

PRIVATE PRISONS: PROMISES AND PERILS

by

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The State of Texas experienced a significant increase in incarceration rates beginning in the late 1970s along with the rest of the United States. As we entered into the current period of mass incarceration, rates of adults entering our U.S. prisons jumped from 100 per 100,000 to more than 400 per 100,000 today.¹ The Texas Department of Criminal Justice (TDCJ) exploded from less than 30,000 prisoners in 1980 to a population of over 152,000 prisoners today. As a beginning correctional officer in 1980, I was assigned to work in one of 27 prison units. At the time of my retirement as the Director of the Correctional Institutions Division (prison division) of the TDCJ in July of 2006, I was responsible for more than 100 prison and state jail facilities. Ninety-four units are operated by the TDCJ, while 15 facilities (prisons, state jails, and pre-release facilities) are privately operated.

Current prison and jail populations in the United States of America indicate that the population of prisoners incarcerated within private prisons exceeds 100,000.² Only the prison systems of the US Government, California and Texas hold more total prisoners. It is obvious that the movement toward prison privatization has become a fixture within the incarceration landscape here in the United States. Trend lines forecasting prison populations continue to rise; Texas alone projects an 11,000 population increase over the next five years. Criminologists see little evidence that “America’s imprisonment binge” will decrease with any appreciable significance in the near future.^{3 4}

A review of data within the European Union indicates that many countries are likewise feeling prison population pressures and the utilization of private partnerships are active and being further debated and explored.⁵ Certainly there must be a continued aggressive debate, discussion and focus upon the myriad of significant policy issues that drive mass incarceration rates, but as practitioners, we must work within the political realities of today. The philosophical debates over privatization are important and will likely continue, but as government employees charged with prison management, administrators can take many important steps to insure that the private public partnership addresses our vital mission of public safety.

The Arguments for Privatization – The Promises

The website for the Corrections Corporation of America (CCA), a leading vendor of private prisons, touts their services as a cost-effective value, with reduced operating costs (20 percent lower), outstanding safe performance (0.43 escapes per 10,000 inmates), construction benefits with shorter construction times, and effective

programming aiding rehabilitation.⁶ Lower costs and shorter construction times are perhaps the primary arguments that make private sector involvement within corrections attractive to its many proponents.

The budget request presented to the Texas legislature by the TDCJ for the 2008 and 2009 fiscal years is 2.5 billion dollars for each year with approximately two billion dollars slated for its incarceration responsibilities. In addition to their base line request is a request for over 430 million dollars to build three new prisons (two public and one private) to address population growth projections of 7,400 within the two-year budget cycle. The prison agency is proposing that they contract with a private prison vendor to design, construct, and operate a 1,000 bed facility. This contractual partnership would allow the state to take advantage of price competition, price leverage, and performance leverage were reasons cited by the state in their proposal.⁷ While not specifically mentioned, certainly construction time considerations are paramount to their request for private sector involvement.

The promises that privatization proponents offer are that private enterprise can run prison operations more efficiently and effectively than government agencies. They promise to be able to offer at least the same level and quality of services as a public department of corrections at a lower cost and are in a stronger position to negotiate with other private enterprises in the provision of goods , services, and programs while being somewhat insulated from the sluggish nature of legislative and political bodies.⁸ In an era of prison population pressures their attraction of much greater speed and flexibility with construction needs cannot be ignored.⁹ Very simply, private prisons promise to be cheaper, more responsive, and more effective than their government counterparts.

The Arguments against Privatization – The Perils

Opponents to private prisons begin with philosophical issues at the heart of their argument that the state must not and cannot delegate their responsibility of incapacitating a person through incarceration to a private vendor for profit. Critics contend that it is immoral to profit from the incarceration of a person and that imprisonment is solely and exclusively the inherent responsibility of government.¹⁰

Accountability and safety concerns are also at the forefront of privatization opponents. They contend that the government, by forfeiting their responsibilities to a vendor that operates to insure a profit, will cut corners, provide minimal or inadequate staffing, and reduce quality in goods and services provided. Inadequate accountability and reducing safety can lead to prisoner unrest and violence along with civil rights violations against those imprisoned. Labor groups, many criminologists, and inmate advocacy groups lead the outcry against the continuing expansion of privatization.^{11 12}

A final peril of private prisons advanced by those opposed is that the very nature of profiting from imprisonment leads to an environment where growth in prison populations is a positive societal outcome. Therefore efforts to increase sentencing laws, and stymie alternatives and diversion to prison will be encouraged by the private prison

industry.¹³ Privatization actually encourages prison construction is a very real concern of opponents and thus diminishes the more appropriate and necessary focus on policies and strategies to reduce the growth and number of prisoners incarcerated.¹⁴

What Research Shows

Researchers have conducted numerous studies in attempts to determine if private prisons save money since the first private prison reappeared on the scene in 1985. Rather than conclusively providing an answer, much of the research indicates how complex a valid evaluation is in determining true cost comparisons. While many studies might draw favorable conclusions that seem to support proponents of privatization, others suggest that there is no conclusive evidence to support the alleged benefits, and some studies highlight significant problems in safety and security.^{15 16}

Evaluating costs alone between systems are significantly complex and as different studies attempt to draw conclusions, invariably there are significant flaws. In Texas our average costs per prisoner per day average \$40 per day within state run prisons. TDCJ contracts with private prisons at a rate of \$34 per prisoner per day. Likewise, at state operated state jails the cost to the public is \$34 per prisoner per day while private operated state jails are paid \$29 per prisoner per day.¹⁷ On the surface the state would seem to realize substantial cost savings well in excess of ten percent, but I would posit that all costs are not appropriately calculated in making such a comparison.

The State's average cost includes high security offenders, medically ill offenders, and special needs offenders. It accounts for substantial prison administration costs from classification processes and staff, emergency response staff and training, financial and oversight staff and processes along with ultimate responsibility of the offender. Prisoners classified to private prisons within Texas are minimum custody, medically healthy and are returned to a state operated prison if their custody or medical classification is downgraded. In the event of any type of security emergency at a private prison, TDCJ staff will respond to assist with the situation. Expenses such as these are often inadequately accounted for in cost comparisons. While many studies do highlight a potential realization of five to fifteen percent cost-savings, I remain unconvinced that the studies to date have accurately and completely accounted for and computed all the necessary and valid operational expenses.¹⁸

Accountability concerns, especially regarding operational and offender management issues remain as perhaps the largest concern of opponents. There are numerous documented accounts of serious incidents, potential abuses, and operational failures within private facilities.¹⁹ Many private prisons have been built and are operating outside any direct regulatory oversight potentially creating conditions within which shortcoming are more likely to occur. Research does provide ample evidence that capable monitoring is critical to ensuring performance success amongst private operators.²⁰

Just this past year Canada concluded after a five-year pilot that their own publicly operated jail outperformed a similar privately operated facility and plan to terminate their

contract with the private vendor. While acknowledging that the private operator was in compliance with its contract, and did in fact operate at a cost-savings compared to the government operated jail, a comparison, through data analysis of performance indicators rated the public facility much better in security, prisoner health care, and reduced recidivism rates.²¹ Research in the State of Florida has not shown any significant differences in the recidivism rates between prisoners incarcerated in public or private prisons.²² The State of Kentucky released a detailed performance of their State's privatization efforts and discovered significant problems with the methodologies used to determine cost comparisons and found fault with contractual requirements for accountability.²³

What is perhaps significant of the Canada study is that most of the research conducted to date has found that privately operated facilities provide at least the same level of service as compared to government operated prisons.²⁴ This study would seem to suggest that in evaluating privatization, research needs to focus on a more comprehensive approach to include cost comparisons along with performance and quality measurements. "Best-value selection" criteria using performance-based contracts capitalizing upon the value of competition can have a substantial positive impact upon the relationship and partnership between private and public sectors.²⁵ I believe that in Texas, through our long relationship (over 15 years) with private vendors, we have developed a beneficial relationship and partnership utilizing performance-based contracting along with strong monitoring systems to insure our private prisons are operated appropriately.

Benefits Received Through Effective Contracts and Monitoring – The Texas Experience

Private prisons entered the Texas prison landscape during our rapid expansion beginning in the late 80s. The State Legislature authorized the TDCJ to enter into contracts with private prison vendors to operate four 500-bed facilities. An immediate significant strength in the State's position was the fact they owned the facilities and were only asking for bids to operate. The State has continued to follow this same policy position as they expanded the use of private prisons and private state jails from four to the current total of fifteen. With the State retaining ownership of the actual buildings they have been able to re-bid the operations on a set schedule, thus maximizing competitive costs benefits between vendors. On one occasion, in the late 90s, the State took back the operation of one facility based upon performance (not cost) issues. During the current proposal to build a new 1000 prison the TDCJ is hoping to maximize price competition among private prison vendors bidding to construct the prison (the State plans to take ownership of the facility) and then after construction receive the same price leverage and competition by bidding out its operation.²⁶

The original legislative statute (SB 251) that authorized the State to enter into contracts with private prison companies recognized the need for strong contract language dictating in the body of statute performance standards that must be met along with a requirement to be accredited by American Correctional Association (ACA). In 1987 when this bill was passed, there were no prison units within the TDCJ that were

accredited by the ACA. Drafting and utilizing detailed and specific contract language that specifies comprehensive performance expectations covering all aspects of prison operations are critical in achieving a beneficial partnership. The range of performance expectations included in the contracts cover staffing levels, program requirements, food caloric quantities, offender grievances, disciplinary procedures, security procedures, and training requirements along with a mandate to adhere to all policies that govern operational procedures within state operated prisons.

The TDCJ established, as required by the authorizing legislation, on-site monitors for each of the private facilities to provide for daily checks of compliance with contract provisions. Private operators are required to provide office space to their assigned monitor and allow them complete access to all parts of the facility as well as to the prisoner population. The monitors provide daily reports to regional supervisors who report to a Deputy Director of the Correctional Institution Division (CID).

Texas uses a number of critical oversight systems to help insure that all their facilities are operating, safely, securely, humanely, and appropriately. Included in their oversight systems are the private prisons and state jails that they contract with to house offenders sentenced into the TDCJ. The agency does not relinquish, but retains all final responsibility and control over all important decisions with policies, procedure, and punishment within any private facility. Every prison facility, state and private, is required to undergo a security audit every two years. Staffs that conduct the audits include senior level administrators from other units. Reports that are produced along with follow-up visits are governed by and routed up to the Director of the CID.

Each correctional institution within TDCJ has an assigned staff member that serves as a compliance monitor receiving direction from central administration on specific areas to review each month. On private facilities, the assigned monitor follows the same review schedules sending their reports back through central administration. An operational review is conducted on each facility, state and private, every three years. This audit tool is a fairly comprehensive on-site review by central administration staff covering all aspects of facility operations. Compliance reviews are conducted on policies and procedures that cover issues such as mail, clothing, food service, medical, education, programs, fire and safety, tool control, staffing, recreation, visitation, grievance system, disciplinary, classification, and budget. Detailed reports are generated that again are routed up to the prison division Director. This process provides the TDCJ a valuable tool to insure that a thorough compliance assessment occurs on a systematic basis for each facility and insures a significant oversight process for the different private operators.

As mentioned earlier, each private prison is required to meet nationally recognized standards as developed by the American Corrections Association (ACA) and must maintain accreditation (reaccreditation occurs on a three-year cycle). Private prisons in Texas were the first accredited facilities, and today more than 60% of state facilities are accredited with the TDCJ continuing to move aggressively forward to achieve 100% accreditation by 2009.

Other significant processes that private operators are required to follow include daily reporting of any unusual or serious security incidents that might occur. The TDCJ has established an emergency action center (EAC) that is operational 24 hours a day. All units are required to report any unusual or serious security incidents within three hours to the EAC. Staff at the EAC then in turn reports all calls to the Director of the CID. The Warden of the unit is required to conduct an administrative review and file a report to their Regional Director when an incident of a serious nature occurs (i.e. staff assaults, offender assaults, attempted escapes, sexual assaults). Private facility units have the same reporting requirements to the TDCJ administration. Incidents such as a homicide or escape are investigated and reviewed through a Serious Incident Review process that is at the direct command of the CID Director. This investigation involves senior-level staff from central administration who critically review all pertinent issues surrounding the incident. A detailed report with recommendations and actions is produced for review and follow-up.

The Office of the Inspector General (OIG) of TDCJ reports to the Texas Board of Criminal Justice (a nine-member citizen board appointed by the Governor of the State of Texas to provide policy oversight to the TDCJ and are charged with the hiring of the Executive Director). They are responsible for conducting investigations of alleged or suspected employee misconduct and/or criminal violations committed on TDCJ property or authorized interest. OIG officers are commissioned Texas peace officers and are assigned to units around the State of Texas. They are fully authorized to enter any private facility that the TDCJ contracts with to hold their prisoners and to conduct any necessary investigation reporting to the Chair of the Texas Board of Criminal Justice.

Other significant operational accountability and oversight processes include hiring and training requirements for all correctional officers. Private vendors are required to submit to the TDCJ personnel department all staff they are seeking to hire for approval. This procedure insures that staff members terminated for some type of misconduct are not able to return to active employment within a correctional facility within the jurisdiction of the TDCJ through one of our contracted vendors.

Contract language also includes the ability of the state to withhold payments based on failure to meet or maintain performance at contract levels. Failure to maintain staffing or required personnel levels results in the potential to withhold scheduled per diem payments to the private firm. Failure to submit required reports in a timely manner, or inaccuracies of reporting, along with a significant number of other measurements all have the potential to cause a negative financial impact.

Conclusion

My own experience as Director of the CID with our private prison partnerships was generally a positive experience. Practical benefits included less staff that I had direct responsibility for from a personnel perspective along with a reduction in daily operational and administrative responsibilities. We included all the data from our private prisons along with data from all our facilities in our monthly performance indicator reports. I was

very much aware on how each facility performed. I did have to be careful of a tendency to over monitor our private facilities or hold them to standards above a state facility because of our significant levels of oversight and control (Some scholars cited this very same tendency in their research²⁷). When problems or concerns did arise we were able to proactively communicate with the leadership of the private prisons. Significant problems were rare, and while I believe our private partners worked diligently to operate their facilities appropriately, we classified only minimum custody offenders into their facilities and removed quickly any prisoners that developed into any type of disciplinary problem.

At the same time I share many of the concerns that critics often voice. I did see tendencies to cut corners with facility repair issues (they were responsible for all repair issues up to a specified dollar amount) and most of our private prisons suffered from staffing shortages associated with their lower pay levels. Without our persistent monitoring there was a sense that conditions would lower in order to reduce their costs. Some of our state legislators were beholden to our private firms through their extensive lobbying efforts and “good corrections” did not often drive their efforts or their interests, rather their focus was on maximizing the number of beds under contract. Company lobbyists were not hesitant to seek legislative pressure if they perceived they were being treated unfairly or differently than some of the other vendors under contract with the agency.

I firmly believe that the principal difference in any cost evaluation comes only from the fact that they pay their line staff significantly lower than state levels. Any program benefit is achieved only through specific contract language and will substantially increase per diem costs. The present contract costs are based on the classification of the prisoners they hold. If the State were to ask them to house a higher security offender, certainly they would expect a per diem increase; in other words the government receives what it pays for. In spite of the fact that there is little empirical evidence that clearly supports the promises or perils of privatization, the corrections professional today must recognize that privatization is a recognized fixture within the criminal justice system and with carefully constructed oversight systems can achieve a successful partnership.

I believe that Texas has developed a successful model in establishing a beneficial partnership with private operators through strong contracts establishing performance measurements, with on-site monitors, security audits, operational reviews, ACA accreditation process, serious incident reporting requirements, and independent OIG oversight. Texas maintains a strong and healthy oversight of its private prison partners recognizing their critical responsibility to ensure accountability.

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