

Privatising punishment for profit

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The wisdom of the current trend toward entrepreneurial prison operations is questioned by looking at the agenda of the New Right.

The role of the state has undergone considerable revision in several western 'democracies'. Governments are seeking new and more efficient ways to run public services based on private business practices, and where possible, are hiving off public functions to the private sector in order to reduce public expenditure.

This trend towards the reduction of state involvement as a means of reducing budget expenditure has led to considerations of handing over the delivery of punishment to private enterprise. Opposition has come from each end of the political spectrum although many have been won over by persuasive arguments based on an apparent ability of private operators to build and run efficient and humane penal institutions.

The trend towards privatisation of prisons is occurring in Australia with one privately owned and operated prison in Queensland, and another being built in New South Wales.

Whose job is punishment?

The emergence of entrepreneurial incarceration in a form which appears to be efficient, cost effective and more humane than the state has been able to manage, has forced a reconsideration of the assumption that the delivery of punishment should be a function of the state only. This creates a degree of anguish for those on the left who, while critical of the job done by the state in the area of incarceration, have a healthy distrust of the motives and potential future outcomes of the participation by profit-motivated entrepreneurs in corrections.

The primary justification for the trend towards all forms of privatisation is economic. In the area of corrections, it is a trend that has arisen in response to the crisis of prison population blow outs at a time of tough approaches to sentencing and reluctance by electorates to expand already unwieldy corrections budgets.

Proponents of privatisation claim it to be far more cost-effective than public enterprise. Whether it be in the area of prisons or garbage collection, it is held to be the panacea for all that is wrong with the public sector.

Three sectors can be identified as participants in the delivery of punishment. First, there is the state and its employees. Second, there is the private sphere, where two interests can be identified: those who function for profit, primarily corporations, which either contract to deliver services to the penal system such as food preparation, maintenance, management of prison industries, provision of medical care and so on; and those which seek to finance, design, build and manage entire facilities. Third, there are the non-profit organisations which are also identified as having private interests, including the voluntary sector.

The blending of state and non-state interests has always been a feature of the criminal justice system, although there have been alterations in the content of this involvement. This article focuses on the privatisation of prisons for commercial interests. Its purpose is not to dwell on discussions about whether the private sector is more efficient, competitive or better at rehabilitation, nor does it examine methods of evaluating these aspects of the debate. It concentrates on discussions of ideology and the role of the state.

Many academics seem to avoid the politics of privatisation by focusing on arguments about performance and efficiency, or they separate the political and moral from the empirical. While it is important to examine the empirical this should not be removed from political and moral arguments because they are intimately connected. Ryan and Ward say the fact that the 'productive efficiency' of the private sector is being discussed at all is a reflection of changing political and moral perceptions and in any case it is difficult to believe that the 'productive efficiency' of any social institution or service can be sensibly measured by using criteria which are 'largely divorced from political and moral values'.¹

New right ideology

The purported main objectives of privatisation, in the general sense, can be categorised as the philosophical — enhancing freedom, improving efficiency — and the pragmatic — reducing public expenditure and tackling the burden of the public sector payroll.² It fits

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neatly into right-wing ideology which views the state as fatally flawed on the counts of both freedom and efficiency compared to the market.

In the case of law and order, however, there is something of a paradox in the new right's position, since they also want the state to do more to control those whose activities pose a threat to the orderly functioning of the free market, be they 'terrorists', 'rioters', trade union 'extremists' or just common 'criminals'. For the new right, 'a minimal state does not mean a weak state. On the contrary, the state has to be strong to secure the conditions in which a free economy can work.' The thought that the free market might itself be able to provide some of the hardware of the strong state is a further ideological attraction of prison privatisation.³

It would seem that the growing popularity of the expansion of prison building and operation through private enterprise fits neatly with the drift towards the reduction, through social and economic policies, of employment, housing, welfare, education, transport and so forth. Little recognition is given to the crime control effect that policies which lead to expansions in those areas could effect. 'Social policies which give people some control over their environment will have far more significant effects on the commission of and prevention of crime than new police, courts and prisons'.⁴

A further contradiction lies in the claims that private prisons can out-perform the public prison system on rehabilitation and the concomitant reduction of recidivism rates. Indeed the ability to rehabilitate has been cited as a commercial incentive for companies to maintain their contracts.⁵

The methods proposed have not been tried in prisons before, due more to inertia than reasons of principle. This is an example of where the state could perhaps learn from the private sector, but there is nothing about privatisation that would ensure rehabilitation that the state could not possibly achieve as a matter of policy.

While acknowledging that the current culture among prison officers in state institutions is less than desirable,⁶ and the apparent ability of private operators to introduce a new breed into the system, to create a more humane environment, I am not enthused by the motivation of privatisation proponents in the industrial arena. Claims that public employees are overpaid,⁷ and that reduc-

tion of labour costs is required to create cost efficiency are part of the dubious new right agenda which should be opposed.

The reduction in wages and conditions for prison workers through the employment of casual and non-unionised labour is not in the interests of social justice for the wider community. The fact that private prisons are so far in the minority, and that it has been suggested that the state would hold on to maximum security institutions, means that any change in prison officer culture would not have significant impact on the wider penal system. It also means that there would be two classes of prison workers, those who have industrial rights and those who do not; who would be working with two classes of prisoner in the developing two-tiered system of low security private prisons and high security public prisons.

Ideological issues

The rationale for involving the private sector in the delivery of punishment is both ideological and pragmatic: it is urged on governments as a solution to the existing penal crisis in a form which appeals to their basic political instincts about limiting the role of the state.⁸

The ideological opposition to the privatisation of prisons is based on what comes down to a value stance that it is appropriate and proper for the state to maintain as one of its prime functions the custody of those who have breached its laws and have been sentenced by the judiciary.

This fundamental ideological objection rests on the premise that the provision of laws, punishment and crime control are unique and essential state functions. For some, 'prisons were a public trust to be administered on behalf of the community in the name of justice. To open the way for the private sector into the administration of prisons would undermine the very essence of a liberal democratic state'.⁹

The dispersal of coercive power among private agencies is seen as threatening the impartiality and universality of law enforcement and thereby undermining normative structures. The exercise of coercive power and the distribution of punishment are held to have profound social and symbolic implications which cannot be safely discharged to private and particularistic interests.¹⁰

There is a counter argument that there has always been a private involvement in the delivery of punishment at

the low security end of the 'carcereal continuum', ranging from residential 'halfway houses' at one end to community service orders, probation, and pre-trial diversion schemes at the other. 'The extension of the carcereal "ladder" into the community, and placing more rungs on it, has been accomplished with the ideology of community control, and more recently, the attendant ideology of privatisation'.¹¹ In Australia, however, most of these functions are either carried out by the state or are not for profit and experience a high level of state regulation.

The role of the state

The view that punishment is inherently a function of the state which should therefore not be transferred to the private sector has been challenged by arguments that draw from the historical reality that the hegemony of the state over the penal system is a 20th century phenomenon. While this may be the case, and state control cannot therefore be taken for granted, that argument on its own does not automatically legitimate the resurrection of privatisation (through profit making) into the present and future. While recognising that the state does not have a particularly good record in providing for the welfare of prisoners, neither did the private sector of the past, and that is one reason why the state took responsibility for incarceration.

While the social and economic conditions of the present are vastly different from the past two to three centuries, so will they be in the future. The decisions which are being made today have a significant and far reaching impact on the penal system of the future, and the outcomes may be far less easy to reverse than they were when the state first took control of corrections. It is worth examining the conditions which have given rise to this more recent trend to re-privatise the penal system.

There appears to be an interrelationship between the loss of interest in rehabilitation, tougher law and order policies, prison crowding, and interest in private sector involvement. Governments are reluctant to appropriate funds to create more space. Crowded conditions have stimulated concern about the economic costs of maintaining the ever-increasing populations, yet crime rates have not risen dramatically.¹²

This raises speculative questions about future trends in population size. Would potential prison populations contract in line with reducing crime rates?

Would this create problems for private owners and operators of prisons, or would it not? Experience in both this and the last century indicates that declining or stable crime rates do not seem to produce contractions in prison populations.¹³

The profit motive for entering the penal area leads to questions about the ability of private operators to influence the prolonging of prisoners' sentences in the cause of keeping the prisons full. Corporate employees provide reports on prisoners' behaviour and attitudes for consideration in classification, remissions, prison offences, parole and early release. They also adjudicate internal disciplinary charges which can also result in the prolonging of sentences.¹⁴

Any concern about this experience along with concerns about the vested interest entrepreneurs would have in maintaining large numbers in prison seems to get lost in the quest for cost efficiency. Durham suggests that based on similar experience in the 19th century, 'where the lure of economic advantages encouraged many states to maintain contracts with the private economy even when the pressure of overcrowding began to subside in the late 1870s', that contemporary advocates 'ought to be prepared to tolerate continued private sector participation in the administration of punishment' long after the pressures of overcrowding have disappeared.¹⁵

It is also apparent that 19th century experience 'suggests that vested interests on the part of both the state and the private companies profiting from contracts, will be able to influence public policy regarding the role of the private sector', including the taking of bribes by politicians from prospective lessees.

Symbolism and state justice

There is a further argument that there is an important symbolism in the state being seen to be the agency which administers justice.¹⁶ While privately owned and operated prisons remain a distinct minority, there is negligible threat to this symbolism. If the situation were to reverse (with the state having minor involvement in the administration of coercive power) perceptions must be different.

There is enormous symbolism tied up in the concept of the social contract, especially because it is the theory that underlines our concept of parliamentary democracy today. Given that governments make the laws, and through the judiciary try and punish offenders, and since prisons are integral to the punishment function of government, it is inap-

propriate for it to relinquish this responsibility. The fact that reactions to the prospect of this happening have been so strong is an indication of the strength of the assumption held by many, and the threat privatisation poses to the sense of propriety attached to the government maintaining this function.

Porter argues that justice is a condition and not a service and that 'acceptance of the law will only continue while it is enforced by the agents of the state. Just as criminal trials are open to the public, so symbolically, the state should be seen to punish those who break the law'.¹⁷ While this has not appeared to be a problem to date, the spread of privatisation in the penal sphere only extends to a tiny proportion of penal institutions mostly of the low security kind.

At this point of the debate it is usually pointed out that there is a distinction between the allocation of punishment and its delivery, and it is not being suggested that the state gives over its monopoly of the allocation of punishment, although Ryan and Ward do mention that there are some 'anarcho capitalists' who have argued this case.¹⁸ Privatisation of prisons, however, does make it easy for the state to distance itself from the problem of prisons.

It must be remembered that the primary motivation for the handing over to private enterprise is an economic one. It has not evolved from a policy consideration. While it is difficult to imagine, could not the privatisation of the entire corrections administration for economic reasons pave the way for handing over the judicial function or the prosecutorial function to private enterprise in the cause of economic efficiency? This would certainly threaten the community's perception of the criminal justice system as we know it.

Other reasons for the state having sole responsibility for the delivery of punishment (i.e. the use of force) are: this power is open to corruption and it is much harder to keep the private sector accountable than it is the state. There is also the question of the ethics of profiting from the power to inflict punishment and the possibility that the profit motive provides an even greater incentive to corruption.

To point to examples of corruption and abuses within state-run institutions as a counter-argument raises difficulty for opponents of privatisation. The accountability of the state through the ballot box is more achievable than the accountability of corporations which,

although theoretically accountable to the state, are beyond the reach of the public.

Talk about privatisation shifts the discourse away from abolition of particular components of the penal system and even away from arguments about alternatives to the penal system. We are left with technical discussions of different ways to keep doing the same thing. The prevailing question is whether it will be done *privately* or *publicly* and who will profit from it.¹⁹

The privatisation of corrections needs to be understood as part of the larger political agenda. In the context of right-wing ideology where the objective is a 'reconstructed State and civil society', privatisation serves to de-politicise the economy and society. 'The preoccupation with fiscal efficiency deflects attention away from political issues and removes corrections from democratic control'.²⁰

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