995) was scathing: "The real lesson from the riot is that the federal government isn't any better at managing private contracts than it is at the many other things it does poorly. . . . Previous riots involving I.N.S. [Immigration and Naturalization Service] detainees at facilities managed by the federal government have been far more destructive, and they led in part to the I.N.S. deciding to hire private companies to jail detainees. But privatization can be done badly, and the I.N.S. could write the book on how not to write the contract."

However, Esmor itself was not blameless. It became evident that the successful bid had been "lowball," underestimating the true costs of doing the job properly.[8] This had serious consequential effects—inade-

[8] Lowball bids are simply not economic if the specified job is to be done at all. In the early days of privatization such bids were sometimes made to get a foot in the door. There was a view that, once the purchaser is placed in a dependency relationship with the provider, prices may be adjustable upward at the first contract renegotiation. In jurisdictions where RFP evaluations do permit price to be treated as the single most significant selection criterion, lowballing creates a high risk of failure. By and large, lowballing is starting to disappear, though working on low margins is still commonplace with bids in new markets: e.g., it is generally thought that the two South Africa private prison contracts fall into this category.

quately paid and thus poorly qualified guards, insufficient investment in training, high staff turnover, and so on. The subsequent INS inquiry found that the level of salary was not realistic and could not . . . ensure the availability of well-qualified applicants. It is obvious that many of the . . . guards hired by Esmor did not meet the requirements of the contract or were marginally qualified. Consequently, it was no great surprise that, as inmate tensions increased, staff discipline broke down, leading to assaults upon inmates and other forms of mistreatment, which in turn provoked the uprising.

The emerging theme, then, is that riots are seldom monocausal. It will usually be disingenuous to assert that a riot occurred simply because the facility was privately managed (or mismanaged). Just as head office policies and failures often create the preconditions for riots in public sector prisons (Wicker 1976; Dinitz 1981; Weiss 1991; Woolf and Tumim 1991; Adams 1994; Smith, Indermaur, and Boddis 1999), so too they contribute to serious problems in private prisons.

There have been several other major disturbances and riots at private prisons: for example, at Eden Detention Center, Texas (a CCA facility) in 1996; at Dickens County Correctional Center, Texas (a Bobby Ross Group prison) in 1997; at Crowley County Correctional Center, Colorado (a Correctional Services Corporation prison) in 1999; at the Bayamon Detention Center, Puerto Rico (also a CSC facility) in 1999; and at the Guadalupe County Correctional Facility, New Mexico (a WCC prison) in 1999. This list does not purport to be comprehensive. There have also been riots and disturbances at private prisons located outside the United States: for example, Port Phillip in Victoria (Australia), Arthur Gorrie Prison in Queensland (Australia), Parc Prison at Bridgend (United Kingdom), and Doncaster Prison (United Kingdom). Interestingly, each was a postcommissioning riot at prisons whose start-up rates had been pushed too fast. Precisely the same pattern was occurring simultaneously in public sector prisons in those jurisdictions—for example, Woodford (Queensland), Moorland (United Kingdom), and Full Sutton (United Kingdom).

Riots and disturbances are almost always outward manifestations of bad management. The essential issue, therefore, is that of regime quality. It is appropriate that there be an intense media spotlight on any new departure in penal administration, particularly prison privatization. But it is premature to construe these narratives as demonstrating

across-the-board inferior regime quality, particularly in light of the fact that only fragmentary information is readily available about public sector prison troubles.

C. Assaults

Much the same comment can be made in relation to assaults, whether by staff upon inmates or as an aspect of intimidation and bullying by inmates upon other inmates. Once more, there is no lack of coverage of private prison incidents—but with no comparators by which to evaluate the public sector. The optimum model is a longitudinal study of the sort carried out at Junee (Bowery 1999). That showed, in relation to inmate assaults upon staff, that the private sector prison was doing worse in its first two years' operation in comparison to the established public sector prisons but that, in relation to inmate upon inmate assaults, it was consistently doing better. Those sorts of findings do not, of course, necessarily cross boundaries and cultures. But they suggest that, in this area as virtually every other, it is total system issues with which we are really concerned rather than privatization per se.

D. Deaths and Self-Harm

Murders are relatively rare and very serious events. The Youngstown situation, involving two murders, has already been mentioned. The Clark inquiry (1998, pp. 64–65) characterized the second of these events as "a devastating convergence of security lapses. . . . It is very reasonable to conclude that this incident was preventable and should never have occurred." The report concludes: "The incident clearly evidences a combination of major problems which had been allowed to take hold at NEOCC: (1) lack of policy and procedure in critical security areas; (2) inexperience and poor security training of supervisors and line staff; (3) lack of any effective internal management controls at the local or corporate levels. In sum, the most basic security operations were seriously flawed."

Homicides committed by officers are even more serious. There are some documented examples in several privatization jurisdictions. A notable example is found in the United Kingdom with the 1995 death of a prisoner, Alton Manning, at Blakenhurst prison, which is run by U.K. Detention Services, a CCA subsidiary company. The inquest evidence showed staff ignorance or disregard of fairly elementary protocols relating to safe restraint, leading to the prisoner's suffocation. The

coroner's jury returned a verdict of "unlawful killing," which under the U.K. system left it to the Crown Prosecution Service to decide whether to bring criminal charges. The company, supported by the Home Office as purchaser of the prison services, had previously resorted to High Court injunctive litigation in an unsuccessful attempt to prevent the coroner from even considering the possibility of such a verdict—a classic case of the purchaser overidentifying with or being captured by the interests of the provider.[9]

These incidents and the official responses are reminiscent of those found in public sector prisons. This point could be illustrated ad nauseam, and reference has already been made to the various inquiries and analyses of the Attica and Santa Fe disasters (Wicker 1976; Dinitz 1981). A more recent example concerns the Corcoran State Prison, California, the location of officially condoned and concealed systematic brutality, including fifty shooting incidents, ten or so of which resulted in prisoner deaths, over a seven-year period (Arax and Gladston 1998). In other jurisdictions, there are similar trends. The Woolf report in the United Kingdom (Woolf and Tumim 1991) illustrates this. In Australia there are numerous documented instances (Nagle 1978; McGivern 1988; Murray 1989), the third of which related to the deaths of five prisoners trapped behind electrically controlled gates during a fire. The coroner concluded with words all too familiar to those versed in public sector corrections: "The Office of Corrections was inept and moribund at every point of observation. It has treated the Coroner as an adversary, both in the courts and by way of personal and public attacks. It has objected, protested and litigated, rather than provide information exclusively within its possession. It has used public resources to protect itself, its interest and its image. It has been prepared to bully, apply pressure and deceive rather than to face the truth. It has placed itself in priority to the community it serves" (Hallenstein, quoted in Murray 1989, p. 63).

The problem of deaths, then, is a problem with prisons—closed systems that are by their nature volatile and high-risk environments. There is nothing so far to suggest that privatization exacerbates the problem.

If, to this point, the evidence concerning homicide is fragmentary and anecdotal, concerning suicide it is much more robust. A recent

[9] The private companies have been quite litigious in their efforts to stem criticism. In Australia there have been several examples of defamation stop writs being used against critics: see Harding 1998*b*, p. 4.

study (Biles and Dalton 1999) has shown that the private sector has no worse a track record and arguably a slightly better one than the public sector. Prisoner suicides have been a much greater problem in Australia than in the United States. They have become inextricably enmeshed with the whole issue of discriminatory criminal justice system practices and general imprisonment rates in relation to the indigenous population. A national inquiry was established into Aboriginal deaths in custody and, while the main focus of its recommendations was upon indigenous needs, a by-product was the collection and analysis of a unique body of information about prisoner suicides generally (Johnston 1991).

Subsequently, there has been widespread recognition in Australia that high suicide and self-harm rates, persisting over a sufficient period of time, constitute a sure indicator of bad prison management (Harding 1999). The United Kingdom has been going down a similar track. The chief inspector of prisons has stated: "This [report] stresses the importance of the total prison environment in amplifying or mitigating suicidal feelings in those who are at risk. . . . The overwhelming conclusion from . . . research is that suicidal behavior is not just a function of individuals' vulnerability and circumstances but is also influenced by the quality of prison regimes and the response of staff" (Ramsbotham 1999*a*, p. 57). The report then goes on to endorse and expound the concept of a "healthy prison," previously formulated by the World Health Organization (1998).

Against that background suicide rates are a good indicator of management quality. The particular context of the Biles and Dalton study was that a new private prison, Port Phillip in Victoria, had been the site of five suicides in little more than a year—a pattern strikingly similar to that of an older private prison (Arthur Gorrie in Queensland) during its first two years of operation (Harding 1997, pp. 129–30). The operators of Port Phillip (Group 4) were consequently the focal point for immense criticism. The Australian study sought to put these matters into context and thus spanned the whole period of privatization in all states. It controlled for risk exposure by calculating prisoner occupancy years and relating this factor to numbers of suicides. These data were then compared with public sector data. In this aggregated form, displayed in table 1, it emerged that the two parts of the system had almost identical performances.

More cogent are the disaggregated data that attempt to compare prisons with similar profiles. Both Arthur Gorrie and Port Phillip are

TABLE 1

Distribution of Suicides in Prison Custody, 1990–99

Type of Prison	Number of Suicides, 1990–99	Suicides per 1,000 Prisoner Years, 1990–99
Private prisons	19	1.51
Public prisons	211	1.57
Total	230	1.56

difficult prisons in terms of functional and inmate mix. They cater for remand, reception (newly sentenced), and protection prisoners, as well as ordinary medium-security inmates. A public sector prison (Silverwater, New South Wales), possessing a comparable profile and being approximately the same size and age, was selected and the three prisons compared. To sharpen the picture, the comparison was made for the first twenty months only of their operation—that being the period during which, by common observation, regimes are at their most volatile, prisoners most vulnerable, and good management most crucial. Table 2 indicates, once more, that the private sector was of fair average quality.

Larger figures or a greater number of comparator prisons would make the data more cogent. Probably they support the view that, during the applicable period, none of the prisons was well managed (Harding 1997, pp. 86–87). However, the point is once more to demonstrate that these failures are not inherent to privatization so much as to "prisonization."

TABLE 2

Comparison of Suicides in Arthur Gorrie, Port Phillip, and Silverwater Prisons

	Arthur Gorrie (June 1992–January 1994)	Port Phillip (September 1997–April 1999)	Silverwater (April 1997–November 1998)
Number of suicides	3	5	7
Suicide rate per 1,000 prisoner years	6.60	5.08	6.03

E. Summary

It would be otiose to go through all the remaining risks of the prison situation. It is apparent from the foregoing examples that they are common to the public sector and the private, that to date there is no evidence to suggest that the private sector is any more negligent or incompetent than the public sector, and that the generic questions are, as always, how best to make a closed system accountable and how to put in place effective preventive measures. What also emerges is that data collection is for the most part too fragmented to be useful, though where it has been carried out efficiently it can be seen that the private sector at least meets and quite often exceeds industry standards.

V. Contracts

The prudent model is for states to authorize prison privatization by specific statutory provisions. This was done in Texas, the groundbreaking U.S. state; in Queensland, the first Australian state; and in the United Kingdom. This procedure is prudent not only because it heads off constitutional challenge (a relevant issue in the United States) but also because it enables risk allocation between the state and the contractor to be clarified.

Nevertheless, there are some states that depend upon statutory interpretation, that is, an implied or attributed power arising out of the general authorization to detain prisoners. In the United States, these states include Georgia (seven private prisons), Kansas (two institutions), and North Carolina (three institutions), as well as the territory of Puerto Rico (Thomas, Bolinger, and Badalamenti 1997, pp. 44–45). This is also the case in South Australia. Frustrated in its attempt to get enabling legislation through the upper house of the parliament, the government took the view that, as nothing in the generally applicable Correctional Services Act positively prohibited the delegation of custodial powers, privatization could be justified by reliance on the inherent powers of the executive arm of government to delegate or contract out its functions. However, it was deemed necessary that some of the functions of the prison manager, particularly those involving the exercise of enforcement powers, be done in the name of the superintendent of a neighboring public sector prison—who thus is obliged to visit regularly and be in daily contact. Such an arrangement is cumbersome and constitutes something of a barrier against the very innovation and cultural change that privatization seeks to bring about (Harding 1997, p. 41).

The Western Australian government, negotiating a private prison contract throughout 1999, seemed likely to face a similar dilemma for the same reason—opposition in the upper house. The very detailed attempts to negotiate on this basis brought home graphically that risk transfer is extremely difficult to combine satisfactorily with public accountability in the absence of specific statutory authorization. Providentially, the requisite legislation was passed, enabling the project to proceed without these complications (Harding 2000).

The recent inquiry into prison operations in New Mexico correctional institutions (http://www.legis.state.nm.us/corrections.html) cogently reinforced the point that specific and direct legislation is crucial if privatization is to work smoothly. New Mexico's law authorized privatization of county jails but not state prisons. Two new facilities—Lea County and Guadalupe County Correctional Facilities—were opened pursuant to contracts between the respective counties and WCC. Back-to-back contracts were then made between the counties and the New Mexico Department of Corrections to house state prisoners in those facilities. In fact, no county prisoners were held in either of them. Subsequently, each prison encountered major problems, leading to the setting up of the inquiry. The report stated, "The circumvention of the procurement mode was the most damaging aspect of the approach taken with these two facilities. . . . [I]t cannot be determined who is responsible for many of the inappropriate, confusing, incomplete and costly provisions of the contracts." In the end, the complex contractual arrangements, the unclear facility missions, the need for prison beds, and the involvement of too many agencies and individuals in negotiations resulted in contracts that fall well short of industry standards and create security, programmatic, and fiscal implications for the State (Prison Privatisation Report International 2000, no. 33, pp. 3–4).

A. The Procurement Process

Without benchmarks private procurement is impossible. Entering upon the procurement process with outsiders compels prisons departments to identify precisely what it is they currently purport to achieve, to create process maps, to attempt to attribute accurate costs to specific items, and generally to re-examine their objectives and procedures.[10]

[10] I have been involved in a procurement process on the government side, from the earliest stage of drafting an Expression of Interest document to evaluating responses of short-listed bidders to the RFP to contract finalization. The most revealing aspect of

At the very least, therefore, desired outputs become clearer. There may be various ways of achieving those outputs, and the private sector may have quite different and innovative ways of doing so than the public sector. Often they will be less expensive—perhaps because of greater investment in new technology, or because arcane workplace practices can be avoided, or through the contracting in of specialist services such as health. Or certain aspects may even be more expensive—for example, in the Western Australian context the requirement that culturally appropriate cognitive skills and related programs be developed for the indigenous inmate population.

The procurement process, then, is calculated to throw up varied ideas and approaches, which start to enrich an environment that frequently has become famished. Evaluation of bids by the purchaser is a complex matter in which two matters stand out: probity and price.

i) *Probity.* As to probity, this should encompass all factors that bear, or might be seen to bear, upon conflict of interest. The U.K. and Australian practice, as well as that in most of the U.S. states, is for a "probity auditor" to be present at all key meetings throughout the whole process, to alert participants to possible conflicts or unequal treatment of bidders, and so on, and to sign off at the end that no impropriety has occurred. This serves to switch the focus of commercial groups—traditionally not reluctant to litigate—away from the purchaser.

That is well and good during procurement, but concern has sometimes arisen in the United States and elsewhere that the highest standards of probity may not have been observed before or after the procurement process. For example, the main companies are known to make political donations from time to time in states in which they carry on business, and this can lead to suspicion of favorable treatment. In one case, for example, members of the Wisconsin Assembly Corrections Committee received political donations from CCA sources shortly before the state decided to send an additional 357 Wisconsin prisoners to a CCA prison in Oklahoma (Prison Privatisation Report International 1999, no. 29, p. 3). In another case, CCA won the procurement contract for a juvenile prison in Suffolk, Virgina, even though it had not initially scored best; it later emerged that it had made numerous small political donations to significant players in the

this was the difficulty that the public sector department—charged with benchmarking activities—had in identifying and then sometimes explaining or justifying, what, why, and how it was running its existing prisons in the way it was.

Virginia political world (Prison Privatisation Report International 1997, no. 15, p. 3). There are also documented examples, in both the United States and the United Kingdom, of persons who had been involved in the procurement process from the purchaser side later joining the staff of a successful bidder.

Such practices give the appearance of lack of probity, as indeed they would in any equivalent procurement situation. Political donations are so much a part of U.S. big business culture that it might seem fatuous to urge that they be altogether prohibited. However, this is a particularly sensitive context. As for the subsequent hiring of public sector procurement personnel, smacking as it does of a retrospective reward, the Australian and U.K. practice is to require that successful contractors should not employ specified personnel involved in the procurement process from the government side for a specified period after the opening of the prison—usually one year. In an industry where there always seems to be a shortage of experienced and skilled staff, that may be as far as one can realistically go.

Another probity issue arises when the government itself enters the bidding as a potential provider, while also being the purchaser of the prison services. This comes about in the context of "market testing" or "contestability"—a concept foreign to U.S. prison privatization but familiar in both Australia and the United Kingdom. These labels refer to a procedure in which the public sector provider can bid against the private sector, whether for a new project or in relation to a contract renewal.

Given that one of the principal aims of privatization is to invigorate the public sector through competition, logic requires that the success of this strategy should at some stage be tested in a genuine contest between the public and private sectors. This is significantly different from the process whereby the private sector bids are benchmarked against the notional public sector price and regime—for example, with regard to the 7 percent formula of Florida. Ideally in market-testing situations, the (public sector) purchaser of prison services should not itself be a provider; there should be an arm's length relationship with each of the potential sectors that could provide the services. Unfortunately, this "pure" model of procurement is seldom found.[11] Conse-

[11] An exception was the state of Queensland (Australia), which for a period of two years (1997–99) worked with a purchaser/provider split—the Queensland Corrective Services Commission being the purchaser and Queensland Corrections (QCORR) being the public sector provider (Harding 1998*b*, pp. 2–3). However, this arrangement diluted the political responsibility for prisons in ways that were found unacceptable (Peach

quently, the relevant prisons department or agency, itself the major provider, is in danger of being judge in its own cause—an acute probity issue.

The response in Australia and the United Kingdom has been to create elaborate "Chinese walls"—intended to prevent the bidding group within the public provider from communicating with the evaluation group, to quarantine financial information, and above all to ensure that the public sector bidder has no inkling of the scope of the private sector bids. No matter how fastidious these arrangements seem to be, they do not really command much confidence within the private sector, particularly if the public sector bid is successful. This was what happened in 1994 with respect to a new Queensland prison, Woodford. The public sector provider, in consortium with private sector builders, architects, and bankers, beat both private providers—Australian Correctional Management and Corrections Corporation of Australia. The probity of the outcome came under immediate attack, and although a parliamentary inquiry (Queensland Legislative Assembly 1996) upheld the probity, the mutual trust between the two sectors was badly damaged.

Much the same occurred in the United Kingdom in 1994 in relation to Manchester Prison, where the public sector provider bid successfully against the private sector. Manchester was an old prison that, having been shut down for several years following major riots and arson, was about to reopen. There was widespread cynicism in the marketplace that its management would ever be taken away from the public sector; not only was it one of the biggest in the United Kingdom but it was a stronghold of the labor union. This cynicism was exacerbated less than a year later when the "service level agreement" (an arrangement akin to a private sector contract) was canceled, thus bringing the prison back into the public sector mainstream with regard to funding and many management practices (Harding 1997, pp. 146–47).

The most recent market-testing exercises in the United Kingdom—one won by the private sector and the other by the public sector—have evinced similar cynicism (Prison Privatisation Report International 1999, no. 30, pp. 1–4).

1999). The U.K. arrangement involves a specialist body within the Home Office—the Contracts and Competition Group—making the procurements, but the perception must be that it is too close in its daily operations to the Prison Service itself to be regarded as wholly independent (Harding 1997, p. 50).

Market testing in a genuine contest involving actual pricing and performance undertakings, as opposed to the U.S. model where the superiority of the private sector bid is assessed in a notional comparison of costs and regime quality, is essential if the optimum benefits of privatization are to be obtained. These benefits relate to competition and cross-fertilization, and the only irrefutable way of demonstrating public sector response to the private sector (and vice versa) is by way of rigorous assessment of promised and actual performance. To this point, however, confidence has not yet been established in the probity processes and standards that are applied.

ii) *Price.* The desire to reduce operating costs was one of the main drivers of privatization, and costs evaluation has played a disproportionate role in the debate and research. Lowballing has occurred, and poor performance tends to follow in such circumstances. In that context, it is important to emphasize that, in the majority of procurement systems, the cheapest bid is not ipso facto entitled to be successful.

The typical arrangement is that the procurement agency assigns fixed scores to various items in the proposal. These may be quite broad; for example, in the 1999 Western Australian procurement the weights were 55 percent for operational service requirements, 35 percent for design and construction, 5 percent for the organizational structure and dependability of the consortium, and 5 percent for community acceptability of the total bid. No subweightings were made, though it was specified that each of the various heads within the main categories would carry equal weight. Also, bidders had to obtain an acceptable rating in each category; in other words, a failure even on a 5-percent item such as community acceptability would disqualify a bidder even if the total of all of the items were higher than that of another bidder who had reached an acceptable score on all four categories. Finally, it was stated that the decision would be made on the basis of "value for money," flagging quite clearly that a more expensive bid might well be successful if the additional operational and/or structural value outweighed the higher dollar price.

Broadly speaking, with variations in detail, this is the standard Australian approach. Three of the eight contracts so far awarded in Australia have gone to a bidder who was not the cheapest.

The U.K. approach is not dissimilar. The most complete exposition, amounting in effect to a handbook of procurement best practice, is found in a report by the auditor general relating to the first two

DCFM procurements (National Audit Office 1997). Two key points emerged. First, the criterion of "deliverability" allows some decision-making flexibility to the procurement team (the Contracts and Competition Group), akin to the Australian notion of "value for money." Second, system-wide benefit, going beyond "deliverability" as between the bidders, may be taken into account. In the particular procurements under review, the same bidder was substantially cheaper in each procurement and, had it been awarded both contracts, could have reduced costs even further on the basis of economies of scale. Nevertheless, the Contracts and Competition Group decided not to award both contracts to that bidder, partly on the basis that benefits would be likely to flow to the next procurement by way of enhanced competition if one of the two contracts were awarded to a second bidder. The auditor general considered that this was a defensible decision, not in contravention with any explicit or implicit requirements.

It is doubtful whether this mode of promoting medium-term public interest above the interests of a complying bidder would survive legal challenge in some states of the United States. General procurement laws and practices, as well as the particular protocols applicable to private prisons, tend to be more prescriptive. For example, the Florida Correctional Privatization Commission, in evaluating procurement bids, allocates scores to eighteen separate areas divided, in turn, into 107 subareas. Each has a precise value, some as little as 0.25 percent. The greatest weight is given to price—20 percent. The evaluations are made, the scores added up, and the highest number wins. Thus, the Glades County Correctional Facility contract went to WCC ahead of CCA by a margin of 0.25 percent; no further "subjective" judgment such as "value for money" or "deliverability" could enter into it (Harding 1997, p. 76).

Not all U.S. states are quite as tightly prescriptive as this. For example, Virginia has only nine scoring categories, the final one of which is 10 percent based on interview of the shortlisted candidates. Nevertheless, departure from the numerical scores would only occur very exceptionally.

A threshold criterion adopted by virtually all the U.S. jurisdictions is that the private bid be less expensive than the actual or notional public sector costs of carrying out the same tasks. One approach is to specify a percentage—for example, 7 percent in Florida, 10 percent in Texas and Kentucky—by which the private sector bid must undercut the costs of the public sector. The procurement authority must thus

undertake complex calculations—often little better than guesstimates—as to the price at which the public sector could run the planned prison. Contract renewals are typically subject to the same requirement. There does seem to be a law of diminishing returns here. Starting from the low base of expenditure per prisoner per diem in the United States, it is difficult to see how the private sector can go on jumping the price hurdle indefinitely.

The other main approach to pricing is less constraining, looking to quality ahead of price. The Tennessee formula (Tn. Code Ann. Sec. 41-24-105[d]) is typical: "The contract may only be renewed if the contractor is providing at least the same quality of services as the state at a lower cost, or if the contractor is providing services superior to those provided by the state at essentially the same cost." Other states, including Arkansas and Virginia, follow this approach.

A whole literature of research and evaluation of operational costs has been spawned around these requirements. Obviously, a responsible government would not wish to pay the private sector more for a service than it would cost to perform it through its own employees (though the history of privatization generally throws up many examples of imprudent bargains), so cost checking is essential.

B. Specifying Contractual Outputs

A great advantage claimed for private sector contracting is that it has compelled prison authorities to specify what it is they desire should come out of the correctional regime. This relates not only to the primary aim of the secure custody of inmates but also to care and well-being, rehabilitation, and reparation. The avoidance of escapes, deaths, and violence within prisons is a primary objective but so too are good health and nutrition and an equitable regime. Do the purchasers (the state authorities) want to achieve basic literacy rates of 30 percent, or 50 percent, or what for those prisoners illiterate upon receival? Should it be expected that 10 percent or 40 percent of prisoners gain trade qualifications while serving their sentences? What percentage of sex offenders should complete specialist treatment programs, and what does "completion" entail? Is a positive urinalysis rate of 5 percent, or 15 percent, or what acceptable? How many incidents of inmate assaults upon other inmates are tolerable? The list is almost endless.

The input approach, so characteristic of the public sector, was akin to asking, how long is a piece of string? Goals were either not set in advance or, if set, were quite loose. If hepatitis C rates increased within

the prison, this was unfortunate but not in itself seen as a sign of unacceptable managerial performance. If literacy rates were improved by 10 percent one year, 25 percent the following year, and 5 percent the year after that, in a context where the staffing and resources inputs had not changed, nothing much turned on it in management terms. The explanation for variance might well be sought, and found, in changing inmate profiles or attitudes.

While the above may, perhaps, be something of a caricature and while, certainly, some aspects of the public sector system were, and are, output focused, nevertheless it is a fair representation of the broad disparity in expectations and attitudes. Contract would change this, it was thought. However, the early contracts did not really provide the mechanisms for doing so, thus lending some support to those who denounced this input/output dichotomy as "gobbledegook" (Ryan 1998, p. 324) or as bespeaking "a dominant form of managerialism" (Sparks 1994, p. 24).

In Australia the original Junee Prison contract provided that "the Correctional Center is to provide access to, and encourage offenders to undertake, a range of educational and vocational programs." While formally this might possibly be construed as output focused, it is so nonprescriptive that it is impossible to say what would or would not constitute compliance. It is indeed exactly the sort of "obligation" that an input-orientated organization would be happy to impose upon itself. This is not really surprising as the contract was written by an input-focused organization, the public sector prisons department, which clearly had not at this early stage woken up to the fact that it was now playing in a new game. Not surprisingly, this clause led to several major disagreements (Harding 1997, p. 67), culminating in its being rewritten.

Much the same problems had been experienced earlier with the Borallon contract in Queensland—the first in Australia. Requirements that the contractor provide "regular" access to various health and dental services, for example, were fraught with the potential and the actuality for dispute. Likewise, a problem with the Victoria contracts of the mid-nineties was that "the private sector outcomes were set on the basis of the average, or in some cases the less than average, results achieved in the outdated prisons which had been identified for replacement" (Auditor General Victoria 1999, p. 2). In other words, in specifying the new regime the public sector providers who were now car-

rying out the procurement could not escape intellectually from their own experience.

The United States started at a more sophisticated level, but even so some of the early contracts were rather loose. For example, the 1995 Florida/CCA contract relating to a youthful offenders' institution depends a great deal for its meaning on cross-reference to "the standards." This is defined to mean: "ACA Standards; applicable court orders, including but not limited to orders entered into in *Celestino and Costello v. Singletary;* the Health Care Standards, Health Services Bulletins and guidelines and recommendations of the Correctional Medical Authority; and applicable federal, state and local laws, codes and standards."

Important as American Correctional Association (ACA) standards are in maintaining a level of accountability in U.S. corrections, they are primarily processual ("Written policies must provide") and formulaic. Practical, on-the-ground compliance or breach is seldom clear-cut, yet clarity and predictability are crucial for accountability. Moreover, to the extent that ACA standards can be interpreted with sufficient precision, they might well conflict or overlap with the other generalized standards picked up by cross-reference in a clause such as that set out above. Once more, it is difficult to be sure what would or would not amount to compliance.

Australian, U.K., and U.S. contracts have come a long way since then. For example, a 1998 Texas solicitation (the terms of which can be found on Logan's Web site, http://www.ucc.uconn.edu/~logan/) shows modern practice at work. As with virtually all jurisdictions, the terms of the solicitation would be incorporated by reference in the contract or award. It can be seen that the contractor has room to move, to do things its own way, in many program areas. Nevertheless, the problem may here have become that the terms are a little too prescriptive—output focused but based on the assumption that desired outputs can best be achieved by adoption of public sector procedures and inputs. This assumption is shown by the frequency of cross-references to the Texas Department of Criminal Justice Policies and Procedures, which the private prison's own policies and procedures must take into account. This reflects the basic ambivalence governments still have about risk transfer in this politically sensitive area. Nevertheless, the contractor is still left with some room to move.

In Australia, the pattern is not dissimilar. The balance is between

encouraging innovation in achieving desired outputs and exercising residual control over how the institution should be run. For example, the 1999 Western Australia contract gives great latitude to the contractor as to what industries should be available for prisoner work and training. The old formula of metalwork, carpentry, leather work, and so on, with workshops purpose-designed for those activities, has been discarded: "The evident failure of traditional prison industry models and practices means that innovation must be found by way of links with suitable business partners and in terms of the design of industry areas. The aim will be to provide industry work experience generating a work habit that will be relevant to post-release employment opportunities" (Western Australian Government 1998, para. 1.6).

In summary, contracts seek to be output based, they look for innovation, they aim to produce measurable compliance or performance criteria, and yet the most recent tendency is that they do not quite transfer the whole risk from the public to the private sector. The days are long gone when the private sector operator could almost write its own contract, for the public authorities are now becoming quite sophisticated in their demands and expectations.[12]

C. Fee Structures and Compliance Mechanisms

In DCFM contracts—now the most commonplace—the fee structure will incorporate the capital repayment schedule, and this of course will remain unchanged over whatever is the applicable period. As for management fees, while precise mechanisms vary, the broad objectives are similar: to pay the agreed fee only for full performance and thus to deduct amounts for any aspects of partial or nonperformance. The financial incentive should drive performance in a way that is impossible in the state-funded public sector.

To illustrate the importance of financial leverage: in Victoria (Australia) a maximum fee has been set that is calibrated with actual occupancy, and within that there is a performance-linked fee (PLF) that is only payable to the extent that performance is satisfactorily carried out. The amount of that fee is such that, if it were all lost, the financial return on capital to the operator would make the enterprise marginal. In other words, most of the commercial profit is tied up in the PLF.

[12] The dream of unbridled self-regulation has not yet quite died. A very senior executive of a major company recently lamented in private conversation that governments would still get the best value if they said to the companies, "There's the prison; here's your fee—run it for us as best you can."

In addition, many modern contracts also impose specific penalties for failures of performance in the most sensitive areas—escape, nonnatural death, riot. For example, in Western Australia a penalty of $100,000 is payable for each one of such events.

The corollary is that contracts provide for payment for additional services, usually but not exclusively arising out of such matters as higher occupancy rates or the provision of greater services than previously agreed. For example, in 1997 the fees payable to WCC for the operation of South Bay Correctional Center were increased to take account of the fact that greater numbers of advanced HIV+ prisoners than previously agreed were being sent there.

The very early contracts put great reliance upon the contractor's reporting systems for the purchaser to be able to determine what was payable. This would sometimes be augmented by on-site observation and audit. However, it has become common, but not universal, practice for a contract compliance monitor to work on-site, the purchaser's own records supplementing those made available to it by the contractor. The most recent Australian contracts require that the contractor's books must be available on-line to the contract compliance monitors.

The standard Texas provisions epitomize monitoring practice in most U.S. states:

> TDCJ [Texas Department of Criminal Justice] will designate a contract monitor to review all administrative, non-programmatic, recreational and programmatic requirements of the contract. The Contractor shall provide, at its own expense, a separately keyed private and secure office in the up front Administrative Building for the Contract Monitor. Contractor shall provide all furniture, office equipment, office supplies, and a dedicated telephone and fax line with fax machine and TDCJ mainframe computer connection to the Contract Monitor at Contractor's cost. (Para. C9)
>
> TDCJ in coordination with the Contract Monitor shall, in its discretion, devise its own procedures for monitoring the quality of Contractor's performance under this Contract . . . and the Contractor shall cooperate fully with the TDCJ and the Contract Monitor in obtaining the requisite information. (Para. E3.1)
>
> The Contractor shall be required to maintain acceptable performance standards in various areas as determined by the TDCJ. Contractor's failure to maintain acceptable performance standards shall result in a deduction to the monthly per them as

listed in this section. (Para. G3.5; see Logan's Web site at http://www.ucc.uconn.edu/~logan/)

Of course, a great deal depends upon how the compliance monitoring is actually done. The practices are quite variable, particularly in the United States. At the Lea County and Guadalupe County Correctional Facilities, New Mexico, the state at no stage had any on-site monitoring presence, the Department of Corrections arguing that it could not afford to fund such positions even though they were provided for by contract. The report into the New Mexico corrections system (http://www.legis.state.nm.us/corrections.html) highlighted this failure as an important aspect of the problems that led to the various disorders.

The United Kingdom is resource rich when it comes to monitoring. The key point has been recognized that the more authority is devolved, the greater must be the commitment to regulation and accountability. Consequently, the early recognition of problems and the imposition of sanctions are active components of the privatization structures. The withholding of performance-linked fees is graphically illustrated by the experience at H.M. Prison Parc, in Wales. This started up shakily, with widespread allegations of racism, intimidation, breaches of the duty of care in relation to health and safety matters, and general regime confusion including a malfunctioning electronic security system. In the first six months of 1998, fees totaling about 800,000 pounds (ca. $1.3 million) were withheld from the operators, Securicor Ltd., for failing to meet standard contract requirements. This amount would have accounted for the whole of the operating profit budgeted for that period. By the end of 1999, the chief inspector of prisons (Ramsbotham 1999*b*) was able to report that "Parc has largely overcome many of the problems with which it was beset" (p. 1). While, doubtless, this improvement was driven by additional factors than financial incentive, the normal business concern of a listed company to avoid losses must have played a part.

Withholding fees is the first significant step along the sanctions track, which can culminate in contract cancellation. Harding (1997, p. 48) has postulated that regulatory mechanisms in relation to private prisons are more susceptible to capture—that is, a situation where "regulators come to be more concerned to serve the interests of the industry with which they are in regular contact than the more remote and abstract public interest" (Grabosky and Braithwaite 1986, p. 198)—than in relation to other, more strictly commercial, activities:

"Whenever the principal operator in a public service industry is empowered to contract out or delegate to others some part of its own operational responsibilities, and in so doing takes on the role of regulatory agency in relation to the activities of those delegates, there is a high risk that some degree of capture or co-optation will occur." This is because the failure of the contractor is in effect the failure of the purchasing agency, which is still also wearing the hat of provider of such services.

In Victoria (Australia), this indeed turned out to be the case at Port Phillip. This 600-bed multifunction, medium-security prison commenced operations in 1997. Almost at once the operators, Group 4, ran into all manner of problems—bullying and violence, riot, fire, suicides. The culmination was a major disturbance in March 1998, lasting two days. A task force report stated that "[We have] little confidence in the current management's ability to manage, and believe that this management regime is destined to experience ongoing serious problems; and [we have] concluded that the management of the prison prior to, during and after the incident of 11/12 March 1998 was not and are not able to deliver to a satisfactory standard a range of contracted services" (Auditor General Victoria 1999, chap. 5, p. 22).

Yet no consideration was given to the cancellation of the contract. All that happened was that fees totaling less than 0.2 percent of the annual contracted amount were withheld. A subsequent inquiry (Auditor General Victoria 1999, p. 22) was of the opinion that notice of possible cancellation should have been given. Clearly, the state authorities overidentified with the need to rehabilitate and cushion the operator, and this was partly because of their continued need to ensure that the imprisonment function was carried out on their behalf. As the problems compounded, the authorities appeared unduly reluctant to exercise their full contractual rights: cancellation. Accountability through contract cancellation is something about which United States authorities feel fewer qualms.

D. Public Access to Contracts

If contracts remain confidential to the parties, a crucial element of accountability is missing. But if specifications are on the public record, all manner of interested parties can bring pressure to bear upon the contractor as well as the agency whose duty is to ensure compliance. These include prisoners themselves, who are invariably the best informed as to how the regime is functioning; members of legislatures;

the media; and, above all, advocacy groups such as civil liberties and prisoners' support organizations. The latter groups are particularly important in the United States where prisoner litigation is often activated by such bodies.

In the United States, access has not generally been a problem. State procurement laws typically require public access to such contracts. In addition, contracts made by publicly listed companies (a category into which all the market leaders fall) must, under Securities and Exchange Commission rules, be lodged for inspection. Some states, notably Florida, go further, requiring public sessions of the Correctional Privatization Commission to be held at which contract variations are discussed and explained.

In the United Kingdom and Australia, the bureaucratic instinct for secrecy has traditionally been strong. With the early private prison contracts, the authorities in both countries latched on to the notion of "commercial-in-confidence" as a means of trying to prevent public access to any part of the contract. The argument was that the companies were entitled to have their pricing basis protected from the view of their competitors, and that any aspect of contract performance and standards would cast light upon this so that, accordingly, the whole contract should remain secret. This approach produced some remarkable outcomes—for example, in the United Kingdom, the Home Office, as commissioning agency for research into the comparative efficiency of the first private prison and a comparator public prison, withheld the relevant contract from the researchers whom it had commissioned to do the work (Harding 1997, p. 70).

In Australia, this posture soon started to break down (Harding 1997). Nevertheless, the state of Victoria would release only significantly edited versions of its contracts. Public interest litigation was launched under the Freedom of Information Act by the Coburg-Brunswick Legal Referral Center, a group with a strong and enduring interest in prison conditions in both the private and the public sector, and in late 1999 the supreme court ordered the release of all contractual documentation other than the security plans for emergencies. It emerged during the court proceedings that it was the government authorities much more than the contractors who wanted to maintain secrecy (Freiberg 2000).

While this saga worked its way through the courts, the newest privatization state, Western Australia, enacted legislation mandating that the contract and all relevant supporting documentation be tabled in

Parliament within thirty days of signature. In practice, the full contract has also been placed on the government's Web site (http://www.moj.wa.gov.au/offmngt/private.htm). This provision echoed that found in the New Zealand legislation. The U.K. situation remains legally fuzzy, however, with access dependent in practice upon the attitude from time to time of the Home Office.

VI. Regulation and Accountability

Accountability depends upon numerous systems, processes, and values; it is a complex notion of interconnected matters rather than a unitary concept (Harding 1997, pp. 27–31, 158–65). Some key factors are beyond the influence of legislators or administrators, notably the crucially important issue of media exposure and debate. Others are utterly intangible, such as the prevailing attitudes toward crime and offenders. Some accountability factors relate to broad system matters, others to the minutiae of bureaucratic arrangements within the responsible state agencies.

Several issues already discussed fall into the accountability basket. They are whether the delegation of the administration of punishment to the private sector strays over the line into the allocation of punishment; whether the private sector is permitted, or successfully takes upon itself, a privileged and undemocratic role as a penal lobby group; whether the private companies have sufficient capacity to manage prison regime risks lawfully and equitably; whether the processes for letting contracts conform with probity and are applied with integrity; whether the terms of the contract and the processes for ensuring compliance protect the needs of the public authority sufficiently; and, related to this, whether contracts are publicly accessible.

What follows is a discussion of some of the remaining major factors that bear upon accountability. The list cannot be exhaustive; mechanisms and their relative significance vary across time and place. The broad conclusion will be that, in the context of the whole basket of accountability items, the private sector is no less, and arguably somewhat more, accountable than the public sector.

A. The Purchaser/Provider Split and Its Relevance to Accountability

The risk of capture, which is inherent when the regulator of the private sector is itself a public sector provider, has already been raised. The obverse difficulty is antagonism—a determination to find fault. Although this is by no means as well documented, there have been

signs of this in New South Wales (Australia), where it was the strong desire of the public correctional authorities to reclaim Junee Prison for the public sector, and also in the United Kingdom in relation to Buckley Hall, a private prison that the state agency seemed determined to return to the public sector.[13]

The best theoretical model is for the purchaser of prison services to be separate from all providers, public or private. This enables true competition, provides a mechanism for a churn rate between sectors, and enables regulatory standards to be applied across the board. Thus, if the state authorities decide that a new prison is required and they have no compelling reason to assign it to the public sector, the purchaser/provider split enables the public sector and the private sector to bid against each other on equal terms in a way that meets probity standards. At the end of the contract period, rebidding can also be open to all comers, with the same advantages including industry confidence in the outcome—something so notably lacking with regard to Manchester, Woodford, and Buckley Hall. Finally, it facilitates the process of applying the same broad regulatory standards to all prisons, regardless of the operator's identity.

However, this model in its "pure" form has only once been used, in Queensland (Australia).[14] The predominant U.S. model is for the public sector prisons authority to be both a provider of services in its own right and also the purchaser of private sector services. This possibly reflects something of the origins of U.S. privatization, which was less about doing a different job more innovatively than doing the same job less expensively. Of course, there are usually distinct work sections within corrections departments administering the private contracts, and many contract monitors are flexible and innovative in overseeing regimes. But the fact remains that the public sector culture and processes are the omnipresent reference point.

[13] Buckley Hall had originally been a public sector prison, then was won from the public sector in a market-testing exercise by Group 4. In 1997 the Prison Service Agency made a declaration that it was in need of "special managerial attention." This was seen in the industry as an early warning of the public sector's determination to reclaim it. Yet the chief inspector of prisons saw the prison as being in many ways a model of best practice and stated, "Not only is the stigma attached to it undeserved, but in view of the large number of prisons which are way below the standard of Buckley Hall but have not been made subject [to such a declaration], it undermines the credibility of the process" (Ramsbotham 1997, preface). Two years later, upon expiry of the private operator's contract, the public sector agency won the bidding for its management—an outcome that was greeted with some cynicism.

[14] See n. 11, above.

Florida broke away from this pattern. From 1985 the Department of Corrections (DOC) had been statutorily empowered "to enter into contracts with private vendors for the provision, operation and maintenance of correctional facilities and the supervision of inmates" (Fla. Stat. 944.105), and the same year county authorities were authorized in similar terms (Fla. Stat. 951.062). The latter soon started to utilize this power, but the state DOC was evidently reluctant to do so. In 1993 the legislature stripped the DOC of this power and established a new organization, the Florida Correctional Privatization Commission, whose sole function was to take charge of privatization at both the state and the county level. Consequently, the line of accountability for private prisons goes to a body that is itself not a provider and not wedded, therefore, to public sector provider patterns and attitudes. That is a good thing, congruent with the ideal model. But the accountability line of the private sector at no point intersects with that of the public sector. This is a flaw in the model. If competition and cross-fertilization occur, it is despite the model, not because of it.

In the United Kingdom, the public sector provider, H.M. Prison Service Agency, contains within it a quasi-autonomous purchasing body known as the Contracts and Competition Group (CCG). Once the government has decided that a private prison should be procured, the CCG sees the whole procurement process through to the point where the contract is ready for the minister to sign. On-site contract compliance managers and controllers (the governor-grade public sector officials responsible for adjudications about disciplinary matters) are appointed by and in theory work for the CCG. However, in practice the dominance of public sector provider interests start to take over at this point, with Prison Service area managers signing off on fee payments or making decisions as to their reduction. Contract rebidding also falls within the CCG's operations. However, the CCG model falls short of what is ideal, for the public sector provider in practice has taken on a significant role in regulating the private sector.

In Victoria (Australia), the Office of the Correctional Services Commissioner was established in 1994, as the state commenced privatization. Its role was to monitor performance in both the public and the private sector. However, its regulatory role was confused and it had no budgetary responsibility for the purchase of services. As the Port Phillip saga showed, it was also unduly diffident in exercising its monitoring role—in particular, by failing to put monitors on-site and by not recommending contract termination.

Queensland, as mentioned, adopted the "pure" model of a purchaser/provider split. Following the industry concern at the award of the Woodford contract by the public sector provider to its own bidders, a purchaser/provider split was legislated. The Queensland Corrective Services Commission (QCSC) became the purchasing, standard-setting, and supervisory body for both the public and the private sector, while Queensland Corrections (QCORR) became the public sector provider. This model lasted only two years, from 1997 until 1999. With a change of government came an inquiry (Peach 1999) and then a much-anticipated change back to a structure where the public sector provider became the regulatory body for the private sector. An autonomous purchaser apparently stripped too much control for their political comfort from a government dependent on support from the labor unions. With the structural change came also an announcement that "market testing" for new prisons would not henceforth occur and a strong industry expectation that not only would there be no new private prisons in the state but also that existing ones might be taken back into the public sector.

In summary, a legislatively mandated purchaser/provider split would tend to facilitate accountable privatization, for it would enable procurements to be made in a way less dominated by the political process. Administrators recognize the importance of this dichotomy, which is crucial in pure commercial privatization, but nevertheless prison privatization has had to go ahead within a public provider-dominated structure that tends to inhibit its development.

B. The State's Vetting Powers

The threshold accountability point is the selection stage. It is now so complex and thorough that the state really only has itself to blame if it gets it wrong.[15] Companies often put a great deal of nonrecover-

[15] In the U.K. and Australian experience, "getting it wrong" usually means departing from "correctional value for money principles." Consider the case, e.g., of the problem prison in Victoria—Port Phillip. A tranche of three private prison contracts were being let, and there is some suggestion that the government strongly desired that each of the three main companies—ACM, Corrections Corporation of Australia, and Group 4—should be successful in one bid, this being rather naively seen as a way of enhancing competition. Accordingly, it indicated its preference for the successful bidder to be the one that had not yet won a contract—Group 4. The report of the Auditor General Victoria (1999, paras. 4.53–4.61) makes no reference to these strongly held industry beliefs and records that it is satisfied that the evaluation panel met all probity requirements. However, it did emerge that all three short-listed bids were initially treated as nonconforming and that rebidding was permitted only within the previous base prices. This is an unusual requirement and would certainly seem potentially to open up the opportunity for an unexpected outcome as a consequence, say, of off-the-record government to com-

able money into preparation of a bid—on some estimates for big contracts up to $1 million. After that comes the contract itself—a further opportunity to put into concrete terms what is expected of the operator, and then the contract administration phase involving for the most part on-site monitors.

In addition, a key control and accountability lever relates to the appointment and qualifications of personnel. As McDonald et al. (1998, p. 59) state: "Adequate, quality staffing and training constitute two of the most critical contract provisions public authorities may address in private prison agreements. Both represent likely areas in which private contractors will seek to reduce expenditures, either through the payment of lower wages and benefits, the hiring of less experienced personnel, the deployment of innovative staffing patterns or the introduction of special technology (e.g., specialized surveillance equipment)."

Nevertheless, the U.S. pattern is generally not overprescriptive. Typically, the most invasive level of control is a provision such as that found in Texas contracts: "Contractor will retain no Upper Level Management Personnel for administration of the Facility without prior approval of selection by the Texas Department of Criminal Justice, which approval shall not be unreasonably withheld" (para. I.7: see Logan's Web site: http://www.ucc.uconn.edu/~logan/).

"Upper level management personnel" will have been defined in the request for proposals to meet what the agency sees as its legitimate needs. Moreover, as contracts invariably require ACA accreditation to be obtained, superimposed upon this vetting power is the requirement that managers meet educational and training qualifications expected by those standards. Thus, in the case of wardens, "a bachelor's degree in an appropriate discipline, five years of related administrative experience, and demonstrated administrative ability and leadership" are required (American Correctional Association 1990, 3-4009).

This is also the case with all levels of custodial officers and the training that should be available to them (American Correctional Association 1990, 3-4079–3-4081). However, these provisions stop well short of enabling the state authority to decide for itself whether any particu-

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pany communication. Subsequently, as Port Phillip failed, the government contributed funds for the redesign and adaptation of parts of the prison. This was thought within the rest of the industry to indicate the bid was probably known to have had a lowball element in it. In the case of Parc Prison in the United Kingdom, the CCG could well have been unduly impressed by the novelty of the footprint of the winning design, which was much smaller than the usual U.K. prison size, and also by the electronic systems. Each of these factors subsequently became a crucial problem.

lar individual is suitable for employment, and they do not empower the agency to dictate training requirements in detail. By contract some states go further: for example, Florida requires that private sector staff undergo the same training as those in the public sector. But for the most part this aspect of the prison function is regarded as within the contractor's management prerogative.

The United Kingdom and Australian approach is quite different. In essence, the state authority not only possesses the power to veto any person at any level for employment or to withdraw authorization subsequently but also must positively authorize private prisons personnel if they are to act in that capacity. No authorization, no employability. The U.K. provisions are found in the Criminal Justice Act 1991. This designates all employees involved in the running of the prison, from the manager or warden to the base-grade uniformed officers, as "prison custody officers": "In this Part 'prison custody officer' means a person in respect of whom a certificate is for the time being in force certifying (*a*) that he has been approved by the [Home Secretary] for the purpose of performing . . . custodial duties; and (*b*) that he is accordingly authorized to perform them" (Criminal Justice Act 1991, Sec. 85[l]).

These personnel thus derive their status and authority not merely from their contract of employment with the private company but also from a certificate granted in the name of the Home Secretary. The statute sets out the qualifying criteria and the circumstances for revocation. A person must be "fit and proper and must have received training to an approved standard"—that is, approved by the state authority. Revocation can occur on the basis that a person has ceased to be, or never was, a fit and proper person. This is very much an administrative process, not reviewable through judicial challenge. The statute has been designed so that the state agency can seek to minimize by its direct intervention one of the management risks—unsuitable personnel—that it is otherwise trying to pass to the contractor.

The U.K. model has been adopted for the most part in Australia: for example, the most recent privatization state, Western Australia, has virtually replicated the U.K. statutory provisions. South Africa has also taken this approach. There is a reason why this is particularly important in non–United States jurisdictions. The private prison industry leaders are CCA, which has approximately 55 percent of the U.S. business, and WCC, with about 22 percent. Each also operates in non-U.S. markets through subsidiary companies that are usually "$2 companies"

formally incorporated but not capitalized in the local jurisdiction. In those markets, WCC has 54 percent of the business, CCA 14 percent, and the British/Swedish Group 4 consortium 28 percent.

There is a strong tendency for U.S. companies to believe that the U.S. way of doing things has universal applicability and that American managers are the best choices for starting up new businesses overseas. While this is an understandable belief in relation to, say, motor vehicle manufacture or computer software or pharmaceuticals, it is wrong in relation to prisons. Prisons are as much a manifestation of national culture, identity, priorities, and problems as are schools or sports or dietary habits or religion. For example, a Japanese prison regime—in the broad sense not only of accommodation type and standard but also of less tangible matters such as attitudes of prisoners and staff toward punishment and confinement, acceptance of authority, expectations of privileges, relations with other prisoners, and so on—is completely different from that of, say, a Finnish regime. A French regime is different from a British one, or a Malaysian one from an Australian one. And they are all quite different from the United States. In other words, prison management is not simply a generic skill applicable anywhere on the globe but one that is to a significant degree culture specific. In a closed institutional context, to misread the culture, to fail to pick up the signals could have serious, if not catastrophic, effects.

In fact, this has happened with at least three prisons—Arthur Gorrie and Junee in Australia and Doncaster in the United Kingdom. In each of these cases, statutory power for the agency to withdraw the authorization of senior management personnel to work in the prisons was a strong bargaining chip in discussions with the operating company, leading in two cases to the company's "voluntary" decision to replace U.S. personnel with local managers (Harding 1997, pp. 85–88).

C. American Correctional Association Accreditation

It is the invariable practice for U.S. contracts to include a clause requiring the private prison to obtain ACA accreditation within a specified time, usually three years. Even states that do not require accreditation for their own public sector prisons nevertheless impose that requirement upon private prisons (Harding 1997, p. 64). Accreditation works as follows. The ACA, a voluntary association of high-level correctional professionals, has developed and published, through its Commission on Accreditation of Corrections, standards applicable to twenty-one types of corrections, including adult prisons. A state system

or an individual institution seeking accreditation will request an audit, and at an agreed date a team of three or four auditors will visit. If standards are acceptable, a certificate will be issued, valid for three years. If the audit is unsatisfactory, deficiencies will be identified and a date for recall set; as long as everything has been rectified, a certificate will then be issued.

Many criticisms have been made of this system. One is that the institution seeking accreditation has to pay for the whole procedure and that the ACA for its part is dependent on these fees. The prisons are "customers," therefore, rather than applicants; a degree of capture is likely. The ACA rejects this criticism, believing that its professionalism is unassailable (Keve 1996, pp. 133–37). Another weakness is the highly structured nature of the visits, with plenty of advance warning. The regulatory literature constantly illustrates this as being a weakness in audit processes. Even more tellingly, perhaps, critics refer to the formulaic and procedural nature of the audit. It is very much dependent on ascertaining what the written procedures of the institution lay down as operational processes, rather than observing whether those processes in fact are followed. An ACA accreditation audit could in principle take place 80 percent in the warden's office and only 20 percent in the prison itself; contact with staff and inmates is something of an afterthought.

McDonald et al. (1998, p. 49) summarize their concerns:

> For the most part, the prevailing professional standards prescribe neither the goals that ought to be achieved nor the indicators that would let officials know if they are making progress toward those goals over time. Two facilities could conform equally to ACA standard by having a written policy on a particular issue, yet they could have diametrically opposite practices and outcomes on that issue.
>
> The effect of these various trends has generally been to conceive of prison performance quite narrowly as conformance to law, state rules and regulations, and professional standards. That is, performance trends tend to be measured according to procedural compliance.

These criticisms possess validity. However, the fact remains that every single private prison has or will soon have ACA accreditation, whereas this is not so with the public sector. Even now, when the ac-

creditation process has been available since 1978, more than 20 percent of public sector facilities have not been accredited. Typically, there is a degree of self-selection at work; prisons that will fall short are located in jurisdictions that choose not to seek accreditation. Privatization marks a distinct step forward, at least symbolically, in the commitment of state agencies to improved standards.

D. Inspection: The U.K. Model

Neither the United Kingdom nor Australia nor any of the other privatization states has an accreditation system. In the United Kingdom the Woolf Report (Woolf and Tumim 1991, 1.186–87, 15.5.6) recommended that such a system should be established, based on precise standards. Procedurally, it would have been tied in with the activities of the chief inspector of prisons, whose inspection reports would form the basis of the accreditation process. The idea met with governmental and bureaucratic resistance, quite possibly because the creation of precise standards carried with it some danger that the courts might construe these as constituting prisoners' rights. The U.K. approach has always basically been that standards, such as the Prison Rules, "do not, either singly or in combination, purport to provide a code of directly enforceable rights in prisoners" (Richardson 1994, p. 80). The United Kingdom—and the Australian—philosophy has been to prevent, as far as possible, the prison regime being judicially overviewed, and there is no Bill of Rights in those countries, as in the United States, to enable prisoners to break down this intransigence and enter through the doors of the courts.

The U.K. inspectorate system performs a related function, however. Until 1981 prison inspections had been very much in-house Prison Service affairs—management reporting for the benefit of management. There was very little continuity in the system; reports were not made public; follow-up actions, if any, thus not able to be logged. These deficiencies led in 1979 to the establishment of a committee to review the process. It recommended that an independent inspectorate be established, within the Home Office but not as part of the Prison Service itself; it should report to the Home Secretary, and its reports would be made public (though not until after the Prison Service had the opportunity to respond to them, its written response being made public simultaneously). The inspectorate would be able to make unannounced, as well as announced, inspections of prisons and also to overview general issues "thematic inspections."

The favored modus operandi is for an inspection team to spend five or more days at a prison. The primary source of information, in contrast to ACA accreditation processes, is direct observation, discussions with prisoners and staff, participation in some programs, follow-up interrogation of management, all this fortified with detailed scrutiny of documentation and records. The two most recent officeholders have created a culture of not pulling their punches, and the findings can be devastating: for example, with Wormwood Scrubs, a "flagship prison" in the U.K. system, the chief inspector characterized his report as "the worst prison report in penal history" (*Times*, June 29, 1999).

The weakness is that no sanctions or other processes necessarily flow from an inspection report, however damning it might be. The reports are advisory and recommendatory only; it is for the Prison Service officials to decide whether to act upon them. Over the years, the low and slow take-up rate has been a source of great frustration to successive chief inspectors.[16] In the context of privatization, however, the great advantage was that it was a ready-to-go, independent body for evaluating the performance of operators in this controversial new area—evaluations that would not merely be self-contained but that would possess a strong comparative element.

This has occurred, with the new private prisons being inspected earlier in their operational lives than was the standard practice with new public sector prisons (Harding 1997, p. 62). By and large, they have emerged with considerable credit. Doncaster prison, run by Premier Prisons, Ltd. (a WCC subsidiary company), was "the most progressive in the country" with regard to its antibullying strategies, its management of young offenders, its care of potentially suicidal prisoners, and several other key functions (Ramsbotham 1996, preface). Blakenhurst Prison (CCA) was "marked by a refreshingly 'can do' attitude amongst staff, demonstrated in their approach to their tasks—an attitude that is, sadly, not found in too many public sector prisons" (Ramsbotham 1998, preface). Altcourse (Group 4) "is by some way the best local prison that we have inspected. . . . It is not the first prison I have left with a feeling of optimism, but never before have I listed forty-five examples of Good Practice in a report" (Ramsbotham 2000, preface, pp. 1–2).

[16] The 1997/98 annual report of the chief inspector of prisons (Ramsbotham 1997/98) epitomizes this frustration, cataloging numerous examples of earlier recommendations that have not been taken up, in each case leading to exacerbation of the identified problem.

The inspectorate model, then, seems very robust for measuring qualitatively, and to some extent quantitatively, the performance of private prisons. It is a model that, unfortunately, is not standard in Australia. For public prisons the pre-1981 U.K. model of in-house inspections or audits is normal. With privatization all states recognized the need to bolster this system, and the relevant statutes all make provision for monitors to be appointed. However, the practice has been to take them off-site after the initial settling-in period (Harding 1997, pp. 42–45) or, in the case of Victoria, only to bring them on-site after trouble has occurred. Visiting audits are now, for the most part, the norm for private as well as public prisons.

However, Western Australia, embarking upon privatization, has seen the inspectorate model as a lever for system-wide reform of penal administration. A major public sector prison riot in 1998 brought the system into crisis (Smith, Indermaur, and Boddis 1999) and revealed the lack of a mechanism either to recognize looming problems or to deal with them after they had occurred. Ostensibly because of the need to ensure accountability of the private sector but no less to bring transparency into the closed public sector system, the opportunity was seized to create a system-wide inspectorate along the U.K. lines. The model is, if anything, a stronger one—the inspector's reports are to be tabled in parliament, not merely presented to the minister of justice, and the inspection function is to extend to police lock-ups and juvenile detention centers. It is an enlightening example of how privatization can bring about system-wide reform.[17]

E. Prisoner Complaints and the Ombudsman System

For public prisons in the United Kingdom, Australia, and other jurisdictions such as New Zealand and Canada, an aspect of accountability is the access of prisoners to an ombudsman to complain about their treatment. This is a crucial part of the accountability jigsaw, for two reasons: first, the inspectorate model, where it exists, is not designed or intended to deal with individual complaints; second, litigation either individually or as part of a class action is seldom possible in a legal context where prison rules do not create prisoners' rights. Without the ombudsman system, therefore, an accountability gap would exist in relation to those manifold day-to-day matters that are the essence of

[17] From August 2000, several months after this article was accepted for publication, the author was appointed as the inaugural inspector of custodial services for Western Australia.—Ed.

prisoner experience and stress. The ombudsman system is no less accessible to prisoners in private as in public sector prisons.

In the United States, the theoretical and practical opportunities for litigation have been much greater either individually or as part of class actions brought not only by prisoners but more typically by external watchdogs such as the American Civil Liberties Union (ACLU). Day-to-day matters tend to be dealt with by on-site mediation procedures of varying procedural quality. The ombudsman model is not generally found. Private prison inmates are, however, on the same ground as public prison inmates. The standard Texas provision exemplifies the position: "*Offender grievance procedure.* Contractor shall provide the resources necessary to implement the offender grievance procedure in the manner detailed in B.P. 03.77, Offender Grievance Procedure Manual, and applicable Court Orders" (C.5.19 at Logan's Web site: http://www.ucc.uconn.edu/logan/).

In recent years both federal and state laws have started to restrict prisoners' access to the courts (Bronstein and Gainsborough 1996). In that context, the ombudsman or the inspectorate model would enhance accountability.

F. Litigation

Actions against public sector prison authorities have led, from time to time, to individual prisons or whole prison systems in no fewer than forty U.S. states being placed under court order. This is usually as a consequence of class actions brought on behalf of prisoners, and the basis is a breach of the Fourth, Fifth, Eighth, or Fourteenth Amendments to the United States Constitution. There is no reason in law or practice why private sector prisons are not susceptible to similar actions. An early example (1997) is an ACLU suit against the Bobby Ross Group for overcrowding in its facility at Karnes City, Texas, to which Colorado prisoners had been sent.

To date, however, most litigation has been aimed at achieving individual compensation in relation to conditions or incidents in particular prisons. (Of course, these cases also may be, and mostly are, brought as class actions.) This litigation is mostly based on 42 U.S. Code 1983—deprivation of constitutional rights under color of state law. To succeed these cases must surmount two hurdles: "state action" (i.e., the defendant must have been acting on behalf of the state rather than privately) and "color of law" (i.e., in purported reliance upon a state or local law or administrative practice). A 1988 decision (*West v. Atkins*,

[1988] S.C.R. 2250) had held that private medical services provided in a public prison by way of contract between the prison authorities and the medical practitioner fell potentially within the liability of 42 U.S. Code (1983). So it was inevitable that direct prison services would also be covered, and in the growing body of subsequent litigation that has not even been questioned.

The Youngstown case has previously been mentioned. Not surprisingly, it soon led to litigation against the operators, CCA, on behalf of all prisoners who had been sent there on or before October 19, 1998. In April 1999 the parties agreed upon a settlement involving the payment of $1.65 million to be distributed among affected prisoners. The settlement also involved CCA agreeing to allow an independent monitor employed by the city of Youngstown to oversee the future operation of the prison.

Litigation by inmates is also in progress in relation to other high profile private sector alleged failures—notably at Columbia, South Carolina, against CCA in relation to staff violence at a juvenile detention center, and at Elizabeth, New Jersey, against Esmor (as it then was) in relation to its running of an INS facility. The companies themselves, not the individual officers, are the defendants in all of these actions. In a public sector context, the individuals would be the nominal defendants—though the state authorities in practice would normally stand behind them in terms of legal and compensation costs. However, as anticipated by Thomas (1991), the Eleventh Amendment provision that nominally insulates state authorities from such actions is not applicable to private sector prison operations. The plaintiff can litigate directly against the companies on the basis of their vicarious liability. In this respect, therefore, the accountability of the private sector by way of litigation is greater than that of state authorities.

Furthermore, the 1997 Supreme Court case of *Richardson v. McNight*, 138 L. Ed. 2d 540 (1997); 521 U.S. 399 (1997), held that there was no qualified immunity for private sector, as opposed to public sector, defendants in 42 U.S. Code (1983) cases. The majority opinion stated:

> Our examination of history and purposes [of prison privatization] thus reveals nothing special enough about the job or about its organizational structure that would warrant providing these private prison guards with a governmental immunity. The job is one that private industry might, or might not, perform; and which history

> shows private firms did sometimes perform without relevant immunities. The organizational structure is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments. Since there are no special reasons significantly favoring an extension of governmental immunity, . . . we must conclude that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a U.S. Code (1983) case (138 L. Ed. 2d 552 [1997]).

Nevertheless, speaking for the dissentients, Justice Scalia lamented (at p. 559) that this could adversely affect privatized corrections in that "it would artificially raise the costs of privatizing prisons." A preferable perspective would seem to be that it is likely to enhance, albeit marginally, accountability through litigation. In this regard the private sector is thus more accountable than the public sector.

The U.K. and Australian jurisprudence relating to prisoner litigation is, by comparison, stunted and ineffectual. Class actions generally are doomed to fail; this is simply not an actionable matter.[18] Individual actions are for the most part confined to situations involving breaches of the duty of care.

G. Nonrenewal and Cancellation of Contracts and Step-In Rights

Most contracts provide for nonrenewal at the end of the agreed term. This may be by way of unilateral state decision or after the contract has been rebid and a preferable offer accepted. These changes are never straightforward and certainly pose a risk in the prison environment. There is some real reluctance to switch operators, therefore. Nevertheless, as the industry matures, rebidding—whether limited to private companies against each other or involving full "market testing"—is becoming more commonplace, particularly in the United Kingdom and Australia. The U.K. Group 4 recently lost its Buckley

[18] This is epitomized by a decision of the Western Australia Court of Criminal Appeal, *Bekink v. R.* (1999 WASCA 160). A prisoner appealed against sentence on the basis that he had been sent to a prison that was subject to a twenty-three-hour a day lockdown resulting from a riot that had occurred several months before he had been tried and convicted and that these conditions could not have been contemplated by the sentencing court. However, it was held that prison conditions were entirely a question of the manner of administration of punishment and, as such, exclusively within the discretion of the prison authorities. Under the strangulated jurisprudence relating to prisoners' rights, this was the only way in which he could even attempt to raise the issue.

Hall contract to the public sector, and although WCC retained its Doncaster contract against the Prison Service, it also had to beat off at least one private sector competitor. In Australia, the Borallon contract held by CCA for more than ten years will be rebid during 2000, as will the Junee contract currently held by ACM.[19]

In practice, an inhibition against nonrenewal is found when the private operator also owns the prison—as with the standard DCFM contract where the buyback period may be between twenty and forty years. This was a factor in the Group 4/Port Philip case, referred to above. In that regard, the separation of management from real estate ownership assists the process of accountability.

All contracts make provision for cancellation of a subsisting contract and the exercise of step-in rights by the state agency. Normally, a clear hierarchy of sanctions is spelled out—informal caution, formal warning, default notice, notice of intended cancellation. It is usually in the interest of both sides to try to redeem the situation. The withholding of performance-linked fees goes hand in hand with this sequence.

United States authorities have been more willing than their peers in other countries to cancel contracts. McDonald et al. (1998, p. 53) documented the cancellation of five contracts involving the shipment of out-of-state prisoners to private prisons in another state. These related to contracts made by authorities in North Carolina, Oklahoma, Colorado, Utah, and Montana, each with various Texas prisons.

In relation to in-state contracts, there have also been numerous cancellations. Sometimes the threat to do so has been enough to persuade the operator to withdraw voluntarily. To the outsider it is not always readily apparent whether the operator jumped or was pushed. Examples include the INS detention center at Elizabeth, New Jersey, operated by Esmor (1995); a juvenile detention facility at Columbia, South Carolina, operated by CCA (1997); Brazoria County jail, Texas, operated by Capital Corrections Resources, Inc. (1998); the High Plains youth facility, Colorado, operated by Rebound (1998); the Talullah Correctional Center for Youth, Louisiana, run by Trans-American Development Associates, Inc. (1998); North Fork Correctional Center, Oklahoma, run by CCA (1998); and Travis County Community Justice Center, Texas, operated by WCC (1999). The follow-up has varied: sometimes the state has taken over, but more often

[19] The operators of Borallon, CCA, lost the contract to Management Training Corporation.

another private operator has come in on revised terms. The most recent cancellations—in June 2000 of two CCA contracts in North Carolina—involved returning private prisons to public sector management. Whatever the outcome, however, there can be no doubt that cancellation is a significant component of accountability.

In the United Kingdom the only cancellation so far occurred related to the running of the prison workshops at a public sector prison, Coldingley (1999). Operations at both Parc Prison (U.K.) and Port Phillip Prison (Victoria) had provided a suitable trigger for contract cancellation had the authorities chosen to go down that track.[20]

Finally, it should be noted that privatization of a total system—as twice proposed by CCA in Tennessee—seriously weakens accountability by inhibiting cancellation and step-in rights. If the state no longer runs some part of a prison system directly, how can it have the skills and experience to take over a private prison that is in crisis?

VII. Regime Quality

The ultimate question is whether private prisons can and do provide good, or even superior, quality correctional services. Measurement of this is not easy. It may be qualitative, such as the reports of the U.K. chief inspector of prisons; by way of participant observation studies, as with the U.K. evaluation of The Wolds (James et al. 1997); interview based (Carter 2001); or derived vicariously from the evaluations of contract monitors (McDonald et al. 1998). Ideally, there will be a quantitative element also, and sometimes indeed the evaluation will be predominantly quantitative. A seminal attempt, still possessing validity a decade later, is the work of Logan (1992).

A. Logan's Confinement Quality Index

Logan, a pioneer in the academic analysis of prison privatization, saw the need to develop evaluation methods that were objective and measurable. The qualitative approaches inevitably required subjective leaps of interpretation. Consequently, they could not be replicated with any confidence, making it difficult for a reliable corpus of longitudinal research to be established. If the ultimate question were the quality of privatized corrections, a research base was crucial.

In a context where belief in rehabilitation through the imprisonment

[20] In November 2000, the government of Victoria canceled the CCA contract in relation to the women's prison at Melbourne, and the public sector operator took it over.

experience had been destroyed, Logan's aims were quite modest. He stated, "The criteria proposed here for comparative evaluations of prisons are normative, rather than consequentialist or utilitarian. They are based on a belief that individual prisons ought to be judged primarily according to the propriety and quality of what goes on inside their walls—factors over which prison officials may have considerable control" (1992, p. 579).

Yet what goes on inside the walls is, in reality, an important penological matter. The prison experience is notorious for causing further deterioration in offenders' ability to cope upon release into the outside world. Public antagonism or indifference to humanitarian issues and philosophical disillusionment with rehabilitation (Martinson 1974) should not distract from this fundamental point. A penal objective, minimalist enough to suit the temper of our times, would be to try to ensure that prisoners do not undergo further social or character deformation while incarcerated (Cross 1971, pp. 85–86). In that context, "confinement quality," as Logan called it, is a first-order issue.

Logan created a matrix, or index, which addressed eight key aspects of imprisonment: security, safety, order, care, activity, justice, conditions, and management. These notions were amplified by numerous subthemes. The protocols were then applied to three prisons: the new women's prison in Grants, New Mexico, operated by CCA; the men's side of the public prison from which the women had been transferred; and a federal prison for women in West Virginia. The data were gathered from formal institutional records, staff surveys and interviews, and inmate surveys and interviews. "Confinement quality indices" were then constructed, based on 335 separate data items.

Logan's conclusions are worth quoting at length, not because the performances of those three prisons at that historical period are of any current interest but because they bring out the complexity and highlight the countercurrents in any such evaluation:

> The private prison out-performed the state and federal prisons, often by quite substantial margins, across nearly all dimensions. The two exceptions were the dimension of Care, where the state outscored the private by a modest amount, and the dimension of Justice, where the federal and private prisons achieved equal scores. The results varied, however, across the different sources of data. The private prison compared most favorably to the state prison when using data from the staff surveys and consistently,

> but more moderately so, when using data from official records. When inmate surveys provided the data, however, the state prison moderately outscored the private on all dimensions except Activity. . . . Regardless of the data source examined, there were many similarities among the three prisons, and for each one there were large numbers of both positive and negative indicators. Despite a high level of prior performance, however, the weight of the evidence in this study supports the conclusion that by privately contracting for the operation of its women's prison, the state of New Mexico improved the overall quality of that prison while lowering its costs. (Logan 1992, pp. 601–2)

Shichor (1995) and James et al. (1997) have each reviewed Logan's work, as well as the few other empirical studies available at those times. Each criticizes the fact that his broad-brush conclusion ("the private prison outperformed the state and federal prisons" and "the overall quality improved") did not reflect the more complex picture that the data threw up and that he had himself described. His objectivity as a researcher is questioned on this basis. However, there is no sleight of hand; the data are there for all to see. Other researchers may thus interpret and evaluate them for themselves.

A more pertinent comment is that of McDonald et al. (1998, p. 54): "Perhaps the most striking aspect of this research literature is that it is so sparse and that so few government agencies have chosen to evaluate the performance of their contractors formally. Even though there exist over a hundred privately operated secure confinement facilities [in the United States], there have been very few systematic attempts to compare their performance to that of public facilities. Most government agencies have been satisfied with monitoring compliance with the terms of the contracts."

This is true; for the "research-evaluation-modification loop" (Harding 1997, p. 119) is crucial to humane and constructive penal administration, be it public or private. Research outside the United States is more active than McDonald et al. state, however. Apart from the four-year longitudinal study at Junee (Bowery 1999) and the work in the United Kingdom carried out by James, Bottomley, and their team (James et al. 1997), Harding and Rynne have been conducting evaluative research within the Queensland prison system since 1998. The FBOP has now made a welcome entry upon the scene, commissioning evaluation research through the National Institute of Justice at the

WCC facility operated on its behalf at Taft, California (National Institute of Justice 1999).

Logan's approach, though not methodologically flawless, is a very useful model—capable of improvement, strongly quantitative, and possessing the crucial characteristic of being able to be replicated in disparate correctional facilities. It stops short, however, of addressing the most difficult and methodologically hazardous research question: are the outcomes, in particular recidivism rates, better or worse for prisoners who serve their sentences in private prisons?

B. Recidivism Research in Florida

The Florida Correctional Privatization Commission is required to submit an annual report to the legislature that includes "a comparison of recidivism rates for inmates of private correctional facilities to the recidivism rates for inmates of comparable facilities managed by the department" (Fla. Stat. 957.03(4)(c) [1993]). Lanza-Kaduce, Parker, and Thomas (1999) carried out such research on behalf of the commission in relation to matched samples of prisoners released from private and public prisons in the four-month period June 1, 1996–September 30, 1996. The researchers' methodology addresses the problems in controlling key variables that would affect the sample—security classification of inmates, offense, race, prior record, and age. They rigorously deal with competing definitions of what constitutes recidivism. They also differentiate between degrees of seriousness of recidivism, based both on the administrative/legal sanction imposed and, where recidivism consists of reoffending, the nature of the subsequent offense. They readily concede that a twelve-month follow-up period is not ideal, but for this pilot study this short period was dictated by the exigencies of finding a sample from the private prisons, which had only been in operation since mid-1995, and finishing the report in time for it to be tabled as part of the commission's 1997 report.

The one methodological issue they were not able to address satisfactorily relates to whether the prison sentence was served wholly in the public or wholly in the private prison.[21] The concept of "prison of release" does not tell one enough about the correctional inputs relevant

[21] This problem is explicitly acknowledged in the in-house version that is summarized on Web site http://web.crim.ufl.edu/pcp. However, it is handled inadequately, viz., "If inmates were transferred between public and private institutions during the [follow-up] year, the last institution at the time of release was used to determine whether the release was from a private or public facility" (p. 7).

to the inmates' prison experiences. Ideally, the matching samples should be between inmates who have served their whole sentence in a public prison and those who have served it in a private prison or, at the very least, a finite and unbroken period of, say, twelve months immediately preceding release, including the whole of the period during which they are in receipt of correctional programs. Otherwise, there may be "contamination" effects of one prison regime upon the other.

Nevertheless, their conclusions are striking. By all measures except technical breach, public prison releasees were significantly more likely to recidivate, and their recidivism events were significantly more serious in terms of public safety. Time to failure was approximately the same, however. They conclude as follows:

> Our judgment is that recidivism results probably reflect substantive differences between public and private operations in Florida. Whether the lower recidivism among the group of private prison releasees relates to better programming in the privatized facilities needs to be studied in greater depth. . . . The statutory and contractual requirement for private firms doing business in Florida to involve inmates in programming specifically designed to reduce recidivism may have encouraged them to place inmates into appropriate programming. Certainly, our interviews with programming and classification staff at the private facilities indicated their awareness of the importance of this issue. . . . We [also] wonder whether the specific programs may be less important to recidivism than the organizational context within which they are offered. An institution with leadership and an internal culture that supports something other than "warehousing," that effectively coordinates worthwhile programs with other institutional demands, and that mandates involvement of inmates in programming is likely to create an environment that is conducive to attitudinal and behavioral change. (Lanza-Kaduce, Parker, and Thomas 1999, pp. 42–43)

It is to be hoped that this research will be followed up in Florida or elsewhere, with the remaining methodological flaws able to be addressed. It is precisely the kind of fundamental question that needs to be asked about privatization. It is also the kind of question that public prison systems have often been coy about researching and answering in relation to their own operations.

C. Staff Attitudes

In a closed institutional structure, it is extremely difficult to maintain a culture that stresses programs and prisoner development rather than custody and control. There are myriad reasons for this, all interacting with each other: low recruitment qualifications of officers; inadequate training resources; poor pay; senior management's poor appreciation of the role of the custodial officer, with consequential indifference or hostility to the workplace situation; thus, the use of union power to change or control conditions in the workplace, and so on. It can, and frequently does, become a downward spiral, with uniformed staff ultimately coming to stand in the way of the official correctional objectives. This is particularly so in the public sector by dint of, if nothing else, its size and longevity. There is almost endless documentation of this: see, for example, Vinson (1982), DiIulio (1987), Kauffmann (1988), Woolf and Tumim (1991), and Harding (1997, pp. 134–36).

In the United Kingdom, reports of the chief inspector of prisons are an objective and valuable resource for documenting staff attitudes. The 1999 Wandsworth Prison report (Ramsbotham 1999*c*) is notable not only because it is so critical but also because it is so representative.[22] Wandsworth is a 1,300-bed medium- and maximum-security public sector prison located in South London. Making an unannounced inspection, the chief inspector found a "pervasive culture of fear," with up to 14 percent of inmates having recently been assaulted by staff. As for the "filthy segregation unit, never have I had to write about anything so inhuman and reprehensible as the way that prisoners, some of them seeking protection and some of them mentally disordered, were treated" (Ramsbotham 1999*c*, p. 8). These things grew naturally out of the prison culture:

> In no prison that I have inspected has the "culture" . . . caused me greater concern. . . . This is not just because of the grossly unsatisfactory nature of the regimes for many different types of prisoner . . . but because of the insidious nature of what "the Wandsworth way"—as the local "culture" was described to us—represents in terms of the attitude of too many members of the staff to prisoners and their duty of care for them. . . . Many staff do not seem to think that the phrase, "look after prisoners with

[22] That report refers at various points to four other recent inspections—Brixton, Feltham, Wormwood Scrubs, and Holloway—that were no better. Twenty-six prison officers at Wormwood were charged with assaults upon prisoners in June 1999.

> humanity," enshrined at the heart of the Prison Service Statement of Purpose, applies to them, and they continue to apply an agenda which, if it ever was authorized, is not only long out of date but far removed from current and acceptable practice. (Ramsbotham 1999*c*, pp. 6–7)

In his 1997–98 annual report, the chief inspector had alluded in more general terms to staff attitudes: "Some staff exhibit a cynicism for positive programs with prisoners, oppose the need to change long-established work patterns, and continually challenge the authority of the Prison Service. This is more readily apparent, although not exclusively so, amongst older than newer staff whose instincts appear more akin to those demonstrated by staff at private prisons" (Ramsbotham 1997/98, p. 24).

Carter (2001) has picked up on this last comment in conducting a pilot study of staff and prisoner attitudes at a private prison, Altcourse, situated in the north of England (the prison that subsequently was so highly lauded by the chief inspector of prisons). His detailed observations, based on semistructured interviews with staff and inmates, are made against the backdrop of the following hypothesis: "That the new operators of the private sector are contractually obligated in the delivery of the 'secondary roles of imprisonment' [care and well-being] and they may not have the same unbalanced, one-dimensional attitude and historical overemphasis towards security and control [the primary role of imprisonment] as is evident in the public sector." His conclusion is that attitudes, and the whole culture and ethos of the private prison environment, are tangibly different and that this is in a sense "related to the fact that none of [the staff] carry any of the institutional or historical baggage possessed by many of the staff in the public sector."

This is only a pilot study. But it is exactly the sort of research that should be carried out as a matter of course in both the private and public sectors, on an ongoing basis. It is likely, however, that the currently preferable culture of the private sector would tend to come back toward the public sector culture, unless management explicitly support and nurture it. The contractual obligations and the other mechanisms of accountability should act as a catalyst for them to do this.

Carter's observations tie in with two other structural factors. First, the private sector mostly goes out of its way to avoid hiring uniformed or custodial staff with extensive public sector experience. (They are, however, adept at "poaching" the cream of public sector senior man-

agement.) Second, their recruitment policies are for the most part gender blind, with the consequence that from the outset the culture develops in a way that does not simply reflect male working-class values. It is difficult to displace those values, once they are established, by affirmative action recruitment policies. Coming into a male culture, female officers tend to survive and prosper by taking on many of those male values.

In summary, the speculation by Lanza-Kaduce that improved recidivism rates in the private sector may have as much to do with the private sector prisons providing a more supportive environment ties in with the observations about staff attitudes. Each of these matters is central to further research and evaluation of private sector prisons.

VIII. Competition and Cross-Fertilization: System-Wide Improvement?

If it could conclusively be shown that the private sector were doing a better job—however that be defined—than the public sector, this by itself would be a sufficient justification for the complexities and controversies involved in privatization. But only just. If we are left with, in effect, two prison systems—a numerically marginal but new and vibrant private sector and a numerically dominant but run-down and demoralized public sector—we have made some, but not much, progress. The justification for privatization ultimately lies in its system-wide impact. In other words, does the public sector change and improve as a consequence of and in response to private sector performance and ideas?

In seeking to answer this question, one should identify two separate but closely interwoven ideas: competition and cross-fertilization. A competitive response may be a decision to do something simply because the competitor does it, to keep up—but without any precise analysis of whether it is a good thing in itself. Cross-fertilization has a connotation of appreciative learning—adopting a new practice because its benefits are apparent. It is not always clear whether a particular change is attributable to one rather than the other; indeed, motives are usually mixed. For the sake of simplicity, the two notions will hereafter be rolled into the single one of cross-fertilization.

One would expect cross-fertilization to start as a one-way process—from the private to the public sector. This is because the public sector practices and standards are the given from which, by definition, it is desired to progress. This model can be called stage 1 cross-

fertilization. But a mature model of cross-fertilization would have the private sector likewise responding to initiatives within the public sector, as the latter began to set new standards of its own—stage 2 cross-fertilization. There is, in fact, a paradox of successful cross-fertilization—that, as it occurs, regimes will progressively come to resemble each other. The source of innovation will be harder to pinpoint, and the incentive to innovate may fade away.

A. Examples of Cross-Fertilization

What evidence is there of cross-fertilization? Harding (1997, pp. 134–49) referred to several examples. In the United States, the state of Louisiana required ACA accreditation by its private prison but not for its own public sector prisons. This requirement soon worked its way into the fabric of the public sector system. The mechanism was the individual initiative of a newly appointed director of the state department of corrections, exposed to the issue by his strong professional links with the manager of the private prison.

In the United Kingdom, an example related to the standards required of the private operators of a new remand prison, The Wolds. The mandated minimum standards far exceeded in every component those expected of comparable public prisons: for example, out-of-cell hours, visits, access to showers, out-of-doors time, telephone usage, and so on. While The Wolds was starting up, the Prison Service was developing its new Model Regime for Local Prisons and Remand Centers. The standards approximated those earlier required of the private prison operator—a quantum leap. Commenting on this, Bottomley et al. (1996, p. 3) state that "the threat of market testing [i.e., opening up more remand prisons to private sector operation] . . . acted as a powerful spur to innovation."

In Queensland (Australia) current research being carried out by Harding and Rynne has identified clear cross-fertilization effects with regard to health care, where the standards the public sector required of the private sector were initially far higher than it required of itself. Within a few years the public sector found it necessary to equal those standards. The international flavor of cross-fertilization emerged here, with ACM (aware, doubtless, of United States developments through its links with WCC) adopting the American Medical Association's custodial health manual as a guide in a jurisdiction that hitherto had no manual of its own.

The same research project has also identified substantial cross-fertil-

ization in the area of prisoner programs. Borallon Prison (CCA) avowedly set out to integrate programs into the daily lives of inmates through a unit management approach. The cognitive programs directed at addressing offending behavior were different from anything else found in the public system, and the vocational and educational programs were innovative in their links to outside certifying bodies. These fresh approaches were picked up by the public sector quite quickly.

In the United Kingdom, the Prison Service has commenced the practice of developing Service Delivery Agreements (SDAs) for each public sector prison. An SDA is akin to a private sector contract; it sets out standards and expectations at the level of the individual prison. While the rate of implementation of this development is a little disappointing, it is nevertheless inexorably occurring. The conceptual complication is how to bring financial sanctions to bear for poor performance, for such sanctions are absolutely central to ensuring private sector performance. But how can the state impose a penalty upon itself, without pushing standards down even further during the period the penalty is in effect?

The U.K. chief inspector of prisons has made it a regular practice to log examples of good practice at private prisons. However, he has been disappointed at being unable to see "any direct evidence that the lessons of good practice learned from these private establishments are being applied to the management of establishments run in the Public Service" (Ramsbotham 1996, preface).

The best-documented account of cross-fertilization relates to Junee Prison (Bowery 1999). This report refers to "a substantial exchange of ideas and information between the Department and the ACM staff at Junee." Reference is made to six departmental initiatives "aimed at ensuring inmates receive a consistent level of treatment and access to programs and services" being extended to Junee (stage 2 cross-fertilization). Likewise, four private operator initiatives "were evaluated by departmental staff with regard to their suitability for incorporation into departmental programs" (stage 1 cross-fertilization). Bowery (1999, pp. 79–80) concludes: "Thus, by the end of year four [i.e., mid-1997] opportunities for innovation in inmate management and the provision of programs and services were limited. The only initiative introduced by ACM . . . that remained unique to Junee was the Integration program. . . . Over time a strong working relationship has developed between ACM and the Department, with Junee staff at-

tending some departmental training courses, visiting departmental centers and sharing information with their colleagues in departmental centers." Junee thus epitomizes the paradox of successful cross-fertilization—that regimes progressively become more similar than dissimilar to each other.

B. The Mechanics of Cross-Fertilization

Cross-fertilization does not occur through some sort of organizational osmosis. Someone has to facilitate it. Quite often this will be a committed individual, as in the Louisiana example; sometimes from executive level, as with the U.K. Standards for Remand Centers; sometimes from middle management, as with programs at Borallon. Movement of staff between systems is also important, as they take the seeds of good ideas back and forth. Ramsbotham (1997, preface) has identified a greater willingness of the private sector to pick up good ideas from the public sector (stage 2 cross-fertilization) than vice versa and perhaps that is because many private prison wardens or governors are refugees from the public sector.

The clearest indication that cross-fertilization has occurred—as opposed to recognizing precisely how it occurred—should be found in market testing. This, it will be recalled, means the bidding of the public sector against the private in a genuine contest. This is different from the benchmarking that is required in many jurisdictions as to costs. Four examples have been referred to—Woodford (Queensland), Manchester (U.K.), Buckley Hall (U.K.), and Doncaster (U.K.)—and it will be recalled that outcomes in each of them have for various reasons been treated with some cynicism. But the principle is clear: if the public sector can beat the private sector in a fair bidding contest, it must have learned well from the experience of others. However, market testing does not occur in the most mature market, the United States, while in Australia and the United Kingdom, a transparent process that commands the confidence of all parties has not yet been developed.

To date, then, there has not really been any sustained or systematic attempt in privatization states to build cross-fertilization into the management structures of the prison system as a whole. Cross-sectoral management conferences, though regular in a few jurisdictions, are generally infrequent; mutual in-service training is uncommon. Academic conferences tend to divide into the "anti" and "pro" privatization camps, and this is reflected in the tone of much of the literature.

Industry conferences likewise tend to focus on one side or the other of the prison scene. And market testing still lacks some credibility.

Cross-fertilization is a first-order question in the privatization debate. In some antiprivatization circles, there is skepticism as to whether it is a topic worth pursuing at all. For example, Ward (1999, p. 126) has stated "Harding [argues] that evaluation studies have been asking the wrong question: what we should ask is not whether private prisons are superior to public ones but whether their presence tends to improve the prison system as a whole. There may seem to be a 'heads I win, tails you lose' quality to this argument (if public prisons turn out to do better than private ones, that just proves that competition is good for them!)."

The National Institute of Justice (1999) has recently committed substantial funds to addressing this very question. Congress has directed the FBOP to undertake a prison privatization demonstration project, which will take the form of research and evaluation of the WCC-run Taft Correctional Institution. Cost and performance are to be addressed, and "of special interest is the development of models explicating specifically *how and why*—and not just *whether*—privatization conveys advantages" (1999, p. 1).

In summary, there is evidence that cross-fertilization occurs, but the public and private sectors are still not yet sufficiently at ease with each other for this long-term public interest objective to be realized systematically rather than fortuitously. Further research may point the way.

C. Barriers against Cross-Fertilization

Institutional resistance to cross-fertilization can be quite stubborn, however. Public sector officials, in monitoring private prisons, may not only be captured but, equally, be positively antagonistic. Outstanding performance by an alternative service provider may be threatening to the principal provider, highlighting its own inferior performance. There is also the standard bureaucratic factor of turf wars—what Aldrich (1979) calls domain consensus/dissensus. Of course, there may also be more legitimate reasons, such as to ensure uniformity of standards and equality for prisoners.

Two examples will suffice. In the United Kingdom, head office resistance arose when the Prison Service won a market-testing contest to operate Manchester prison. This involved a service delivery agreement specifying programs and a ring-fenced budget, that is, one quarantined from general Prison Service savings or reductions. However, almost

immediately this budgetary arrangement was canceled; Manchester was to be treated just like any other prison and brought within the overall control of the area manager. The opportunity for innovation was thus strangled at birth and with it any chance for cross-fertilization with other parts of the public sector.

In Queensland, Borallon had commenced operations with fresh programs that were picked up by the public prisons. But from 1995 onward it was decided that all programs, even at the private prisons, must be approved by head office personnel, and this soon shaded into a situation where all programs were developed centrally. Innovation has now dried up; there is no cross-fertilization in this area of activity because everything is the same.

D. Summary

The whole discussion of cross-fertilization must be seen against the backdrop of current organizational and political theory, in particular the notion of reinventing government (Osborne and Gaebler 1992) and the National Performance Review (1997). Claims that public administration is shifting "from the classical bureaucratic model . . . to a post-bureaucratic paradigm characterized by risk-taking, innovation, empowerment, customer orientation, teamwork, quality, and continuous improvement" (Sims 1998, p. 9) would not yet seem to have been borne out fully in the context of corrections. There is change in the wind, however, and a key measure will be the extent of cross-fertilization between the private and public sectors.

IX. The Future of Privatization

In 1997 blue-sky expansion of existing markets, particularly in the United States, seemed plausible. Thomas, Bolinger, and Badalamenti (1997, p. xxiii) forecast that there would be 276,000 private prison beds occupied or procured in the United States by the end of 2001. However, the exponential growth pattern has flattened out; a figure of 150,000 or so now seems more realistic. In the other main established markets, Australia and the United Kingdom, expansion is likely to be steady but fairly slow, and there are some countercurrents that could hold it back. These are market testing in the United Kingdom and political ideology in Australia, where Labor Party governments have recently been elected in the two largest privatization states.[23]

[23] Labor governments often feel obliged, as part of their election campaigns and upon taking power, to make antiprivatization noises—"we will take private prisons back into the public sector"—because of their trade union links. In Australia and the United King-

Reassessment of privatization is now occurring in the mature markets. Opposition among community groups is more vociferous and far better organized and sophisticated than in the early days. Examples include the following: refusal of planning permission to Youth Services International to build two detention centers in upper New York state (1997); withdrawal by the county commissioners of permission to build a private prison in Nicholas County, South Carolina, after sustained and acrimonious community debate (1997); preemptive objections by community groups in Fallsburg, New York, to the possibility that CCA might seek planning permission for a prison on land it was discovered it had recently purchased (1998); and litigation in Alaska by seven members on behalf of the community to try to prevent a private prison from being built on the site of Fort Greely, a military base scheduled for closure (1999). Extra sophistication is found in the alliances that have sprung up (between middle-class communities and labor unions), the sorts of arguments made (that the particular project has stock market risks), and the means adopted (not just the usual lobbying and small demonstrations but also the opening of Web sites and resort to litigation). These sorts of action add to the ongoing challenges that civil liberties and similar groups (e.g., ACLU), as well as academic bodies, have made against privatization from the outset.

Similar trends have occurred in Australia, and there has from the beginning been a well-informed and vocal opposition in the United Kingdom. However, general community concern there seems to have abated somewhat.

There has also been much more action by labor unions. For example, Corrections USA (CUSA), a coalition of U.S. and Canadian prison officer labor unions, picketed CCA at its corporate headquarters in Nashville, Tennessee, in October 1998, and another coalition known as the Corrections and Criminal Justice Coalition claims to have 200,000 correctional officers supporting its antiprivatization campaign. Another union, the Florida Police Benevolent Union, which despite its

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dom, public sector prison officer unions are very strong. The U.K. government, which was elected in 1997, made these noises but predictably (Harding 1997, p. 78) resiled from them. The cost of buying out contracts, particularly DCFM, was out of all proportion to the political costs of diverting infrastructure expenditure from other social needs. In Victoria, where a Labor government was elected in October 1999, the incoming minister has made the familiar statements but is likely to find himself politically inhibited exactly as the U.K. Labor government has been. However, the November 1999 incoming Labor government in New Zealand seems likely to terminate the procurement process in relation to all but one of the five adult and seven juvenile private correctional institutions to which its predecessor had been committed.

name represents correctional officers in that state, led the campaign against Charles Thomas of the University of Florida that finally resulted in his deciding to resign from the university (Geis, Mobley, and Shichor 1999). Thomas was regarded as the leading academic supporter of privatization in the United States, so the union campaign to tar him with the conflict of interest brush was symbolically a campaign to delegitimize privatization.

The increase in overt opposition is probably also associated with the fact that the private sector has now had its visible failures, some of them quite dramatic. Harding (1997, p. 156) anticipated that such failures might be difficult for the private sector to absorb:

> What can be predicted . . . is that gross or system-wide repetitive failures by the private sector will cause the debate to be re-located and perhaps to commence all over again. If the chain of private prisons in the UK were ransacked and torched, as was a chain of public prisons in 1990 leading to the Woolf inquiry, it is likely that any review would examine not only what went wrong, not only what to change for the future, but also whether the private sector should be permitted to continue . . . at all. In that regard, the private sector will always be more vulnerable than the public sector whose malfeasance, however negligent or brutal or incompetent, will never lead to its having its prisons taken away from it.

The debate may have started all over again; at the very least the embers have been reignited. While the debate continues, industry growth is likely to be steady at best, rather than spectacular, though the privatization that has so far occurred is most unlikely, particularly in the United States, to be wound back.

As for new markets, at least twenty countries have explored the possibility of privatization, some with greater commitment than others. Bearing in mind the factors associated with privatization—burgeoning prisoner populations, overcrowding, higher state priorities for limited infrastructure outlays, concern about recurrent costs, difficulties with labor unions, and a view of the state as being first and foremost a service provider—it might be thought that Asia, Thailand, the Philippines, and Malaysia could be the most likely to go down that track (and Japan, the People's Republic of China, Hong Kong, Singapore, and, despite its flirtation, South Korea the least likely). The former states

of the old Soviet empire, such as Latvia and Serbia, may retain enough of a collectivist view of state responsibilities to hesitate. However, Central and South America seem more likely to look to privatization. Some expansion into new markets over the next five to ten years can be anticipated, therefore, but it is likely to be fragmented.

A. International Standards

As early as 1989, with prison privatization still novel even in the United States, the Cuban representative on the United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) succeeded in setting under way an inquiry into prison privatization. A principal agenda item he wished to have explored was the legality of prison privatization under international human rights law. Assuming it was not illegal, he then sought a further inquiry into the extent of lawful privatization (the administration/allocation of punishment debate coming in through the back door), the development of United Nations standards for private prisons, and identification of an appropriate way for the United Nations to monitor private prisons.

No funds were available for this, so the subcommission sought the appointment of a special rapporteur by the principal commission—in United Nations practice the way of obtaining funding and status for the project. The first such request in 1993 was unsuccessful, and an attempt to reopen the matter in August 1999 was blocked by the United States delegate.

Another United Nations standard that has been invoked is that of the International Labor Organization (ILO) relating to forced labor. An exemption exists for prison labor that is supervised by a public authority. The peak trade union body in Australia took a case to the ILO in which it was argued that labor in private prisons breaches that convention. In a 1999 provisional ruling, the ILO found that the prohibition on the use of forced prison labor for the benefit of private firms was absolute and extended to work done within private prisons even if its nature, pay rates, and conditions were indistinguishable from or better than work done in public prisons in the same state. Such rulings do not have the force of domestic law in Australia, and no consequences have so far followed. These tentative beginnings suggest that privatization may increasingly have to confront challenges based on international law and practice, not merely ones based on state and constitutional law.

B. Research

Prison privatization is a rich field for research. Foremost should be outcomes research, of the sort that Lanza-Kaduce, Parker, and Thomas (1999) piloted in Florida. Cross-fertilization is no less important; the FBOP has picked up this point in its demonstration project at the Taft Correctional Center, California, following Australian leads. Integrated with this is the quality of confinement itself, building upon Logan's (1992) model. None of this can be done without research into staff and inmate attitudes, their interactions, and the bearing of these matters upon correctional programs and outcomes.

Detailed analysis of the effectiveness of accountability mechanisms is also crucial: How do monitors perform? Are they captured on the job or are they antagonistic? Is the level of intimidation and assault, suicide, and self-harm a function of public/private management regimes and the manner in which control mechanisms are exercised? What about the impact of different technologies on order, prisoner movements, drug availability and use within prisons, and general health matters?

The list goes on. Of course, it also contains the indispensable item of costs. However, the point that should have emerged is that this agenda is one for prison research generally, not merely for private prison research. The advent of private prisons has thrown such matters into higher relief and provided that crucial research tool, a good comparator. And, because of the controversial nature of privatization, there is also a stronger incentive than before. Perhaps that may turn out to be the most important contribution of privatization—that it becomes a catalyst for the kind of research that good penology and responsible penal administration must do better than in the past.

X. Conclusion

Private prisons are here to stay. But they will not displace public prisons or even, in terms of available accommodation, become a serious competitor. They have some tangible advantages and benefits but also pose some serious political and humanitarian risks. These risks tend to become greater as the motive of cost reduction becomes increasingly predominant. It is for this reason that, of the three mature private prison jurisdictions, the United States experience is the one that must continue to be scrutinized most closely.

The regulatory systems and accountability mechanisms that govern their operations must ensure that private prisons meet acceptable state

and community standards. Governments, when privatizing activities, are often tempted to reduce regulatory resources at the same time. With prisons, above all, this must not be done. In a context where a primary objective has been cost reduction, this is a particular hazard. The cost of effective and responsive regulation is part of the price of privatization.

Self-contained and inward-looking public sector prison systems around the world have in many aspects become degraded and demoralized. There is evidence that, as long as they are properly regulated and publicly accountable, private prisons can stimulate improvement of the total prison system. Modern societies have made huge investments in punishment as a means of crime control and prevention. If private prisons are part of a process that gives society greater value for money, consistent with decent and equitable standards and improved outcomes, they will certainly have justified their existence. Discussion about the proper nature and extent of imprisonment must continue, and nothing in the recent history of prison privatization distorts or contaminates the terms of that debate.

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