

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, That the American Bar Association urges 1
that jurisdictions considering authorization of contracts with 2
private corporations or other private entities for the 3
operation of prisons or jails do so with extreme caution; and 4

BE IT FURTHER RESOLVED, That jurisdictions contemplating 5
entering into contracts with private corporations or other 6
private entities for the operation of prison or jail facilities 7
are urged to recognize that: 8

1. the imposition and implementation of a sentence of 9
incarceration for a criminal offense is a core 10
function of government; 11
2. there are numerous and complex legal issues involved 12
in the delegation of incarceration functions to 13
private entities; and 14
3. there is a strong public interest in having prison and 15
jail systems in which lines of accountability are 16
clear, which are operated in a cost-effective fashion, 17
which provide proper care and treatment for inmates, 18
and which meet minimum standards for the operation and 19
maintenance of prisons and jails; and 20

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21 BE IT FURTHER RESOLVED, That the American Bar Association
22 disapproves of any jurisdiction undertaking a privatization
23 program in order to avoid fundamental questions about its
24 sentencing policies, the use of the incarceration sanction, and
25 the conditions of confinement in publicly operated prisons and
26 jails; and

27 BE IT FURTHER RESOLVED, That jurisdictions seeking to
28 contract with private entities for the operation of prison or
29 jail facilities should do so in accordance with the "Guidelines
30 Concerning Privatization of Prisons and Jails," dated March 29,
31 1989, and appended to the Report which accompanies this
32 Recommendation.

REPORT

In recent years, the problems afflicting our nation's prisons and jails have become increasingly severe. Populations have more than doubled since 1978, overcrowding is pervasive, and the cost to taxpayers is spiraling. Crime has not slackened appreciably, however, and there is no evidence that prisoners coming out of correctional institutions are any better off than when they went in. While inside, inmates are often confined in conditions that should be appalling to a civilized society.

As the crisis has worsened during the 1980s, proposals for "privatizing" prisons and jails have begun to emerge. While private companies have for many years handled some of the services required by prisons and jails (for example, medical care, food preparation, education, and vocational training), the emerging concept of privatization is far more sweeping. Its proponents call for federal, state, and local governments to "contract out" their incarceration functions to private entities that would take on operational responsibility for prison or jail systems or for individual institutions.

When proposals for privatization of prisons and jails first began to appear in the early 1980s, little attention had been given to legal issues. It was not clear, for example, whether (and, if so, to what extent) a state or local government could delegate incarceration functions to private industry, what implications such a delegation--if permissible--would have on the liability of the government or the contractor for negligence or for deprivation of inmates' constitutional rights, what standards of performance should be applied, how performance should be monitored, or what should happen in the event of a breach of the contract between the government and the private company.

Given the legal complexities and potential importance of privatization, the ABA Criminal Justice Section's Prison and Jail Problems Committee urged a cautious approach. On the Section's recommendation, the ABA's House of Delegates adopted the following Resolution in February 1986:

Be It Resolved, That the American Bar Association urges that jurisdictions that are considering the privatization

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of prisons and jails not proceed to do so until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved.

"Privatization" refers to contracting for total operational responsibility for a prison or jail; it does not encompass construction or leasing physical facilities or contracting for institutional services, such as food preparation, medical care, and vocational training, in full secure institutions or for operation of non-secure facilities such as half-way houses.

Following up on the resolution, the Criminal Justice Section, through the ABA Fund for Justice and Education, obtained funding from the MacArthur Foundation and the National Institute of Justice to examine the constitutional, statutory, and contractual dimensions of privatization. The study was also designed to provide practical guidance for jurisdictions considering privatization of incarceration functions, through the formulation of a Model Statute and Model Contract.

The study--entitled The Legal Dimensions of Private Incarceration:^{1/}--was conducted by Professor Ira P. Robbins with the assistance of a broad-based Advisory Board. The thrust of this report is consistent with the Robbins study and draws heavily from its findings and recommendations. Simply put, we have three main conclusions:

First, while the state of the law with respect to delegation of incarceration functions to private parties is ambiguous and unclear on certain points, there can be no doubt that an attempt to delegate total operational responsibility for a prison or jail would raise grave questions of constitutionality under both the federal constitution and the constitutions of the fifty states.^{2/} The more sweeping the attempted delegation, the more doubtful would be its constitutionality. The fundamental issue, with respect to an attempt to delegate such responsibility is accountability: exercising power over the conditions and length of confinement of individuals convicted of violating the criminal law is a core responsibility of government, one that cannot be left to the discretion of private parties.

Second, given the gravity of the constitutional issues and the strong public interest in having a correctional system in

which accountability for the operation of prisons and jails is clear, jurisdictions should proceed with extreme caution in considering authorization of contracts with private corporations or other entities for the operation of prisons or jails. If states and localities decide to go ahead with some form of privatization, they should do so within a framework of statutory and contractual provisions designed to safeguard the liberty interests of individuals who will be directly affected (i.e., inmates), while at the same time accommodating the interests of the public, the government, and the private contractors.

Third, privatization should not be regarded as a "magic solution," or "quick fix" for the difficult problems of operating prisons and jails that meet basic minimum standards of acceptability. The problems which plague American prisons and jails, including rampant overcrowding and substandard conditions of confinement, have their roots in governmental policies and practices that require close scrutiny and may ultimately necessitate remedial action. States and localities should not embark on privatization programs that will avoid addressing fundamental questions about their sentencing laws, the ways in which incarceration and other sanctions are actually used to achieve sentencing goals, and the resources that are available to carry out sentencing policies.

In the Robbins study, both the Model Statute and the Model Contract are accompanied by commentary that discusses the rationale of specific provisions. Both respond to the concerns about the constitutionality of delegating incarceration functions to a private contractor, and both place heavy stress on accountability. For jurisdictions that wish to pursue possible private sector involvement in the operation of prisons and jails, the Model Statute and Model Contract are resources which should be considered when developing the requisite legal framework.^{3/}

Some of the provisions in the Model Contract and Model Statute are appreciably more important than others for purposes of ensuring accountability and guarding against overly broad delegation of authority to a private entity. The Guidelines appended to this Report focus on ten issue areas that should be regarded as especially critical. The Guidelines, which draw heavily upon the Model Statute, are commended to governmental bodies as appropriate to be followed if a jurisdiction decides to proceed with some form of privatization of prisons and jails.

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The growing interest in possible privatization of prisons and jails may be healthy if for no other reason than that it focuses attention on an acute problem of contemporary American society. The extensive use of incarceration, coupled with severe limitations on the availability of resources to operate prisons and jails that will meet even minimal standards of adequacy, has produced a near-crisis situation in which overcrowded conditions and lack of meaningful rehabilitation programs are "normal."

Privatization is not a panacea that will cure these ills. It is possible, of course, that private sector involvement may produce ideas about more effective ways to achieve the goals that are sought to be reached through the use of incarceration. However, to do this, it will be essential to focus on the goals of the criminal sanction and on the ways that these goals can be affected by constitutional standards, sentencing policies and practices, and the availability of resources.

Informed debate about the use of incarceration can help to improve public understanding of the scope and limits of the criminal justice system in the United States. Within that framework, there is room for discussion about private sector roles and about innovations that might be possible through private sector involvement. However, the possibility of private operation of prison and jail facilities should not be allowed to divert attention from fundamental questions about sentencing policies, the use of incarceration, and conditions of confinement. Regardless of the extent of private sector involvement, these basic issues must be addressed by every jurisdiction.

Respectfully submitted,

Sheldon Krantz, Chairperson
Criminal Justice Section

February 1990

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ENDNOTES

1. Ira P. Robbins, The Legal Dimensions of Private Incarceration (Washington, D.C.: American Bar Association, 1988).
2. Id. at 9-69. Assuming that a particular incarceration function (or set of functions) can be delegated constitutionally, the private contractor will still be liable if it abridges inmate rights guaranteed by the Constitution or laws of the United States. Id. at 70-118, 206-209; see also West v. Atkins, 108 S. Ct. 2250 (1988).
3. For other perspectives on legal and policy questions related to private sector operation of prisons and jails see, Charles H. Logan, Private Prisons: Cons and Pros (Washington, D.C.: National Institute of Justice, 1989); Charles Thomas et al., The Privatization of American Corrections: An Assessment of Its Legal Implications (June 15, 1988) (report submitted to the Florida House of Representatives Committee on Corrections); Judith Hackett et al., Contracting for the Operation of Prisons and Jails (Washington, D.C.: National Institute of Justice 1987); Charles Ring, Contracting for the Operation of Private Prisons: Pros and Cons (College Park, MD: American Correctional Association, 1987).

APPENDIXGUIDELINES CONCERNING PRIVATIZATION OF PRISONS AND JAILS
(March 29, 1989)

1. Purposes of Privatization. Any statute authorizing contractual arrangements with private entities for the operation of prisons or jails, and any contract between a public agency and a private contractor for such operation, should make it clear that any such contract is to be cost-effective and for the purpose of providing proper care, supervision, and treatment of inmates.

2. Contract Term and Renewal. The term of a contract will vary in light of a wide range of factors, but should be structured so as to take advantage of the potential advantages of private sector competition. It should be long enough to be fair to the contractor and enable the contractor to become economically efficient, yet short enough to ensure flexibility to deal with new problems, prevent market entrenchment, and encourage other contractors to enter the market on a competitive basis. A three year term appears to represent an appropriate balance.^{1/}

3. Standards of Operation. The American Correctional Association (ACA) and the National Commission On Correctional Health Care (NCCHC) have developed and published Standards that constitute minimum recommended guidelines for the maintenance and operation of prisons and jails.^{2/} Requiring incorporation of these standards into a contract for operation of a prison or jail provides a basis for accountability. The standards are objective and realistic. They provide useful yardsticks for measuring performance by a private contractor. Requiring that a private correctional facility meet at least the percentage of ACA Standards and NCCHC Standards required for accreditation of public corrections facilities is sound policy.^{3/} In addition to meeting the ACA and NCCHC Standards, all facilities should, of course, comply at all times with all federal and state constitutional standards, federal, state, and local laws, and court orders.

4. Use of Force. The use of force may sometimes be necessary in a prison or jail setting, in order to maintain order and security. Use of force for these purposes is, however, a quintessentially governmental function. If a private contractor is to be delegated authority to use force in a prison or jail, the scope of such a delegation must be

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defined with great care. The provisions of the Model Statute set forth appropriate guidelines in this area.^{4/}

5. Employee Training. A prison or jail cannot be operated safely and in accordance with constitutional, statutory, and contractual standards without an adequately trained staff. All employees of privately operated correctional facilities should receive, at a minimum, the same quality and quantity of training as that required by applicable federal, state, and/or local statutes, rules, and regulations for employees of public correctional facilities. A private contractor should also comply with the ACA and NCHC Standards relating to training, if any of these are more stringent than governmental standards.

6. Monitoring. Effective monitoring of a private contractor's performance under the contract is a sine qua non of any system that seeks to assure accountability. Although the contracting agency may be able to delegate some of the governmental functions associated with the operation of a facility, it cannot delegate its responsibility to see that these functions are carried out in accordance with constitutional and legislative standards, as well as with other standards mandated by public policy.^{5/} A monitoring system should give the contracting agency maximum access to all of the information it needs to carry out its oversight responsibilities. Key elements of any monitoring system should include the following:

- (1) Appointment by the contracting agency of a monitor for the facility, who will be on-site on a daily basis and will have staff assistance as needed. The monitor should have access to all areas of the facility and to inmates and staff at all times. The contractor should be required to provide any and all data, reports, and other materials that the monitor determines to be necessary to carry out the monitoring responsibilities.
- (2) A requirement that the monitor report at least annually on the contractor's performance to the contracting agency, with a copy of the report forwarded to an appropriate committee of the legislature.
- (3) Access for members of the public to the private facility,^{6/} subject only to the same limitations

placed on public access to an equivalent publicly operated facility.

7. Liability and Sovereign Immunity. A private contractor operating a prison or jail facility should be required to assume all liability arising under the contract and should be prohibited from using immunity defenses, such as sovereign immunity or qualified immunity, to limit such liability. Several states have already adopted this approach in prison-privatization legislation,⁷ and the rationale is clear: it creates an economic incentive for the private contractor to provide adequate inmate care and treatment. Permitting a contractor to escape liability would severely undermine the goal of accountability.

8. Insurance. Private contractors should be required to provide adequate insurance coverage, specifically including insurance for civil rights claims. A requirement of adequate insurance coverage will protect the contracting agency and the public against the possibility that a contractor will be unable to absorb financial losses that could be sustained as a result of prisoner litigation.⁸ Requiring an independent risk-management expert to evaluate the adequacy of a private contractor's proposed insurance plan is one way of providing appropriate safeguards in this area.⁹

9. Termination of Contract and Assumption of Government Control. It is essential that a contracting agency have the authority to terminate a contract on short notice in order to respond to problems arising under the contract or to respond to a shortfall in appropriations. While an abrupt termination is unlikely, each jurisdiction should have a comprehensive plan--in advance of entering into a contract--for assuming control of a facility immediately if necessary. The plan should fully address issues relating to the assumption of control of the facility, including but not limited to the transfer of title to the contractor's files and records.

10. Nondelegability of Contracting Agency's Authority. There are some types of matters--especially those involving the nature and length of inmate confinement--that are particularly close to the core of governmental responsibility, and thus least appropriate for delegation. These include, but are not limited to, transferring inmates from one facility to another; formulating inmate work rules and rules of inmate behavior; conducting disciplinary hearings; granting, denying, or

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revoking sentence credits; developing and implementing procedures for calculating sentence credits, release dates, or parole-eligibility dates; and making work release, parole, furlough, and other release decisions.^{10/} In addition, because of the risk of exploitation of inmates by private contractors, contractors should not be permitted to require an inmate to work, except on contracting-agency projects. Any contract for private correctional services should address these issues with specificity, making it clear that these are areas in which the contracting agency is not attempting to delegate its authority or responsibility to a private contractor.^{12/}

FOOTNOTES TO THE GUIDELINES

1. The Model Contract and Model Statute provide for a three year term. I. Robbins, The Legal Dimensions of Private Incarceration (Washington, D.C.: American Bar Association, 1988) pp. 368, 455 (hereinafter referred to as the Robbins Study).
2. American Correctional Association, Standards for Adult Correctional Institutions (College Park, MD.: 1981) and Correctional Standards Supplement (College Park, MD.: 1986); National Commission on Correctional Health Care, Standards for Health Services in Prisons (Chicago, IL: 1987) and Standards for Health Services in Jails (Chicago, IL: 1987). The ACA Standards cover all aspects of prison life, while the NCCHC Standards focus on provision of adequate health services to inmates.
3. Robbins Study, Supra note 1, at 431-34 (Model Statute). It should be noted that the Model Statute allows the contracting agency to require a higher level of performance by contract. Id. at 456. The Model Statute does not, however, make accreditation a statutory requirement. While the Standards provide a respected and uniform measure of the quality of services provided at a jail or prison facility, the accreditation process should not be used as a substitute for on-site monitoring by the contracting agency.
4. The Model Statute provides as follows:

Use of Force

(A) A private contractor's employees serving as 'jailers' shall be allowed to use force only while on the grounds of a facility, while transporting inmates, and while pursuing escapees from a facility.

(B) 'Non-deadly force,' which is force that normally would cause neither death nor serious bodily injury, and 'deadly force,' which is force that is likely to cause death or serious bodily injury, shall be used only as set forth herein.

(C) Non-Deadly Force. A private-company jailer shall be authorized to use only such non-deadly force

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as the circumstances require in the following situations: to prevent the commission of a felony or misdemeanor, including escape; to defend oneself or others against physical assault; to prevent serious damage to property; to enforce institutional regulations and orders; and to prevent or quell a riot.

(D) Use of Firearms/Deadly Force. Private-company jailers who have been appropriately certified as determined by the contracting agency and trained pursuant to the provisions of Subsection (E) shall have the right to carry and use firearms and shall exercise such authority and use deadly force only as a last resort, and then only to prevent an act that could result in death or serious bodily injury to oneself or to another person.

(E) Private-company jailers shall be trained in the use of force and the use of firearms, in accordance with ACA Standards 2-4186 through 2-4189 and 2-4206, and shall be trained, at the contractor's expense, at the facilities that train public prison and jail personnel for at least the minimum number of hours that public personnel are currently trained.

(F) Within three (3) days following an incident involving the use of force against an inmate or another, the employee shall file a written report with the administrative staff and contract monitor describing the incident.

(G) A private contractor shall stand in the shoes of the contracting agency in any agreement, formal or informal, with local law-enforcement agencies concerning the latter's obligations in the event of an emergency situation, such as a riot or escape. Id. at 435-36.

5. Indeed, inadequate monitoring could render a contract void for excessive delegation and could increase the contracting agency's exposure to liability.
6. Robbins Study, supra note 1, at 439..
7. See Ariz. Rev. Stat. Ann. §41-1609.01(0) (1985 & Supp. 1987); Tenn. Code Ann. §41-24-107(b) (Cum. Supp. 1987); Tex. Rev. Stat. Ann. art. 6166g-2, §4 (Vernon Supp. 1988).

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

No. _____
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Submitting Entity: Criminal Justice Section

Submitted By: Sheldon Krantz, Chairperson

1. Summary of Recommendation(s).

1. That jurisdictions considering private operation of prison or jail facilities do so with extreme caution. Jurisdictions are urged to recognize that incarceration is a core function of government; there are numerous and complex issues involved; and that prison and jail systems should have lines of accountability, are cost-effective, provide proper care and treatment for the inmates and meet minimum standards for the operation and maintenance of prison and jails.

2. That the ABA disapproves of privatization in order to avoid fundamental questions concerning sentencing policies, the use of incarceration sanction, or the conditions of confinement in publicly operated prisons and jails.

3. That jurisdictions seeking to privatize their facilities should do so in accordance with the "Guidelines Concerning Privatization of Prisons and Jails".

2. Approval by Submitting Entity.

This Report with Recommendations was approved by the Criminal Justice Section Council at its August 5-6, 1989 meeting.

3. Previous submission to the House or relevant Association position.

The House of Delegates adopted a policy at the 1986 Midyear Meeting urging "...that jurisdictions that are considering the privatization of prisons and jails not proceed to so contract until the complex constitutional, statutory, and contractual issues are developed and resolved." (Report No. 111B).

4. Need for Action at This Meeting.

In recent years, the problems affecting our nation's prisons and jails have become increasingly severe. Overcrowding is pervasive and the cost to taxpayers is spiraling. When proposals for privatization of prisons and jails emerged in the early 1980's, little attention had been given to legal issues. Given the legal complexities and potential importance of privatization, the ABA Criminal Justice Section's Prison and Jail Problems Committee urged a cautious approach. Following up on the resolution adopted by the House of Delegates in February 1986, the Criminal Justice Section undertook a study to examine the constitutional, statutory and contractual dimensions of privatization. The study -- entitled The Legal Dimensions of Private Incarceration -- was conducted by Professor Ira P. Robbins. The thrust of this report is consistent with the Robbins study and draws heavily from its findings and recommendations.

There is growing interest in privatization of prisons and jails. The extensive use of incarceration, coupled with severe limitations on the availability of resources to operate prisons and jails that will meet even minimal standards of adequacy, has produced a near-crisis situation in which overcrowded conditions and lack of meaningful rehabilitation programs are "normal". Privatization is not a panacea that will cure these ills. Informed debate about the use of incarceration can help to improve public understanding of the scope and limits of the criminal justice system in the United States. Within that framework, there is room for discussion about private sector roles and about innovations that might be possible through private sector involvement. However, the possibility of private operation of prison and jail facilities should not be allowed to divert attention from fundamental questions about sentencing policies, the use of incarceration, and conditions of confinement. Regardless of the extent of private sector involvement, these basic issues must be addressed by every jurisdiction. It is important that the American Bar Association lend its considerable prestige to encouraging attention to these issues.

5. Status of Legislation. (If applicable.)

No congressional legislation is known to be pending at this time. However, legislation may be pending in State and local legislative bodies.

6. Cost to the Association.

This Recommendation's adoption would not result in direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying the Recommendation before Congress and State and local legislative bodies. These indirect costs cannot be estimated, but should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

7. Disclosure of Interest. (If applicable.)

There is no conflict of interest that is known to exist.

8. Referrals.

Concurrently with the submission of this report to the House of Delegates, it is being circulated to the following:

Special Committees and Commissions
Lawyers in Government

Sections and Divisions
General Practice
Individual Rights and Responsibilities
Judicial Administration Division
 National Conference of Federal Trial Judges
 National Conference of State Trial Judges
Litigation
Urban, State and Local Government Law
Young Lawyers Divisions

Affiliated Organizations
Hispanic National Bar Association
National Association of Criminal Defense Lawyers, Inc.
National District Attorneys Association
National Legal Aid and Defender Association

9. Contact Person. (Prior to meeting.)

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115B. Contact Person. (Who will present the report to the House.)

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