

Fiscal Pressure Pushes Prison Privatization

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Tougher felony sentencing laws and practices, combined with dropping parole rates, have borne some profound fiscal fruit in the State of Ohio. The General Revenue Fund (GRF) budget of the Department of Rehabilitation and Correction (DRC) has skyrocketed from slightly over \$52 million in fiscal year 1975 to an estimated \$1 billion for fiscal year 1997. This paper examines DRC's budget in relation to the GRF and explores the privatization of correctional services as a possible option for curbing spiraling costs. Selective slices of contemporary correctional privatization in the United States are depicted as well. Additionally, a tour of related issues and controversies is taken to provide policymakers with a guide through the privatization debate.

Introduction

Let's open this discussion of the fiscal pressure to privatize certain state operations with a question. What state agency for the first time ever joined the very exclusive "billion dollar GRF baby club" in fiscal year 1997? Give up? Okay, here's a hint. Metaphorically speaking, one could think of this state agency as a circa 1970 piece of Detroit iron with a clogged intake filter, too much horsepower under the hood, and a cranky exhaust system. And the answer is — the Department of Rehabilitation and Correction (DRC).

So, what's the point you ask? The point is actually another question. Given the: (1) inevitable clamor of competing programmatic demands; and (2) limited supply of resources with which to satisfy those demands, most specifically GRF money, how can one attempt to constrain DRC's ever-escalating costs?

As a vital premise to this discussion, we would assert that there will be an

ongoing concern — shared at a minimum by the legislative and executive branches in the State of Ohio — with the size and growth of DRC's GRF budget. The purpose of this paper will be to tackle this assertion from two directions. First, we will serve up for the reader's perusal some different ways of describing or looking at DRC's budget. Second, one policy option for curbing the growth in that budget — privatizing the delivery of correctional services — will be selected for specific discussion.

Prison-Driven Spending

When examining DRC's spending habits and the prospects for some fiscal restraint, it really makes sense to focus on the GRF for two reasons.

First, the GRF is the primary operating fund of the state and finances around 60 percent of the activities of state government in Ohio.

"This is the largest fund of the state and receives the majority of tax receipts. The GRF has few

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The GRF covers 87.2 percent of DRC's operating budget.

restrictions on how it can be used. Much of the focus of the budget process is on the plan for the spending of GRF resources since there is significant discretion involved.”¹

This is basically the pot of money over which all of the state's various programmatic areas — primary and secondary education, higher education, justice and corrections, health and human services, and so forth — do battle over the course of biennial operating budget deliberations.

Second, from a funding perspective, DRC is a GRF-driven state agency. A quick calculation using the fiscal year 1997 spending levels provided for in Am. Sub. H.B. 117, the main appropriations act of the 121st General Assembly, reveals that the GRF covers 87.2 percent of DRC's operating budget. And for more of a historical picture, if one looks at DRC's annual spending from the period that runs from, say, fiscal year 1982 through fiscal year 1997, the GRF has consistently been carrying between 80 percent to 90 percent of the department's funding load.

Spending Level

One quick and easy way to look at DRC's annual GRF spending is to picture it over

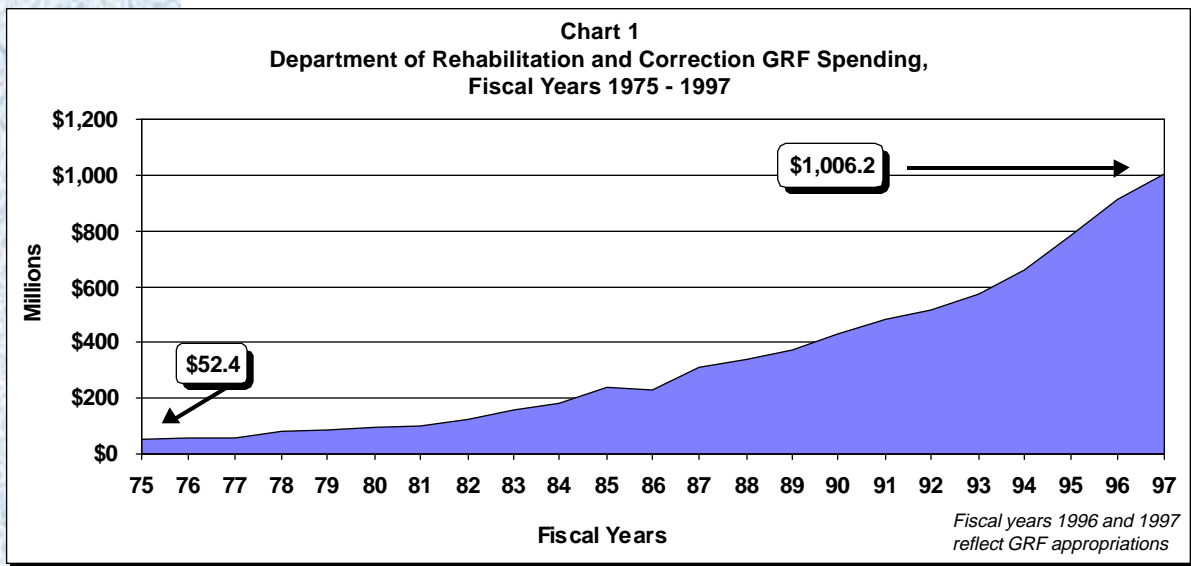
time, which we've done in Chart 1. In fiscal year 1975, DRC's GRF spending totaled \$52.4 million. And, as previously mentioned, by the close of fiscal year 1997, DRC's total GRF spending will have exceeded \$1 billion annually for the first time ever. If one looks at the trend line established by these two end points, it's pretty apparent that DRC's GRF spending really took off in the middle-to-late-1980s and has been on a steady incline ever since.

Spending Growth

As many state programs compete for limited state funds, a potentially provocative comparison can be made between DRC's GRF spending trends in relation to those for other state programs. The annual GRF growth rate for selected state programs, including DRC, is depicted in Chart 2. The comparison period runs from fiscal year 1975 actuals through fiscal year 1997 appropriations.

As the chart shows, DRC's GRF spending has experienced a meteoric annual growth rate (14.7 percent) relative to total GRF spending (8.2 percent), as well as compared to some other major competitors for GRF funding. The only other major

¹ Ohio Office of Budget and Management, *State of Ohio Executive Budget for Fiscal Years 1996 and 1997: Book One* (Columbus, OH: January 1995), p. A5.2.



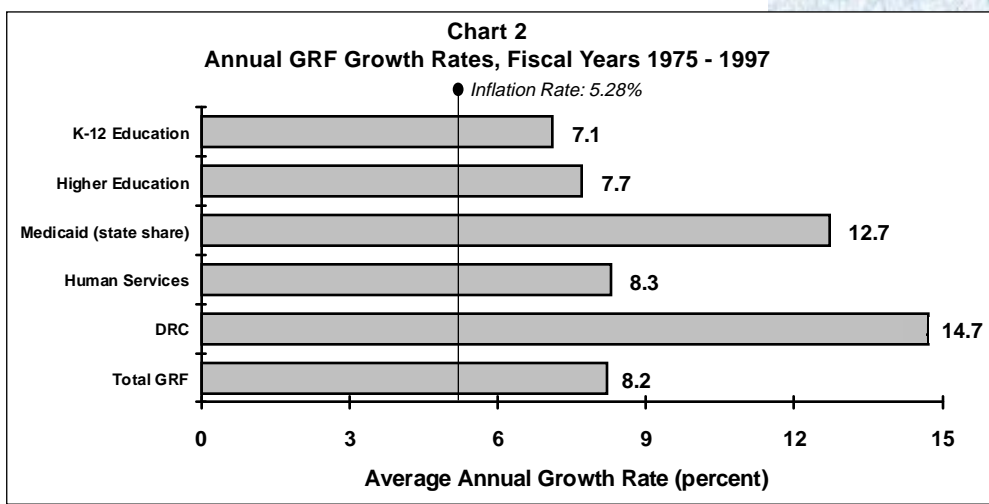
programmatic activity that even comes close to rivaling DRC's annual growth rate has been the state share of GRF Medicaid spending (12.7 percent). (The reader should keep in mind that the latter's actual dollar amount of GRF spending has been two-to-four times higher than DRC's over the course of the last 25 years or so.)

From a budgetary perspective, the trade-offs accompanying the higher annual growth rates associated with DRC and Medicaid spending are fairly obvious — more GRF money for some state programs necessarily means less GRF money for other state programs.

Spending Components

On what exactly is DRC spending all of this GRF money? Well, one way to respond to such a query is to conceptualize DRC's GRF spending as having four distinct components which can be described as follows:

- 1) *Prisons* – Day-to-day costs associated with the provision of housing, security, maintenance, food, and support services for inmates sentenced to the custody of DRC.
- 2) *Parole and community services (P&CS)* – Spending that provides parole and probation supervision for felony offenders and programs which fund community correction alternatives to prison and jail.
- 3) *Debt* – Payments made to the Ohio Building Authority for its obligations incurred as a result of issuing bonds



that finance the design, construction, renovation, and rehabilitation phases of various departmental capital projects, as well as the construction and renovation costs associated with community projects (community-based correctional facilities, jails, and so forth).

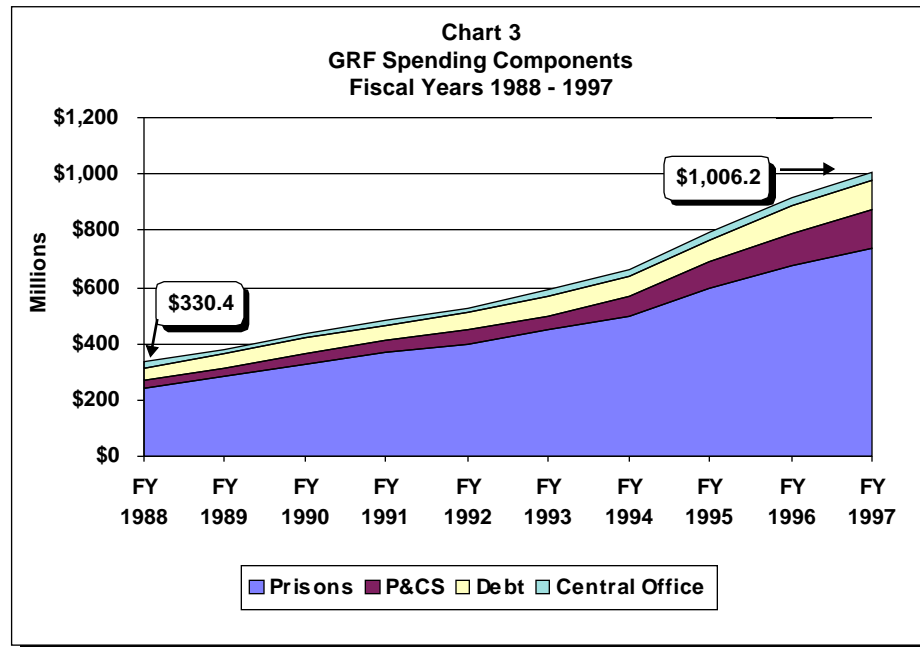
- 4) *Central office* – Administrative operations that provide department-wide oversight and coordination, such as human resources, legal services, management information systems, and budget monitoring and planning.

Chart 3 displays DRC's GRF spending, by component, from fiscal year 1988 through fiscal year 1997 appropriations. The picture that emerges quite clearly is how prison operations dominate GRF spending. As an example, take DRC's \$1-plus billion fiscal year 1997 GRF appropriation. Of that total, around \$739 million, or 74 percent, is allocated for prison operations. In fact, if you were to look over the entire ten-year period covered by the chart, one would find that prison operations (guards, food, medical care, and so forth) do, and will continue to, eat up roughly three-quarters of DRC's GRF budget.

What this fact reflects is the rather remarkable growth that has taken place

DRC's GRF spending consists of four distinct components:

- **Prisons**
- **Parole and Community Services**
- **Debt**
- **Central Office**



in the state’s prison system over the last twenty years or so. By the end of fiscal year 1997, the state’s prison system will have sprouted from eight correctional institutions with nearly 11,000 inmates and 3,000 employees in fiscal year 1975 into a geographically far-flung empire of twenty-nine correctional institutions, somewhere in the neighborhood of 46,000 inmates, and roughly 14,600 employees.

Since the reader is probably already pondering it, we pose the following question: how can one account for Ohio’s meteoric rise in prison population, a four-fold increase since fiscal year 1975 and a doubling in the last ten years alone? What’s going on?

As the stated purpose of this paper is not to engage in an extensive discussion of the forces propelling prison population, let us simply offer a summary drawn from the state’s Office of Criminal Justice Services.

“Several factors have been identified as causative in the expanding prison population including tougher sentencing by judges, mandatory minimums and

‘add-ons’ (e.g., the three year Ohio add-on for committing a felony with a gun) enacted by the legislature, and increasingly restrictive practices [of] the state parole board and others responsible for release decisions. The explosion of drug crimes, arrests and convictions beginning in the mid-1980s, which was closely linked to the crack-cocaine epidemic, has had an impact of undeniable significance.”²

It is also important to keep in mind that this institutional growth is tied into a dynamic first set in motion by the \$638 million correctional building program that the state embarked on in 1982 with the enactment of Am. Sub. H.B. 530 of the 114th General Assembly.

Institutional Operations Spending

Since three-quarters of DRC’s GRF budget directly supports prison operations, it seems appropriate to wonder, what exactly are we getting for this money?

² Ohio Office of Criminal Justice Services, *The State of Crime and Criminal Justice in Ohio* (Columbus, OH: January 1995), p. 73.

Table 1
Institutional Operations - FY 1997 GRF Program Budget Allocations

Program	Total	Payroll	Contracts	Maintenance	Equipment
Security	\$344,231,104	\$341,051,781	\$28,336	\$3,150,987	\$0
Support Services	\$99,946,385	\$14,709,685	\$510,519	\$84,726,181	\$0
Medical	\$85,641,969	\$31,321,961	\$11,470,012	\$42,849,996	\$0
Facility Maintenance	\$62,192,120	\$22,329,011	\$10,470	\$39,852,639	\$0
Mental Health	\$49,517,048	\$38,678,657	\$7,355,544	\$3,482,847	\$0
Administration	\$46,559,024	\$41,377,480	\$0	\$5,181,544	\$0
Unit Management	\$23,899,210	\$23,269,431	\$34,320	\$595,459	\$0
Education	\$12,546,083	\$11,943,090	\$0	\$448,667	\$154,326
Not Programmed	\$10,957,857	\$1,831,959	\$0	\$3,364,477	\$5,761,421
Recovery Services	\$3,839,678	\$3,773,378	\$0	\$66,300	\$0
TOTAL	\$739,330,478	\$530,286,433	\$19,409,201	\$183,719,097	\$5,915,747

An answer to this question emerges in Table 1, which lays out a rather detailed picture of DRC's GRF budget plan for the day-to-day running of prisons during fiscal year 1997. Our intent here is not to exhaustively analyze these numbers and their implications, but rather to simply offer a few observations, and then leave the reader to peruse what DRC actually "buys" with all of that GRF money.

First, *all* of the spending is budgeted for what are known as *operating expenses*: payroll, personal services contracts, maintenance, and equipment.

Second, *payroll* — the wages and fringe benefits of DRC employees stationed at prisons — is expected to consume almost 72 percent, or \$530.3 million, of DRC's GRF program budget allocation for institutional operations.

Third, *security* — the supervision and control of inmates by correction officers — is clearly the dominant programmatic concern for DRC. Close to one-half of the fiscal year 1997 GRF program budget allocations, or \$344.2 million, is slated for security. And almost all of that amount is allocated for payroll.

To conclude, DRC's spending clearly has been driven by their primary

business — the day-to-day running of prisons. And given DRC is expected to open seven new correctional facilities (four full-service prisons and three boot camps adding around 5,450 beds) in the next two-to-three years, there is no reason to believe that this fiscal emphasis on prison operations will markedly shift anytime in the near future.

What is also readily apparent — as evidenced by the amount of GRF money allocated for payroll — is that prison operations tend to be very labor intensive, with a substantial portion of staff detailed explicitly to the supervision and control of inmates. One should never forget that prisons are basically always "open," meaning that some level of institutional staffing, most specifically correction officers, has to be maintained all day, every day, year-round.

Curbing Correctional Costs

Assuming for the moment that there is some level of shared concern relative to DRC's very evident need for ever-increasing amounts of GRF money, then one might ask: how can the State of Ohio attempt to rein in this escalating correctional budget?

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Before switching to an examination of the issue of privatization as a potential spending restraint measure, we feel compelled to briefly note that: (1) other potential cost containment strategies clearly exist, carrying varying degrees of political feasibility; and (2) any of these potential cost containment strategies should not be approached as if they were mutually exclusive, meaning that the selection of one approach does not, and should not, preempt or preclude the discussion and deployment of other strategies as well.

For example, one such strategy to cut or constrain GRF spending would actually involve cost-shifting — the movement of necessary expenses from GRF to non-GRF revenue generating accounts. In point of fact, DRC is already exploiting this cost shifting-revenue generating avenue as evidenced by the manufacture and sale of various goods and services by the Ohio Penal Industries (OPI), as well as commission revenue generated from telephone systems established for the use of inmates.

Along a similar vein, DRC is in pursuit of statutory authority that would permit the department to implement a services copayment program requiring a prisoner make a copayment when the prisoner initiates a request for medical treatment or other related services. The practical effect of instituting such a copayment would be to: (1) create a potential disincentive to use what is now virtually free-and-unlimited medical care, thus cutting demand and saving GRF-supported medical resources; and (2) generate some amount of non-GRF revenue that can supplement existing medical resources.

Why focus on trimming prison operation costs? Because as State Policy Reports stated some two years ago in its review of the rising costs of corrections nationwide:

“To try to find ways to limit the growth of corrections budgets, state officials are asking whether too many people, and/or the wrong people are in prison, exploring ways to reduce incarceration by reducing the numbers sent to prison and reducing sentences served, taking a second look at consent decrees, and looking for savings in prison operations.”³

In the specific case of DRC, it has already been noted that for all intents and purposes three-quarters of its ever-growing GRF budget is devoted to prison operations.

What about the trimming of the other three components of DRC’s GRF budget: parole and community services, debt service, and central administration? First, and most obviously, the cost of these other budgetary components pales compared to the immense costs associated with prison operations.

Second, DRC’s parole and community services budgetary component provides for the direct supervision of non-incarcerated felony offenders and funds community correction alternatives to prison and jail. Simply trimming these expenses potentially produces at least two undesirable effects: (1) it reduces the ability to provide appropriate levels of supervision, thus potentially threatening community safety; and (2) it creates an incentive for judges to sentence more individuals to prison and jail.

Third, given the prison construction program the state has undertaken, debt service payments will not drop anytime soon. The state cannot simply walk away from these financial obligations. And even if the drive to build new prisons subsides, DRC will still have a

³ “Controlling Corrections Cost,” *State Policy Reports*, Vol. 12, Issue 17, p. 14.

massive statewide physical plant that will require funds for repair, renovation, and rehabilitation projects.

Fourth, central administration consumes very little of DRC's GRF budget and has consistently lagged beyond other departmental operations. If one were to focus exclusively on trimming central administration, it would be akin to cutting off someone's head and then expecting the remaining arms and legs to coordinate and function as if they were part of one body.

How does one constrain costs? Cost containment strategies can generally be seen as falling into three devices: (1) front-end diversion; (2) back-end release; and (3) organizational or managerial controls.⁴ The first two devices are efforts to restrain growth in prison populations. On the other hand, the third device more or less takes prison population as a given and then makes optimal use of available resources.

Front-end diversion devices are basically sentencing alternatives that place an offender under some type of sanction in lieu of incarceration in a correctional facility. The effect is to reduce prison admissions and prison population levels from what they would otherwise have been, which theoretically translates into some form of cost savings. Examples of such programs or actions include community corrections that provide an array of residential and non-residential sanctions and changing the technical violation criteria that trigger the recommitment of a released offender to prison.

Back-end release devices basically reduce the length of stay for those committed to prison. The effect is to restrain growth in prison population levels from what they would otherwise

have been, which theoretically again translates into some form of cost savings. Examples of such programs or actions include boot camps, earned credits, furloughs, and electronically monitored early release.

The issue of managerial and organizational controls basically asks the question: what actions can DRC take that will provide cost savings and increase effectiveness in operations? Examples of actions aimed at better management of criminal justice resources include state-of-the-art prison population projection models, offender classification systems, correctional staffing and personnel analysis, and privatization.

Why, out of all of the possible devices that DRC might utilize in controlling prison costs, would one select privatization for more detailed scrutiny? We would offer three rationales for taking a closer look at privatizing correctional services.

First, Charles W. Thomas, a veteran tracker of correctional privatization, has remarked about its "dramatic growth" in the last decade and offered the following remark regarding its future:

"...[W]e have seen little more than the leading edge of a fundamental transformation in the way public policy makers conceptualize the relationship between government agencies and the delivery of correctional services. Increasingly often I believe we will see policy makers encouraging or requiring agencies to allocate more of their efforts to correctional planning and to reduce their involvement as direct service providers. Indeed, no responsible policy maker can any longer view the management of correctional facilities as a monopoly to which

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⁴ Stacie M. Alexander, *Why Prisons are Packed and What States Can Do*, Lombard, IL, A Report of the Midwestern Legislative Conference of the Council of State Governments, January 1989, pp. 6-10; James Austin, "Costly Corrections — What Are the Alternatives?," presentation at the annual meeting of the National Conference of State Legislatures, San Diego, CA, 24-29 July 1993; "Controlling Correctional Costs," pp. 14-20.

The private corrections industry continues to grow both as a provider of specialized contract services, e.g., food and medical services, as well as a full-scale manager of entire correctional facilities.

Ohio has taken concrete steps in the last two years or so that will make the private management and operation of a prison a reality.

⁵ Charles W. Thomas and Dianne Bolinger, *Private Adult Correctional Facility Census*, 9th ed. Gainesville, FL: Private Corrections Project, Center for Studies in Criminology and Law, University of Florida, March 1996, p. viii.

⁶ Richard Crane, "Is the Privatization Wolf At Your Door?," *Corrections Managers' Reports* (June-July 1996), p. 9; Thomas and Bolinger, *Private Adult Correctional Facility Census*, pp. vii-viii.

public agencies and their employees are automatically entitled. The evidence that the public interest is better served by competition between alternate providers is far too strong for such an archaic strategy to prevail."⁵

Second, the private corrections industry continues to grow both as a provider of specialized contract services, e.g., food and medical services, as well as a full-scale manager of entire correctional facilities.⁶ With respect to the latter — management of an entire correctional facility — Ohio's state and local criminal justice systems represent a vast untapped market. Assuming that it has not already begun, one should fully expect that this industry will vigorously market their ability to manage an entire correctional facility for the State of Ohio or its political subdivisions. Such marketing, combined with the fiscal pressures faced by the state and local criminal justice systems, will assure privatization has a place in any discussion of cost containment strategies.

Third, the State of Ohio has taken concrete steps in the last two years or so that will make the private management and operation of a prison a reality. The main appropriations act governing the state's spending for fiscal years 1996 and 1997, Am. Sub. H.B. 117 of the 121st General Assembly, contained new permanent law specifying the conditions under which DRC *may* contract for the private management and operation of a state prison (section 9.06 of the Revised Code). Additionally, temporary law in Section 174 of that act went a bit further in *requiring* DRC to: (1) contract for the private operation and management of a state correctional institution to be built using moneys appropriated in the capital act covering fiscal years 1997 and 1998; and (2)

present by June 30, 1996, a plan for implementing the privatization concept.

Amended House Bill 748 of the 121st General Assembly, the capital appropriations act covering fiscal years 1997 and 1998, subsequently provided \$35.0 million for DRC to build a 1,000-bed medium/minimum security prison, and following its completion, privatize the operation. DRC has since decided to construct this facility on an 180-acre site in the City of Conneaut (Ashtabula County). Site preparation started at the close of calendar year 1996, with the facility expected to be complete and ready for operations by January 1999.

The reader should also be reminded that Am. Sub. H.B. 117 carried new permanent law permitting counties and municipal corporations to contract for the private operation and management of local correctional facilities that are used only for misdemeanants, and specifies the standards to be met and contract terms that must be included (sections 9.06, 307.93, 341.35, 753.03, and 753.15 of the Revised Code). There are up to nine local correctional facilities that could potentially be affected by this permissive authority, though we do not believe any have actually privatized the operation and management of an entire facility. However, at least a few of these local correctional facilities are being operated by private, non-profit vendors, with the county sheriff's office providing security services.

Correctional Privatization: What Does It Mean?

There exists a considerable body of work that speaks in one way or another to the term "privatization." The term does not carry a single, universally-accepted meaning. It carries a load of different meanings and uses that are

driven by varying mixes of conventional wisdom, ideology, theory, and empiricism. Neither this paper, nor the reader, will be served well by getting stuck in a conceptual mire discussing the relative strengths and weaknesses of one particular definition of privatization compared to another.

That said, let us lay out some of the key premises underlying the use of the term *privatization* for this discussion. First, whether explicitly debated or not, privatization carries with it some larger notion of the appropriate roles of the public sector and the private sector in the delivery of a society's goods and services.

Second, privatization is not an "all-or-nothing" proposition. In other words, the private sector's role in a goods and services delivery system does not have to be approached as involving mutually exclusive options that pit no presence whatsoever versus total operational control. Rather, it is more appropriate to view the private sector's presence along a continuum where it can have varying degrees of involvement in the delivery of goods and services between doing nothing and doing everything.

Third, this paper's focus is on the application of privatization to a specific component or segment of the criminal justice system, the management and operation of state prisons — secure adult correctional facilities for persons sentenced to the custody of the state. This clearly ignores the reality that the private sector has varying levels of involvement in the management and operation of other types of local, state, and federal adult correctional facilities across the country, for example, detention facilities, processing centers, jails, and community treatment or transitional facilities, as well as a role in the management of juvenile correctional facilities.

Fourth, though not discussed herein, the private sector clearly can have some level of involvement in the building of a secure adult correctional facility as well, including its financing, design, and construction. The State of Ohio currently finances, owns, and operates all of its prisons, though the private sector typically has had a fairly substantial role in the actual design and construction of these correctional facilities.

Fifth, privatization as it relates to the management and operation of a prison can be seen as having two distinct appearances: (1) a contractual role in the delivery of specific correctional goods and services (contracting); and (2) a managerial role in which complete operational responsibility of an entire correctional facility is turned over (facility privatization).

Correctional Privatization: What Does It Look Like?

David Shichor and Dale K. Sechrest, in a recent discussion of the issue of delegating state functions to public or private entities, stated that:

"Private involvement in the 'prison business' is not a new phenomenon. Throughout history, private entrepreneurs operated various confinement facilities, either at their full capacity or mainly contracting for prison work and production ... In many adult prisons and jails, private contractors supply medical, educational, vocational, culinary or maintenance services."⁷

Contracting for Services. On the specific matter of contracting for correctional services, a DRC project team noted in their report on issues related to prison privatization that:

Privatization is not an "all-or-nothing" proposition.

⁷ David Shichor and Dale K. Sechrest, "Delegating Prison Operations To Public or Private Entities," *Corrections Today* (October 1996), p. 112.

Common areas for private involvement include medical services, food and dietary services, prisoner transportation, mental health services, academic and vocational education, drug and alcohol abuse treatment, and pre-release programs.

“The practice of contracting with private enterprise for the provision of specific services has become increasingly popular in the past thirty years. Common areas for private involvement include medical services, food and dietary services, prisoner transportation, mental health services, academic and vocational education, drug and alcohol abuse treatment, and pre-release programs.”⁸

We can get some sense of the current scope of state contracting for correctional programs and services by looking at a survey on privatization and contracting in corrections initiated by The National Institute of Corrections (NIC) in December 1995.⁹ The NIC survey solicited information from all fifty state corrections departments (DOCs), as well as the District of Columbia, Puerto Rico, and the federal Bureau of Prisons (BOP). Forty-five state DOCs and Puerto Rico provided information on contracting for correctional programs and services. (Data from five state DOCs and BOP was unavailable.)

The NIC survey found that all of the reporting DOCs — with the exception of Colorado and Puerto Rico — were contracting for some type of program or service. And “based on the 1995 data provided by the DOCs, contracting for services is an industry of not less than \$1 billion annually.”¹⁰ (The authors also noted that the data’s limitations include uncertainty as to the degree to which DOCs are utilizing public agencies versus private providers in the delivery of those correctional programs and services.)

What states were the big spenders on contracted correctional programs and services? Three states (Texas, Michigan, and Florida) each reported spending over \$100 million in contract funds for

1995. The State of Ohio registered the tenth largest outlay of contract funds with \$46 million, with virtually all of that amount reported as medical services expenditures.

What did all of the reporting DOCs procure with these contract funds? According to the NIC data, health care services (medical and mental health services) are the most common form of contracted programs or services, amounting to 71 percent, or \$798 million, of all 1995 contract funds reported by DOCs. Contracting for offender programs consumed another \$195 million, a category covering substance abuse treatment, sex offender treatment, community-based programs (electronic monitoring, work release programs, halfway house beds), educational and vocational programs, and penal industry programs. A category labeled “other” took the remainder of the 1995 contract funds, or \$57 million. Food services was the largest component of this contracting activity, registering in at \$42 million.

A glance at DRC’s FY 1997 program budget reveals that \$49 million is allocated for contracts, largely funding halfway house beds (\$24 million), medical services (\$11 million), and mental health services (\$7 million). The vendors who contract with the state to provide halfway house beds are typically private, non-profit firms. If one adds in DRC’s annual contract with The Ohio State University Hospitals (around \$21 million), which is accounted for as a maintenance expenditure, then the amount that DRC has allocated for contracts during FY 1997 rises to at least \$70 million.

Private Prisons: An Ever So Brief History

For our purposes, a General Accounting Office (GAO) report released in 1991 succinctly

⁸ Ohio Department of Rehabilitation and Correction, *Operation Privatization*, report presented by the Operation Privatization Team to Director Reginald A. Wilkinson, 8 July 1996, section 1.0, p. 3.

⁹ LIS, Inc., “Privatization and Contracting in Corrections: Results of an NIC Survey,” National Institute of Corrections Information Center: *Special Issues in Corrections*, U.S. Department of Justice, February 1996.

¹⁰ *Ibid.*, p. 8.

summarizes the history of prison privatization in this country:

“Several states used private prisons in the past. California, Louisiana, Michigan, Oklahoma, and Texas had privately operated prisons at one time or another between 1850 and 1950. The inmates were typically employed by the private sector administrators as personal servants or in businesses operated by these administrators. The revenues derived from inmate labor helped support the correctional systems. By 1950, privately managed prisons had come to an end after legislative inquiries and investigative journalists revealed inmate abuses under the system ... During the 1980’s, growing prison populations, pressures from the courts to quickly add prison space, and increasing prison costs rekindled interest in using privately managed prisons.”¹¹

Legal Environment

We used information gathered in the previously-mentioned NIC study, as well as the annual facility census data collected by Charles W. Thomas, to distill the current legal environment for such state contracting, at least as it stood around one year ago. Of the fifty states, thirty-three had what might be termed a “favorable” legal contracting environment, with twenty-five of those states carrying specific provisions that authorize privatization (including Ohio) and another six in

possession of favorable statutory interpretations. Two states (Delaware and Georgia) believed they could do so under their statutory contracting authority.

Five states were judged to be located in “unfavorable” legal environments. In three of these states (Illinois, Kansas, and West Virginia) contracting is strictly prohibited. And the two other states (Idaho and Rhode Island) reported that “other” factors were barriers to contracting. In the specific instance of Rhode Island, a union contract contains a “no subcontracting” provision.

The legal environment of twelve states was unknown.

Number of Private Adult Correctional Facilities

As far as we are aware, Charles W. Thomas maintains the most thorough and complete information on the annual status of privatized adult correctional

Table 2
Private Adult Correctional Facilities:
Whereabouts & Primary Source of Prisoners
(December 1995)

Geographical Location	Number of Facilities	Primary Source of Prisoners			
		State	Local	Federal	TBA*
Arizona	4	3	0	1	0
California	7	5	2	0	0
Colorado	4	1	2	1	0
Florida	11	7	4	0	0
Kansas	2	0	1	1	0
Kentucky	4	3	1	0	0
Louisiana	2	2	0	0	0
Mississippi	2	2	0	0	0
New Mexico	3	1	1	1	0
Oklahoma	2	1	0	0	1
Pennsylvania	1	0	1	0	0
Puerto Rico	3	3	0	0	0
Rhode Island	1	0	0	1	0
Tennessee	5	1	2	1	1
Texas	38	28	4	6	0
Utah	1	1	0	0	0
Virginia	1	1	0	0	0
Washington	1	0	0	1	0
Total	92	59	18	13	2

*TBA stands for “to be announced.” The facility was not operational and the source of prisoners was not known.

¹¹ U.S. General Accounting Office, *Private Prisons: Cost Savings and BOP’s Statutory Authority Need to be Resolved* (Washington, D.C.: February 1991), p. 10.

As of December 31, 1995, a total of 92 private adult correctional facilities were being operated or planned for operation in eighteen states.

facilities in this country which includes Puerto Rico. The most current data reflects the state of privatized adult correctional facilities as of December 31, 1995. The resulting picture is presented in Table 2.

As of December 31, 1995, a total of 92 private adult correctional facilities were being operated or planned for operation in eighteen states. The states with the most privatized adult correctional facilities (operating or being planned for use) were Texas (38), Florida (11), and California (7). Using the level of government that provides the primary or exclusive source of prisoners, 59 of these 92 private adult correctional facilities were categorized as state facilities, with the remainder predominantly handling prisoners for a local jurisdiction or the federal government.

The reader should also be aware of several important background points, caveats, if you will, to the information contained in the table. Some of these points should be kept in mind for subsequent tables on private state adult correctional facilities and the management firms that ply their trade in this market.

First, 17 of these private adult correctional facilities were not yet operational; these facilities were still undergoing construction or renovation and had not opened their doors to prisoners.

Second, two of those 17 non-operational facilities were captured as “to be announced,” meaning they were under construction, but the source of prisoners was unknown.

Third, nine of the 59 state facilities were *exclusively* housing prisoners from other states, a phenomenon known as “geographical outsourcing.”¹²

Fourth, only thirteen of the 92 private adult correctional facilities clearly have a secondary source of prisoners that mixes prisoners from other levels of government or other states. For example, the primary source of prisoners for two facilities in Texas is the State of Missouri, while the secondary source in both instances is the State of Utah.

Fifth, a number of these state facilities appear to be community treatment or transitional facilities that are not strictly speaking what most might refer to, or think of, as “prisons.” For example, the five privatized adult state correctional facilities located in California are actually known as community corrections facilities (CCFs).

Sixth, information collected from Puerto Rico is included in this analysis.

And last, we suspect that a few of these private adult correctional facilities have been wrongly classified, meaning, for example, that a facility identified as principally serving a local jurisdiction was in reality principally handling state prisoners, or vice versa. To the degree that such mistakes exist, those errors in judgment are the fault of this writer.

Number of Private State Correctional Facilities

A picture specific to what we have identified as private state adult correctional facilities, using Charles W. Thomas’ data again, is presented in Table 3. Of the 59 state facilities, fourteen were planned for use, but were not actually in operation at the time that they were surveyed late in December 1995. Of these 14 non-operational facilities, 11 were located in four places: Florida (4), Texas (3), Mississippi (2) and Puerto Rico (2).

Also captured in Table 3 is the previously-noted phenomenon of

¹² Thomas and Bolinger, *Private Adult Correctional Facility Census*, p. vi.

Table 3
Private State Adult Correctional Facilities:
A Selective Picture (December 1995)

Geographical Location	Number of Facilities	Number Exclusively Outsourcing	Total Rated Capacity	Rated Non-Operational Capacity	Present Prisoner Population
Arizona	3	1	1,874	400	1,313
California	5	0	1,446	0	1,338
Colorado	1	0	752	752	0
Florida	7	0	4,636	2,368	2,210
Kentucky	3	0	1,300	0	1,138
Louisiana	2	0	2,948	0	2,944
Mississippi	2	0	2,034	2,034	0
New Mexico	1	0	322	0	299
Oklahoma	1	1	768	0	756
Puerto Rico	3	0	3,000	2,000	1,46
Tennessee	1	0	1,506	0	1,489
Texas	28	7	18,636	4,000	12,102
Utah	1	0	400	0	238
Virginia	1	0	1,500	1,500	0
Total	59	9	41,122	13,054	23,973

“geographical outsourcing,” specifically the housing of one state’s prisoners in correctional facilities located in another state. This activity was concentrated in Texas, where there were seven private adult correctional facilities identified as exclusively housing another state’s prisoners. States that were in effect shipping some of their prisoners into Texas at the close of 1995 included Colorado, Hawaii, Missouri, Oklahoma, Utah, and Virginia.

The primary source of prisoners for one of the three private adult correctional facilities located in Arizona were the states of Alaska and Oregon, while the exclusive source of prisoners for the lone private adult correctional facility operational in Oklahoma was the State of North Carolina. (The latter was also reported as being the secondary source of prisoners for two facilities whose primary source of prisoners was the federal government, one located in Rhode Island and the other in Tennessee.)

Table 3 also displays the total amount of rated capacity — which we have taken to mean the number of prisoners

that a facility was designed to house — associated with all of the private adult correctional facilities that we have classified as primarily housing state prisoners. This rated capacity includes existing facilities, as well as those not yet in operation, but scheduled for use. Another column shows the total amount of this rated capacity that is attributable to a facility or facilities that were not “on-line” as of December 31, 1995. The last column in Table 3 reveals the total number of prisoners incarcerated in operational facilities as of that date as well.

Number of Management Firms

We would like to close this section of the paper on the current state of correctional privatization with a look at the number of management firms that are in the business of operating privatized adult correctional facilities. As Charles W. Thomas has noted elsewhere, calendar year 1995 began with 19 management firms and ended with 17; and of the latter, 15 were headquartered in the United States. (Two were based in the United Kingdom.)

Table 4
Management Firms &
The Distribution of Private Adult Correctional Facility Capacity
(December 1995)

Firm	Number of Facilities	Number Privately Owned	Rated Capacity by Primary Source of Prisoners				
			Total	State	Local	Federal	TBA*
CCA	39	11	28,263	18,699	3,376	3,728	2,460
Wackenhut	18	2	13,029	10,829	1,900	300	0
M&T	4	2	2,978	2,978	0	0	0
U.S. Corr	6	4	2,918	2,568	350	0	0
Esmor	6	0	1,970	1,500	320	150	0
Bobby Ross	3	1	1,832	1,832	0	0	0
Other (9)	16	5	4,627	2,716	402	1,509	0
Total	92	25	55,617	41,122	6,348	5,687	2,460

*TBA stands for "to be announced." The facility was not operational and the source of prisoners was not known.

Two management firms control almost 75 percent of the total rated capacity of all adult correctional facilities under contract for private operation.

Again, we have taken Charles W. Thomas' 1995 annual census data and cobbled together Table 4, which shows the "market share" of the 15 United States headquartered management firms, as well as the distribution of rated capacity for all of the facilities that they have under contract.

Two management firms, the Nashville-based Corrections Corporation of America (CCA) and the Florida-based Wackenhut Corrections Corporation, control almost 75 percent of the total rated capacity of all adult correctional facilities under contract for private operation. (The Corrections Corporation of America itself controls around one-half of the total rated capacity under contract.) The combined rated capacity of the top six management firms — using total rated capacity under contract as a measuring stick — covers 92 percent of the total rated capacity of all private adult correctional facilities under contract. (The remaining four of the top six management firms are Management and Training Corporation, U.S. Corrections Corporation, Esmor Correctional Services, and The Bobby Ross Group.)

The "other" nine management firms that account for a pretty insignificant amount of the total rated capacity under contract were, in order of market share, Mid-Tex Detention, Capital

Correctional Resources, Cornell Corrections, Dove Development Corporation, Alternative Programs, Fenton Security, RECOR, GRW Corporation, and Correctional Systems.

What is also quite clear from Table 4 is that, to date, the action, if you will, in the privatizing of adult correctional facilities has occurred at the state level. Almost 75 percent of the total rated capacity under contract was accounted for by state prisoners.

Prison Privatization: Matters to Mull Over

Now, we would like to take an extended walk through some of the matters — questions, issues, concerns, and the like — related to private sector participation in the criminal justice system, most specifically having to do with the construction, management, and operation of prisons. Many of these matters are things that one would want to keep in a mental file of sorts, for use whether the debate is at the most basic level of "to privatize or to not privatize," or about the nuances of "what parts, and how much, of a correctional system to privatize."

While not exhaustive, hopefully at the least, we have hit most, if not all, of the major or important considerations. Many of these matters are items that make various lists of the pros and cons,

the advantages and disadvantages, of prison privatization.

Policy Choices

A number of years ago, John DiIulio remarked:

“Conceptually at least, privatization is not an ‘either-or’ issue. Corrections includes prisons and jails, probation and parole, and various community programs ranging from compulsory drug abuse treatment to fines and restitution. Most correctional programs include administrative, financial, and construction components. Any of these correctional program components may be public or private. Thus there are numerous possible permutations of private involvement in corrections ...”¹³

Charles W. Thomas in response to his own question with regard to the future of correctional privatization replied:

“Not infrequently this will mean partial rather than full-scale privatization. Often it will mean that agencies will continue to operate many or most of the facilities in their systems while they simultaneously manage competition between alternative private providers of full-scale facility management services. Sometimes it will mean that one or more private firms will assume operational responsibility for entire correctional systems.”¹⁴

The point is that the decision on how best to deliver programs and services is not a simple dichotomized choice between the public sector and the private sector in the running of entire state prison systems.

When the conditions are right, DRC already “privatizes” program areas

within prisons to cut costs and improve service delivery. Current examples where entire program areas have been turned over to a single contractor include food services at the Corrections Medical Center, medical services at the Northeast PreRelease Center and the Noble Correctional Institution, and medical and mental health services at the Trumbull Correctional Institution. We would expect that trend to continue, particularly where new prisons are coming on-line and no staff, programs, or services are in place.

Also, let it not be forgotten that, although public money is currently being used to finance the building of new state prisons in Ohio, DRC utilizes the private sector in their design and construction.

Philosophy

A matter that is of some concern to the critics of prison privatization mixes dilemmas of morality, ethics, and symbolism.

Stephen Ingley, the executive director of the American Jail Association, has recently delivered some potentially inflammatory prose:

“When people say that they support the privatization of jails, they also say and/or acknowledge a great deal more. They affirm that one of the most important jobs in this country — restricting the freedoms of American citizens — should be taken away from the government and placed in the hands of a corporation whose sole purpose is to generate profits for shareholders. They affirm that profit is an acceptable motive for incarceration and often accept that more inmates equals more profits. They agree that a private, for-profit, and often publicly

The decision on how best to deliver programs and services is not a simple dichotomized choice between the public sector and the private sector in the running of entire state prison systems.

¹³ John J. DiIulio, Jr., “Private Prisons,” National Institute of Justice *Crime File Study Guide*. U.S. Department of Justice, 1988, p. 2.

¹⁴ Thomas and Bolinger, *Private Adult Correctional Facility Census*, p. viii.

A number of legal issues can be presented as potential constraints or barriers to a state that is intent upon pursuing prison privatization.

held corporation should be granted the authority to use force, including deadly force.”¹⁵

Back in 1988, John DiIulio wrote with more dispassion about the moral dilemmas posed by private prisons:

“In weighing the morality of private prisons, the profit motive may be less important than is commonly supposed. The real issue may be instead whether the authority to deprive fellow citizens of their liberty, and to coerce (even kill) them in the course of this legally mandated deprivation, ought to be delegated to private, nongovernmental entities. Inescapably, corrections involves the discretionary exercise of coercive authority.”¹⁶

Legal Issues

A number of legal issues can be presented as potential constraints or barriers to a state that is intent upon pursuing prison privatization. One such legal issue centers around the *constitutionality of contracting out* the management and operation of an entire prison. Penelope Lemov has noted that “... the questions surrounding constitutionality of private prisons may be moot. Private prisons are up and running; no court has held that they are unlawful.”¹⁷

More recently, and, let’s just say, a might more stridently, Charles W. Thomas has written:

“Some critics of privatization argue that contracting decisions are inherently unlawful because they necessarily involve an unconstitutional delegation to the private sector of powers that are exclusively those of government. Much experience to the contrary and the absence of any relevant

case law supportive of such an unequivocal position suggests that the legal judgment of these critics is defective.”¹⁸

A related legal issue — suggested by the work of the State of Washington’s Legislative Budget Committee (LBC) — involves avoidance of an *unconstitutional delegation of corrections responsibility*.¹⁹ That group specifically recommended that the state would need to retain “... ultimate decision-making responsibility in the areas of classification, discipline, sentence-calculation, and release decisions. Other states have strived to accomplish this in a number of ways. The more control that is retained, the less risk of unconstitutional delegation.”²⁰

In the case of the State of Ohio, division (C) of section 9.06 of the Revised Code would seem to provide adequate constitutional cover in this regard as it expressly prohibits the delegation of those kinds of decision by DRC to a “contractor.”

Another legal issue pertains to whether *existing statutory or case law* authorizes, constrains, or prohibits the state from entering into a contract for the private management and operation of a prison.²¹ As previously-noted, the NIC study identified three states (Illinois, Kansas, and West Virginia) where such private operation was specifically prohibited by law. In the case of the State of Ohio, the Revised Code provides explicit permissive statutory authority with regard to prison privatization and specifies the terms and conditions under which such a contract may be entered into by DRC.

Collective bargaining agreements themselves can present yet another legal obstacle to prison privatization.

¹⁵ Stephen Ingley, “Privatization: Yet Another Nonsolution,” *Corrections Today* (December 1996), p. 27.

¹⁶ John J. DiIulio, Jr., “Private Prisons,” p. 3.

¹⁷ Penelope Lemov, “The Punishment Industry,” *Governing*, May 1993, p. 47.

¹⁸ Thomas and Bolinger, *Private Adult Correctional Facility Census*, p. 33.

¹⁹ State of Washington Legislative Budget Committee, *Department of Corrections Privatization Feasibility Study* (Olympia, WA: January 1996), p. 3.

²⁰ *Ibid.*, p. 4.

²¹ *Ibid.*

The State of Washington's LBC found that their department of correction's current collective bargaining contract contained an agreement that the state would not "... contract services when such action would have the effect of terminating classified employees or when the services to be contracted would be the same as those historically provided by classified employees."²²

The collective bargaining constraints currently faced by DRC do not appear to be quite as formidable. Existing contract language would make the turning over to a private contractor of an entire prison currently in operation, in particular one staffed with classified state employees, exceedingly problematic. Such state action would likely be treated as a breach of collective bargaining contracts. However, in the case where DRC has built a new prison that is not up and running, and none of the jobs have been posted or advertised as state jobs — in particular as classified positions — it should not be troublesome for the state to turn the entire operation over to a private contractor.

Then, there is the issue of the state's *liability exposure* from lawsuits. In their September 1994 review of some legal issues relative to the operation of private prisons, the Ohio Criminal Sentencing Commission noted that "state liability, which was once a murky issue, now seems to be taken care of through indemnification bonds, which the private prison operator is nearly always required to provide. These bonds cover civil rights and other areas of liability."²³

Writing some two years later, Stephen Crane said that "... while exposure may be reduced, the state will not be absolved from all responsibility once a contract is let. The state agency will still have the obligation to oversee and

monitor the contract, and failure to do so can easily result in liability."²⁴

In Ohio, section 9.06 of the Revised Code provides that a contractor maintain an adequate insurance policy and that the state and all relevant political subdivisions of the state are named as insured. The statute also specifies the claims, losses, causes of action, and so forth from which the contractor must indemnify, defend, and hold harmless the state, its officers, agents, and employees, and any local government entity in the state having jurisdiction over the facility or ownership of the facility.

Last, is the matter of *inmate rights*.

"Inmates in private prisons are generally entitled to the same rights as inmates housed in state prisons. The actions of private prison operators generally constitute 'state action'... Commentators recommend ... that safeguards assuring the protection of prisoner's rights be carefully drafted and submitted to review by the relevant government agency."²⁵

Operating Costs

With regard to the private sector's claim to cost savings, Crane has stated that:

"Public sector corrections administrators should recognize ... that when it comes to cutting costs, their hands are tied. They have no control over salaries or fringe benefits, and little over overtime — the biggest cost of running correctional facilities. They also do not have the tools — stock options, cash bonuses, and the like — available to the private sector to motivate their employees toward efficiency.

²² Ibid.

²³ Ohio Criminal Sentencing Commission, *Private Prisons*, memorandum prepared by Cheryl Hawkinson, et al., 20 September 1994, p. 7.

²⁴ Crane, "Is the Privatization Wolf At Your Door?," p.4.

²⁵ Ohio Criminal Sentencing Commission, *Private Prisons*, p. 7.

The question of whether private prisons cost less to run than their publicly-operated counterparts still generates some amount of controversy in many corners.

The private sector can sometimes save on salaries by improving on facility design and by greater use of electronic surveillance. The largest savings, however, are the result of lower pension costs ... The private sector also offers few health benefits and holidays. For example, Wackenhut has only nine paid holidays, while the State of Louisiana has sixteen. Obviously, this generates a tremendous savings in overtime costs.”²⁶

The question of whether private prisons cost less to run than their publicly-operated counterparts still generates some amount of controversy in many corners. It is this “reality” that motivated the U.S. General Accounting Office (GAO) to wade in and review some of the most currently available research. In grounding their recently-released report, the GAO painted the two opposing sides of this cost savings debate in the following terms:

“Proponents of privatization assert that the experiences of several states demonstrate that private contractors can operate prisons at less cost than the government, without reducing the levels or quality of service. In contrast, other observers say there is little or no valid evidence that privatization of corrections is a cost-effective alternative to publicly run facilities.”²⁷

In drawing their conclusions of five studies that have been completed since 1991, which offered some comparison of the operational costs and quality of services of private relative to public correctional facilities, the GAO report found that:

“Four of the five studies (Texas, California, Tennessee, and Washington) assessed operational

costs of private and public correctional facilities. In three of the studies (California, Tennessee, and Washington), comparisons of private and public facilities indicated little or some differences in operational costs. Only the Texas study reported finding substantially lower (14- to 15-percent) operational costs for private versus public correctional facilities.”²⁸

The GAO report concluded that:

“These studies offer little generalizable guidance for other jurisdictions about what to expect regarding comparative costs and quality of service if they move toward privatizing correctional facilities. First, several of the studies focused on specialized inmate populations, such as those in prerelease situations, that limited their generalizability to a wider inmate population. Second, methodological weaknesses in some of the comparisons — such as using hypothetical facilities or nonrandom survey samples — make some findings questionable, even for the study setting. Third, a variety of differences in other states and regions could result in experiences far different from those of the states that were studied. For example, cost of living and a state’s correctional philosophy could affect the comparative costs and quality of private and public facilities from state to state. Finally, the age or maturity of the private system should affect the relationship between private and public facilities in terms of costs and quality.”²⁹

²⁶ Crane, “Is the Privatization Wolf At Your Door?,” p. 3.

²⁷ U.S. General Accounting Office, *Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service* (Washington, D.C., August 1996), p.1.

²⁸ *Ibid.*, p. 7.

²⁹ *Ibid.*, pp. 3-4.

“Even if similar private and public prisons are available for study, a comparison of operational costs can still present difficulties in ensuring that all costs, direct and indirect, are consistently and fully quantified. Possible difficulties can arise due, in part, to differences in budgeting and accounting practices between and even within the private and public sectors. Determining the appropriate allocation of corporate headquarters overhead and government agency overhead, for instance, can be particularly difficult.”³⁰

Charles W. Thomas, who believes that “... private management firms can provide professional caliber services in all types of correctional facilities and do so at a highly competitive cost,”³¹ has been cited as being highly critical of this GAO report. In the publication *State Legislatures*, he has been described as labeling the report as “inaccurate and misleading.” Furthermore, he:

“... said that the GAO researchers compared facilities of similar design when ‘they should realize that private companies save governments money by using innovative designs that reduce construction costs’ ... and asserted that private companies provide correctional services at least equal to those of government agencies and a cost below state agency costs.”³²

And so the controversy on comparing the relative operational costs of public versus private correctional facilities steams on.

We would observe that in the case of facility design, private management firms have a distinct preference for

“celled” facilities as opposed to the “dormitory” configurations that DRC typically utilizes in its minimum and medium security prisons. There is a practical effect on construction, as well as operational costs, as a result of this design choice. It is cheaper to build dormitory-style facilities than it is to construct a celled facility. On the flip side, the operational costs associated with a celled facility are lower since prisoners can be locked down, especially at night, which cuts security costs from what they would otherwise be in a dormitory-style facility.

Service Quality

The GAO report also summarized the findings of recent research on comparisons of quality as “unclear” noting that:

“Although comparative costs are important, they are not the only factors considered by policymakers in deciding the direction or extent of corrections privatization. A principal concern is whether private contractors can operate at lower costs to the taxpayers, while providing the same or even a better level of services as the public sector, particularly with respect to safety and security issues.

Of the studies we reviewed, two (New Mexico and Tennessee) assessed the comparative quality of service between private and public institutions in much greater detail than the other studies. Both studies used structured data-collection instruments to cover a variety of quality-related topics, including safety and security, management, personnel, health care, discipline reports, escapes, and inmate programs and activities. The

³⁰ Ibid., p. 4.

³¹ Thomas and Bolinger, *Private Adult Correctional Facility Census*, p. viii.

³² “Do Private Prisons Save Money?” *State Legislatures*, Vol. 22, No. 10 (December 1996), p. 7.

Private prisons clearly threaten the criminal justice system monopoly and should serve as a spur to innovate.

New Mexico study reported equivocal findings, and the Tennessee study reported no difference in quality between the compared private and public institutions.”³³

In closing their discussion of the difficulty of generalizing about operational costs and quality of service from the five studies whose results were reviewed, the GAO report declared that any such comparison is not likely to be “static.”

“Changes over time could alter the comparative performance. For example, the first year of a new prison — either private or public — could reflect expenses for training inexperienced staff as well as hiring replacements for those unsuited to the work. Inexperienced staff could also have a negative effect on some measures of quality. Also, in the initial years of managing a prison, a private firm may choose to bill for its services at rates below costs to obtain or extend a contract. As time goes by, however, to remain a viable business entity, the contractor’s cost-recovery practices would have to change. Similarly, over time, public prisons could become more cost efficient in response to competition from the private sector.”³⁴

Criminal Justice System

Not to be ignored are some possible consequences that extend beyond the gates of a private prison and into the larger criminal justice system. Two possible consequences jump to mind. First, state departments of corrections have traditionally operated as monopolies with no threat of competition that might stir technical and managerial innovations. Private prisons

clearly threaten that monopoly and should serve as a spur to innovate.

In a very recent article on the wakening of a sleeping bureaucracy, Gary Enos found a more powerful weapon than privatization.

“It’s the threat of privatization ... Right now, competition is the hotter idea.

Pioneered in Phoenix under that city’s legendary public works director, Ron Jensen, and refined in Milwaukee and Indianapolis by mayors [John O.] Norquist and Stephen Goldman, ‘managed competition’ or ‘competitive contracting’ shuns privatization’s emphasis on cost savings alone in favor of showing city departments how they can improve efficiency to become competitive with the private sector.

And it doesn’t just apply to computer services or trash pickup ... Union leaders increasingly view managed competition as preferable to the inevitable job losses resulting from outright privatization.”³⁵

Randy Welch has mentioned that:

“ ... the sheer presence of profitable contractors creates pressure for government agencies to revise their own practices, even bidding and procurement procedures. A yardstick will be available by which the public can measure corrections efficiency.”³⁶

Along a similar vein, John DiIulio has written that:

“Correctional policy ... is often made in the context of what

³³ U.S. General Accounting Office, *Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service*, p. 9.

³⁴ *Ibid.*, p. 12.

³⁵ Gary Enos, “Compete or Else,” *Governing*, November 1996, p. 40.

³⁶ Randy Welch, “Private Prisons — Profitable and Growing,” *Corrections Compendium* Vol. XV No. 3 (April 1990), p. 16.

political scientists like to call ‘subgovernments’ — small groups of elected officials and other individuals who make most of the decisions in a given policy area ... Will privatization perpetuate correctional subgovernments, or will it serve to break them up?’³⁷

While such a “competitive forces” strategy may motivate innovations, and as a consequence drive down the cost of doing business and thus state corrections expenditures, others may counter that this cannot help but lower the quality of correctional personnel, programs, and services.

The second possible consequence of private prisons is that they could become influential players in the development of the criminal justice system and policy. Lemov has used the words of then-Pennsylvania corrections commissioner, Joseph Lehman, to express the concern this possibility creates in the minds of some:

“He argues that if profit-making corporations ran a significant portion of prisons, it would create a very powerful lobbying arm in support of the use of incarceration. It would be in the industry’s interest to push for building more prisons and locking people up. Lehman is among those criminal justice officials who advocate, as a matter of both fiscal and social responsibility, community-based punishments for certain crimes. He fears that approach could be derailed by a powerful lobbying group created by privatization. ‘Once you create this entity, it become a little more difficult to be reasonable and rational about public policy as it relates to who goes to prison and for how long.’”³⁸

Entrenched Interests

As previously noted, state departments of corrections can be viewed in most places as still having a monopoly on the running of prison systems. While we do not want to belabor this point, it goes without saying that entrenched labor and management interests that have worked for many years as professionals in this correctional monopoly cannot be ignored. They may rise — individually or collectively — to thwart prison privatization efforts. In the past, groups like public employee unions, the National Sheriffs’ Association, and the American Jail Association have opposed privatization.

Penelope Lemov noted in 1993 that:

“Opposition to private management runs highest in jurisdictions where the power of organized labor is strong. Certainly, that would explain why privatization is more acceptable in the South and Southwest. In the Midwest, Illinois has passed a law forbidding the privatization of prisons. And of the 14 states that have privately operated prisons, only one — Rhode Island — is from the labor-strong Northeast.”³⁹

As the reader could see from our table of private adult correctional facilities by geographical location, this picture — though changing — is not all that fundamentally different from the one Lemov painted some three years ago.

In reviewing privatization’s future, Stephen Crane states that:

“Another impediment to privatization was the resistance of career corrections administrators. However, many of those people now view private

³⁷ John J. DiIulio, Jr., “Private Prisons,” p. 3.

³⁸ Lemov, “The Punishment Industry,” p. 48.

³⁹ *Ibid.*, p. 48.

A commonly cited advantage of privatization ... was the flexibility and creativity of private contractors.

corrections as an alternative career path, as they see numerous wardens and directors moving on to the private sector following retirement or some change in the political scenery.”⁴⁰

Accountability

In many jurisdictions, the operations of private prisons will likely be subject to more scrutiny than is typically the case for state-run facilities. Stephen Crane has stated that this is another strength of the privatization marketing pitch in which “the private sector touts its accountability by pointing out that its operations are overseen by a state-appointed contract monitor and that American Correctional Association and National Commission on Correctional Health Care standards are met.”⁴¹

Concerns can exist that an undue emphasis on cost savings may negatively affect the quality of services and life in confinement at a private prison. Lemov has noted that:

“... one step some states have taken to ensure against such a possibility is to insist that privately run prisons be accredited by the American Correctional Association [ACA], even though no such demand is placed on the state-run facilities. ‘That’s one of the paradoxes of the business,’ says Charles Thomas, director of the University of Florida’s Private Corrections Project. ‘You’ll see a state agency impose a higher performance standard on private managers than it does on itself.’”⁴²

With regard to this issue of accountability, in the case of the State of Ohio, section 9.06 of the Revised Code requires: (1) a contractor retain ACA accreditation; (2) a contractor acquire

and maintain ACA accreditation for the state correctional facility being managed; and (3) the state to appoint and supervise a full-time contract monitor.

Flexibility

Mentioned as a commonly cited advantage of privatization by a DRC research team that focused on prison privatization was the flexibility and creativity of private contractors.

“Bureaucratic organizations are often slow to respond to [the] need for change or even to the immediate needs of the organization. The most commonly used example of this relates to personnel matters and how long it may take to fill a position which becomes vacant. Advocates of privatization point out that the private sector has a much greater capacity for innovation and change, particularly when doing so is compatible with profit motives.”⁴³

Stephen Crane has also noted that flexibility is a part of privatization’s marketing.

“When discussing a specialized facility with the public sector, private companies will push the fact that a new concept can be tried and, if it does not work, can be scrapped at the end of the contract term. But, if the same project were undertaken by the state, it would be difficult to close the facility and fire the employees.”⁴⁴

Another publication notes that:

“... Private corporations, having greater flexibility in purchasing, are freer to shop around for the

⁴⁰ Crane, “Is the Privatization Wolf At Your Door?,” p. 9.

⁴¹ Ibid., p. 4.

⁴² Lemov, “The Punishment Industry,” p. 45.

⁴³ Ohio Department of Rehabilitation and Correction, *Operation Privatization*, section 2.0, p. 1.

⁴⁴ Crane, “Is the Privatization Wolf At Your Door?,” p. 4.

best buys and deals, thus taking advantage of economies of scale.

Private companies also have greater discretion in their employment practices, while public agencies are more likely to be bound by laws concerning screening and selection, discrimination, promotion and retention.”⁴⁵

Facility Construction

“Another marketing pitch made by the private sector is their speed in bringing a facility on line. For a state under the gun to increase bed space, a private firm’s ability to site, design, and construct a facility in one-third to one-half the time required by the public sector is attractive. It is an unfortunate fact that the public sector has built-in mechanisms that slow down the contract process.”⁴⁶

Additionally, if private money is used for prison construction, then a facility can be built without voter referendums and with no debt incurred by the state. Also, prisons constructed under the exclusive direction of the private sector are believed to contain a superior design that translates into lower operating costs.

The State of Ohio, and DRC specifically, has been administering a major prison construction program for a number of years. And as a result, all involved have acquired a considerable amount of expertise when it comes to the financing, siting, design, and construction of prisons. We would suggest that, although a privately-controlled prison construction project would be built faster, the speed of prison construction is generally not a troubling part of the state’s prison construction program. The problem

here is extracting the additional GRF money from the state budget that is needed to open and fully operate a new prison. For example, a 1,200-bed medium security prison like the newly-opened Noble Correctional Institution will consume in excess of \$21 million annually.

Facility Ownership

Lemov has written that some of the cost savings from privatizing services is a function of the fact that:

“Many companies are active in proffering specialized services, and the intense competition for contracts is in the prison system’s favor. It can negotiate for the best possible deal and, when a contract comes up for renewal, change companies if the prices are raised too fast or if the contractor fails to meet all its obligations.

The concern in privatizing prison management is that there may not be the same competitive edge. The overall management of all aspects of prison life is an extensive and expensive business to get into and maintain, and there may not be enough prison management companies in each state or region to foster competition.”⁴⁷

Given that there may not be perfect competition, a state prison system needs to protect itself from the possibility that only a handful of firms will dominate or monopolize the prison management industry. It has been suggested by Douglas Abt of Abt Associates “... that the key to protecting against a monopoly — or being left high and dry if a company folds — lies in maintaining ownership of the assets and privatizing only the management.”⁴⁸

With the prison currently under development in Astabula County, the state will own the facility, while privatizing the management and operation.

⁴⁵ David Shichor and Dale K. Sechrest, “Delegating Prison Operations To Public or Private Entities,” p. 114.

⁴⁶ Crane, “Is the Privatization Wolf At Your Door?,” p. 4.

⁴⁷ Lemov, “The Punishment Industry,” p. 47.

⁴⁸ Ibid.

The state, local school districts, cities, and counties all picked up tax revenue from private prisons.

This is exactly the approach being taken by the State of Ohio with the prison currently under development in Ashtabula County. The state will own the facility, while privatizing the management and operation.

Of the 92 federal, state, and local private adult correctional facilities captured in Thomas' 1995 census, only 25 — or not quite 30 percent — are privately owned. All of the remaining facilities are publicly owned.

Tax Revenue

In the first performance review of state government developed by Texas' Comptroller of Public Accounts in 1991, specific note was made of the *positive economic impacts* of private prisons.⁴⁹ The state, local school districts, cities, and counties all picked up tax revenue from private prisons. Local governments gained property and sales tax revenue, while the state benefited from sales and franchise taxes paid. More recently, a National Conference of State Legislatures' (NCSL) *LegisBrief* labeled this facet of prison privatization as offering to state and local governments a "hidden rebate" through additional revenue.⁵⁰

Geographical Outsourcing

The reader should also be aware of a trend in the prison management industry involving the inter-jurisdictional transfer of prisoners, a development which Charles W. Thomas refers to as the phenomenon of "geographical outsourcing."⁵¹ As his 1995 census data showed, the states of Alaska, Colorado, Hawaii, Missouri, New Mexico, North Carolina, Oklahoma, Oregon, Utah, and Virginia were all housing prisoners in private facilities located within the boundaries of another state.

Speculative Project

"Another trend warranting mention is what some have termed speculative projects. What they mean would be illustrated by any new facility construction project that begins prior to rather than after the award of a prisoner housing contract by one or more government agencies.

Even the relatively brief history of correctional privatization has witnessed a significant number of such projects being proposed or actually pursued in, for example, California, Colorado, Florida, Georgia, Kentucky, Iowa, Oklahoma, Minnesota, and Texas."⁵²

Stephen Crane has also spoken to this concept which:

"... involves the construction of hotel-like facilities that rent out beds to any state or county agency needing them. This approach raises many novel legal and political problems, including inmate access to the courts, the handling of escapes, authority to send inmates out-of-state, complaints from constituents whose family member is placed in a state too far away to visit, and the general problem of sending State A's money to people in State B to do work that could be done in State A."⁵³

Crane has also raised a political concern that:

"Too often, counties have been seduced into building a prison simply on the basis that there are a lot of crowded jail and prison facilities. While true, it does not

⁴⁹ Texas Comptroller of Public Accounts, *Against the Grain: High-Quality Low-Cost Government for Texas* (Austin, TX: January 1993), Public Safety and Criminal Justice Issues, pp. 22-23.

⁵⁰ Elizabeth Pearson and Donna Lyons, "Privatization of State Corrections Management," National Conference of State Legislatures: *LegisBrief* Vol. 4 No. 6 (January 1996), p. 2.

⁵¹ Thomas and Bolinger, *Private Adult Correctional Facility Census*, p. vi.

⁵² Ibid.

⁵³ Crane, "Is the Privatization Wolf At Your Door?," p. 9.

mean that jurisdictions with excess inmates can legally contract for their housing elsewhere, even if they are disposed to do so. State officials should take particular interest in county/private sector ventures as they may one day find themselves bailing out the county and taking over operation of the facility.”⁵⁴

Currently under development in the City of Youngstown is a private prison that will be built and operated by the Corrections Corporation of America. Once operational, the facility, which is scheduled to open in the spring of 1997, will house up to 1,000 out-of-state prisoners.

The Contract Process

Stephen Crane has nicely summarized some important aspects of the contract process that a state should be mindful of once the decision to privatize a prison has been made. His pointers, if you will, go something like this.

Technical Assistance. Do not try to fly this plane alone. Generally speaking, this area of contractual arrangements is not a level playing field. More often than not, private management firms will have a wealth of experience in handling these kinds of contractual arrangements. By comparison, public sector entities will be relative newcomers.

“No private management contract should be entered into without obtaining specialized assistance. After more than 10 years, private management companies have a great deal of marketing and contracting expertise. In selecting and negotiating with a vendor, corrections officials will always be at a disadvantage, unless they have someone experienced with privatization to assist.”⁵⁵

Request for Proposal (RFP). A contractual arrangement is much like painting a house, the results can be in the preparation. Every detail of day-to-day prison operations needs to be spelled out, including who is responsible for what, and reflected in the bidding document.

“Development of the RFP might be the most important [issue], since the RFP is the single most important document in the contracting process, requiring correctional agencies to resolve well over 100 policy issues (e.g., transportation of inmates, profits from telephone commissions and commissary, which functions the state will continue, what sort of computer interface will be used, how much insurance is necessary).”⁵⁶

Cost Assessment. What is your cost of doing business? If you do not know how much is being spent on the management and operation of a prison, then how does one accurately evaluate the price of competing bids?

“It is also essential that the state know its own costs. You cannot compare, negotiate, or report on the success or failure of a private sector proposal without this. The true total cost of operating corrections in a state is likely to be 20-35% higher than the corrections budget. Costs for services provided by other agencies (legal services, centralized payrolls, purchasing, etc.), capital costs, property or other forms of insurance, and so forth should not be overlooked.”⁵⁷

Logan and McGriff have addressed this matter of ferreting out “hidden costs” as a difficulty in analyzing and comparing correctional costs.⁵⁸

⁵⁴ Ibid.

⁵⁵ Ibid., p. 4.

⁵⁶ Ibid., p. 9.

⁵⁷ Ibid.

⁵⁸ Charles H. Logan and Bill W. McGriff, “Comparing Costs of Public and Private Prisons: A Case Study,” National Institute of Justice: *Research in Action*. U.S. Department of Justice, September/October 1989), pp. 1-7.

Contract Negotiations. An RFP has been let, bids have been submitted, and a vendor has been selected to deliver a particular package of good and services, but this does not automatically put a signed, legally-binding contract in place. The actual wording of a written contract must be negotiated to the satisfaction of both parties.

“The potential contractor is entitled to a reasonable profit, but it is important you know what it is, as you are responsible to the taxpayers. Insurance policies must be written so as to clearly protect the state, its officers, and employees. Termination and buyout provisions are important so that the state can take over the facility quickly if the contractor defaults. In addition, other penalties, besides termination, are needed, since termination of a contract over minor issues is not always wise.”⁵⁹

To Crane’s hints on the proper handling of facility privatization, we would like to add some imperatives that come from a self-described working paper prepared for the State of Washington. That paper presented “... five general guidelines that could be followed for minimizing the risk to the state, while promoting cost savings without sacrificing quality.”⁶⁰

Contingency Plan. Buyer beware. For whatever reason, a contracting public entity, a private management firm, or both for that matter, may decide to walk away from an existing arrangement under which the latter provides housing and programming services to some or all of the former’s offender population. The contracting public entity has to have a fallback position, a “what-if” plan, should this occur.

“The state should develop a contingency plan for the smooth

transition of operations from one private vendor to another, or to the state, in the event of contract expiration or termination.”⁶¹

On-Site Monitor. In this case, Elvis cannot leave the building. Very simply, it behooves the contracting public entity to have someone physically located day-in-day-out at a privately-managed facility to mind the store so to speak. The contracting public entity cannot just assume that the contract is self-executing, and show up every now and then to make sure that the facility is being operated safely and appropriately.

“The state should have an on-site monitor at the privately run facility to ensure that the state’s responsibilities for inmates are being fulfilled, and that the contractor is in compliance with the contract.”⁶²

Evaluation. What kind of bang are we getting for our buck? At some point, a contracting agency needs to ask and then answer this question. How else can one decide whether to continue or terminate an existing contractual arrangement if some reasonably clear judgment about service delivery cost and quality has not been rendered?

“The state should design and set criteria for an evaluation of the costs and quality of programs and operations at the privately run facility in comparison to a similar state facility or to established benchmarks. This evaluation should take place after the private facility has had at least one year of operating at full capacity, and should be conducted by an independent party designated by the legislature.”⁶³

⁵⁹ Crane, “Is the Privatization Wolf At Your Door?,” p. 9.

⁶⁰ State of Washington Legislative Budget Committee, *Department of Corrections Privatization Feasibility Study*, p. 27.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid., p. 28.

That about does it. We have set forth well over a dozen issues related to prison privatization. This should raise the awareness level of the reader to the point that one can more comfortably and capably engage others in the debate over the full-scale management of a public prison by a private entity.

Concluding Remarks

Initially, we would like to take a moment and reflect on what some may see as limitations or weaknesses of this paper. Think of it as a proactive act of defense.

The data that anchored our discussion of what prison privatization currently looks like was a year or so old. As we speak, Charles Thomas is probably putting the finishing touches on his 1996 census. We look forward to seeing what things look like a year later.

In terms of our bibliography, much of the cited material no doubt contains angles and subtleties that have been ignored, slighted, or just plain missed. We did not traipse deeply into the research controversies centered around the comparison of private prisons and publicly-run prisons in terms of operational costs and quality of service, and what those findings say or mean.

And, no doubt some material deemed central to our undertaking will have been overlooked, an omission for which we will be roundly chastised and criticized. So be it.

Well, if that was what we fear was omitted, then what did we manage to get done?

Specifically, we have:

(1) offered the reader a way to visualize DRC's prison operation;

(2) walked through different cuts at the amount of money the department spends generally, and on what specifically;

(3) asserted that curbing its escalating costs would start with the 75 percent of the departmental GRF budget that is committed annually to prison operations;

(4) suggested that a cost containment strategy that might receive increasing attention would involve the privatization of programs, services, and operations;

(5) taken a trip through a somewhat current, though admittedly limited, picture of correctional privatization at the state level; and

(6) provided a preliminary map that can guide one through some of the issues that will, and should, arise in any discussion of prison privatization.

Concluding on a broader note, we have walked through DRC's spending history to suggest that the fiscal pressure associated with the size and rate of growth in the department's GRF budget has created favorable terrain for the forces of privatization to sell their management abilities (and quite possibly flourish). Thus, it is imperative that policymakers familiarize themselves with at least some of the privatization issues and controversies that we have laid out in this paper prior to actually turning over the full-scale management of a prison to a private contractor.

The fiscal pressure associated with the size and rate of growth in the department's GRF budget has created favorable terrain for the forces of privatization to sell their management abilities.

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