Privatization of the Coercive Power of the State, Administrative Discretion, and Policy

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PAUP 814 Public-Private Partnerships

23rd June 2008
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Abstract

The privatization of coercive powers of state are examined using moral, legal and administrative frameworks of analysis, focusing on the private ownership and management of prisons in the U.S. An argument is made that complete private ownership and management of prisons is not desirable as the administrative and managerial discretion exercised by private staff constitutes public policy in a core function of state, and contractual statements of policy do not provide sufficient accountability.
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Introduction

The involvement of private enterprise in provision of government services is not a new phenomenon; however, Thatcher and Reagan policies in Great Britain and the United States in the early 1980’s encouraged the diffusion of privatization throughout the world (Morris & Travis, 2003; Prager, 2008). In the majority of industrialized nations and in a significant proportion of developing nations, privatization at all levels of government has since been increasing. Numerous local governments in the U.S. have transferred ownership or management of many government services to the private sector including: maintenance services, I.T. services, school buses, garbage disposal and wastewater treatment, and basic provision of utilities (Savas, 2000). At the national level, driven by Reagan’s reaffirmation and expansion of the Bureau of the Budget’s A-76 Circular, almost every federal department has undergone some level of privatization, the most significant occurring in the Department of Defense (Kettl, 1993).

The majority of literature on privatization\(^1\) follows two arguments to analyze a particular privatization decision – an economic argument and a political argument. The economic argument focuses on cost-effectiveness and efficiency considerations. Government bureaucracies are compared with market mechanisms in terms of efficiency and competitiveness, in their ability to provide certain goods and services (Savas, 2000). The political or ideological argument focuses on the size and scale of government, and the notion of the ‘State’ and its social contract with the people (Garland, 1996). The distribution of power and control in society, the level of state

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\(^1\) Although there are many configurations possible in privatization arrangements (see Savas, 2000, ch 3), for the purposes of this paper, I define privatization as either the complete sale of government infrastructure or provision of goods to private entities, or the management and operation of government services by private entities.
centralization and control, and the ideology of collectivism versus individualism are examined (Feigenbaum, Henig & Hamnett, 1998; Wolfe, 1991, 1999). Numerous studies consider the implications of these two arguments on normative qualities of government such as accountability, democracy and responsiveness, providing a nexus for discussion on the intrinsic value of privatization decisions.

From the economic perspective, distribution of goods and provision of services by the free market may be considered a more efficient mechanism than the state sector (Savas, 2000). However, it has been recognized that efficiency may compromise accountability, as a consequence of the governmental requirement for monitoring mechanisms to prevent opportunistic behaviors which transfer government pathologies to the market (Breaux, Duncan, Keller, & Morris, 2002; Heilman & Johnson, 1992; Morris, 2007). Cost-effectiveness is achieved in market systems by the presence of competition; many studies have highlighted the improvement in effectiveness and reduction in costs that privatization of government services, especially at the local level, has brought over unwieldy and inflexible state bureaucracies (Feigenbaum et al., 1998; Savas, 2000). However, in some instances, government must directly intervene in the market and artificially create or regulate competition, thus diminishing the expected benefits of privatization (Kettl, 1993). Private enterprise can be more flexible and responsive to public need, as a result of being free from government regulations and staffing constraints. In some cases, however, as a result of the requirement for accountability or other demographic and social considerations, private enterprise is subject to stringent governmentally-imposed limitations, thus reducing the increase in responsiveness and the net cost benefits originally expected (Hart, 1997; Sappington & Stiglitz, 1987).
From the political perspective, market-based economics is used as evidence on which to base strategies that reduce government spending, create economic prosperity, enhance freedom, and strengthen necessary state control by diminishing unnecessary state intervention (Wolfe, 1999). However, critics argue that the social contract – the notion that only state institutions derived from popular sovereignty are legitimate – is at risk, having significant implications for democracy, transparency and accountability (Barber, 2000; Kahn & Minnich, 2005). Many politicians, often classed as ‘neo-liberal’, use privatization as a fundamental policy choice that seeks to reduce the collectivist ideal of government to ensure more responsibility, freedom and choice for the individual (Jing, 2005). Yet others see this as a reduction in public involvement in government and a diminution of political sovereignty (Bruszt, 2002); or as market ideology “imprisoning” government policy (Lindblom, 1982), whilst others go as far to view privatization as a form of economic tyranny (Chomsky, 1999, 2006; Whyte, 2007).

The decision by a government at any level to privatize a government function is, fundamentally, a policy choice. Economic and political arguments abound over the various merits and pitfalls of a variety of privatization options; however, the ubiquitous fact remains that privatization changes policy rather than solely implementing it more efficiently (Heilman & Johnson, 1992). Furthermore, scholars on both sides of the privatization debate have recognized that privatization fundamentally changes the nature of government and that regardless of one’s perspective, pragmatically; new and different government capacity must be developed to manage these new governance arrangements (Kettl, 2000, 2002; Sellers, 2000).

There is no such area where these arguments are more apparent than in the issues surrounding privatization of core functions of state – the provision of ‘collective’ goods (Savas, 2000). One such collective good that has received attention in recent years is the coercive power
of the state. Policies that privatize the coercive apparatus of the state – institutions of security, justice and punishment – raise several important moral and legal issues outside the usual arguments occurring in privatization of other functions of government. A further, more complex issue that is not covered in the literature is the implication on administrative discretion and its relation to policy in these privatized arrangements.

In this article, I outline the concept of coercive authority and review the issues that arise when coercive government functions are privatized, using moral and legal frameworks of analysis. Using the specific case of privatization of correctional facilities and an administrative framework of analysis, I discuss the implications for administrative discretion and its relation to policy, and show their relation to the other frameworks of analysis. I argue that in the case of government functions that impart the coercive power of the state such as prison institutions, privatization has serious implications for the role of public administrators. Prison population has reached now record numbers, with one out of every 100 Americans in some form of punitive incarceration (Pew Center on the States, 2008). The costs of prisons are soaring, which in addition to the problem of prison overcrowding, is placing governments under pressure. However, it is public administrators that are ultimately responsible for executing solutions to provide relief from this pressure, and need to be aware of the all the positive and negative implications of prison privatization.

This research is important for two reasons. First, privatization of coercive government functions is growing: private security guards now outnumber the number of state law enforcement officers; the private prison industry has been booming in recent years with corporations now operating many prisons in the U.S; private probation and parole services are now in operation in many states (Reynolds, 2000); and private military contractors provide
significant support, in both combat and non-combat roles, to national armed forces, with U.S.-
paid contractors now outnumbering U.S. military personnel both Iraq and Afghanistan (Singer,
2003; Matthews, 2008). Public administrators now have the responsibility to manage contracts
and oversee regulation of these initiatives; a responsibility that is distinctly different from what
most public bureaucracies originally were designed to do, and against the general expectations of
aspiring administrators on M.P.A. programs, for example (Kettl, 2000). Secondly, it widely
accepted that there is often a wide gap between stated government policy, its interpretation by
bureaucrats, and the manner in which it is implemented by ‘street-level’ staff (Lipskey, 1980;
Lindblom & Woodhouse, 1993; Howlett & Ramesh, 2003). Administrators are increasingly
called upon to contribute to the process of formulating policy, as a result of their expertise and
experience in their field of specialty, and are given significant discretion in implementation. A
certain amount of ‘bureaucratic intelligence’ must be accepted in that effective implementation
necessarily involves some level of delegation of authority to administrative staff to allow them
freedom of action (Lindblom & Woodhouse, 1993). In those government functions that involve
coercive authority and the deprivation of citizens’ liberty, therefore, it is paramount to
understand the wider implications of devolution in the form of privatization, in the context of
policy-making, and managerial and street-level discretion (Vaughn & Otenyo, 2007).

The Coercive Power of the State

James Madison wrote in Federalist no. 51: “In framing a government which is to be
administered by men over men, the great difficulty lies in this: you must first enable the
government to control the governed; and in the next place oblige it to control itself” (Madison,
1788 / 2003, p. 319). Although this article was primarily about the self-regulating checks and
balances of the nascent American state, Madison articulated one of the core and necessary principles of government – that through being the exclusive distributor of coercive force enacted from authority derived by consent, government shall have the ability to legitimately control the governed. The notions of ‘control’ and ‘legitimacy’ have been debated by political theorists for many years, and this article is not the location for revisiting such deliberations; however, there is little dissent from the perspective that coercive authority is integral to the nature of the modern state (Arnold, 2006; Reisig & Pratt, 2000), distinguishing it from social order in early societies that was derived from moral or practical reciprocal behaviors (Molinero, 2000). In fact, Weber (1919, p. 1) defined the ‘state’ as: “…a human community that successfully claims the monopoly of the legitimate use of physical force within a given territory.” Policy-makers, administrators and citizens likewise espouse the Weberian (1947) view that criminal acts violate laws that were created only by representatives of the state. Thus a necessary feature of legal punishment is that it “must be imposed and administered by an authority constituted by a legal system against which the offense is committed” (Hart, 1968, p. 5, as cited in Reisig & Pratt, 2000).

As Weber (1919, p. 1) noted: “…the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it”. Depending on one’s interpretation, the point of whether or not ‘institution’ can mean ‘private institution’ is a critical question. Accepting that the very notion of the state is defined by its ability to control with coercive power, and that the only legitimate use of this power is through government authority derived from consent, then any argument over the delegation of this authority must necessarily examine the question of legitimacy. Using the case of correctional institutions in the U.S., I examine this question using moral and legal frameworks, before turning to the practical issue of
public administration of private facilities and the impact on corrections policy-making. Arguments concerning political and economic considerations will not be discussed, as much coverage has been given elsewhere (Pratt & Mahs, 1999) and are not relevant to the primary discussion in this paper – in fact, a Bureau of Justice Assistance report (Austin & Coventry, 2001, p. 59) which reviewed a range of economic studies in prison privatization concluded:

“(The) privatization model…essentially mimics the public model but achieves modest cost savings…by making modest reductions in staffing patterns, fringe benefits, and other labor-related costs. There is no evidence showing that private prisons will have a dramatic impact on how prisons operate. The promises of 20-percent savings…have simply not materialized….If nothing else, the private sector has shown that it is as equally capable of mismanaging prisons as the public sector.”

The Moral Dimension

There is a subtle difference between the morality of an individual and the public morality of the state. Dwight Waldo noted that: “Public morality concerns decisions made and action taken directed toward the good of a collectivity…an entity or group larger than immediate social groups such as family and clan” (Waldo, 1980, in Stillman, 2005, p. 505). Actions such as the permanent deprivation of a person’s liberty, the execution of a convicted criminal, or the killing of a citizen by a law-enforcement officer, are all considered morally justifiable in the eyes of the state; however, these actions may be partially or wholly despicable in the eyes of a great number of citizens, regardless of the circumstances of those actions. As previously discussed, the state has certain coercive authorities conferred upon it by the consent of the people. With regard to the state’s delegation of coercive force to private entities, several arguments have been raised.

Given that the ability to legitimately apply coercive force is intrinsic to the very notion of the state, some consider it plainly immoral to confer this ability to a non-state entity such as a correctional corporation, regardless of the specificity of any contract or the extent of monitoring
This view is prevalent in much anti-privatization literature in the popular media, however, it is applied and explained with little theoretical rigor. Others have used in-depth analysis of libertarian moral philosophies to demonstrate that they have been inconsistently applied with prison privatization. Reisig and Pratt (2007) note that the libertarian principle of a minimal state is often used as justification for privatizing public prisons and reducing the state, however this is contrary to the fundamental libertarian concept that redistributive protection belongs to an authority not possessed by any individual. Although in the U.S., corporations are recognized with the same rights as ‘person’, individuals only have the minimalist right to self-defense, not to detain or punish.

Another moral argument commonly encountered is that of interests. Although this has an economic basis in free-market capitalism and more formalized statements in principal-agent theory (Breaux et al, 2002; Morris, 2007), the moral argument pertains to the notion that a corporation profits from the incarceration and punishment of human beings. The ultimate goal of any government is to eliminate crime totally by rehabilitating those in detention, and deterring any would-be offenders – the consequence being to eliminate the requirement for prison facilities. The ultimate goal of any corporation is to make at least enough money to be economically viable, but generally, it is to profit. Obviously, these ultimate goals are in violent conflict. In principal this argument is final; however, pragmatically, it is wholly unrealistic to entertain such a scenario as the total elimination of crime and therefore prisons. In fact, there is ample evidence to suggest that requirements for profit and competition have many positive benefits on prison operation and that the problem of conflicting interests in the market is equally as bad as conflicting interests in public agencies (Elvin, 1985; Lukemeyer, & McCorkle, 2006; Logan, 1987). Furthermore, traditional arguments against bureaucracy can be applied: there is no
reason to suggest that public corrections bureaucrats would happily put themselves out of work by eliminating prisons and do, in fact, seek to influence politicians to the contrary (Wilson, 1989). However, there are equal potential and documented influences in the corporate sector, with private prison company executives having political influence in many states (Brancaccio, 2008).

In the literature review conducted for this research, little evidence was discovered to argue the case against prison privatization on moral grounds, other than the widely held emotional and symbolic belief that prisons should be institutions of the state. Conflict of interest arguments against business are widespread, even with respect to bias in scholarship (Geis, Mobely, & Schicor, 1999) and are probably without resolution. As DiIulio (1997) claims, privatization of corrections is morally equivalent to privatization of law enforcement and of justice, yet these receive far fewer advocates. This morally relativistic argument highlights the fact that much government policy is driven by practical concern, rather than moral consequences. The key moral issue may not be the symbolism of a prisoner seeing a corporate logo on prison guards’ shirts rather than a badge of state, but more about the accountability structures in this arrangement (Donahue, 1989). However, the perplexing question regarding the long term implications of new societal norms that may eventually accept the use of coercive force by non-government agencies in all areas, cannot yet be answered.

**The Legal Dimension**

The legal arguments surrounding the legitimacy of prison privatization focus on several key areas. First, the constitutionality of delegation of coercive power is examined in the sense of the normative role of state (Field, 1987; Sullivan, 1987; Zalar, 1999). Legal scholars have
recently concluded that doctrines examining the relationship between administrative agencies and constitutional issues with respect to privatization, are poorly understood and need more analysis (Metzger, 2003). The fact that private prison corporations can exercise significant discretion over operation of government programs is seen as unconstitutional, however, the responsibility of administrators to develop more innovative and unrestrictive mechanisms of accountability is noted (Gentry, 1986). Another perspective is that privatization permits the government to evade constitutional restraints (Gilmour & Jensen, 1998; Sullivan, 1987). In the case of prison operations, this point may be mute: regardless of the fact that the long-term public service prisons provide to society is critical, they do not provide a direct and tangible service to individual citizens, access to which is not threatened by privatization. However, in the case of private prisons, questions arise about the ability of a citizen to have access to information regarding detailed operational procedures, financial information, and a voice in how prisoners are treated, rehabilitated and punished.

Second, the question of liability is addressed. In the event of a violation of inmate’s civil rights, or the death or injury of an inmate at the hands of a corporations’ prison guards, there are difficulties in establishing liability (Dunham, 1986, Elvin, 1985). Moe (1987) notes that major prison policy and administrative decisions regarding these issues have effectively been moved from the legislature to the judiciary, in that it is left to lawyers and judges to unravel the complexities and clear the ambiguities in the event of litigation. There is also evidence to suggest that the scrutiny to which private corporations are subjected actually serves to reduce the number of abuses in treatment of inmates, service provision and corruption.

These issues are certainly complex for the legal community and have a direct impact on the roles and responsibilities of public administrators. As the boundaries between government
and non-government institutions become blurred, the rule of law is blurred, becoming guided by a quasi-authority based on processes, i.e., mechanisms for action set in public-private organizational configurations that are pragmatic and may function well, but do not have deep legal foundations (Moe, 1988; Moe & Stanton, 1989). If private prisons are to become a norm, then development of rigorous and unambiguous legal founding is necessary for the public administrator to manage contracts with private entities or to engage in more integrated partnerships. As Stillman (1987, p. 6) noted, the Constitution wisely instituted federalism to restrain government powers, but “perhaps unwisely and incorrectly it ignored the consequences of unchecked private power.”

The Administrative Dimension

It is a well accepted fact that state legislature cannot, and probably should not, specify policies directing the operation of complex government institutions to great detail. Although administrators are formally guided in their duties by written policies and legal guidelines, the complexity of situations encountered necessarily requires discretion at all levels of an organization. Vaughn and Otenyo (2007, p. xii) define discretion as:

“…embracing ideas about judgment, discernment, liberty, and license. It is about judging among competing values, choosing a best possible solution, and being free to extend the rights and duties of office...(It) is often part of the way decisions are made to conform to professional, community, legal, and moral norms.”

Although the concept of discretion is commonly associated with administrative ethics (Haque, 2004; Johnson & Cox, 2005; Kelly, 1994), I will primarily examine the policy implications. The point at which ‘street-level’ bureaucrats translate policy into implemented policy has been extensively studied (Lipskey, 1980); similarly, the discretion of managerial staff is also recognized (Vaughn & Otenyo, 2007). A key point is that there is a difference between stated
government policy and implemented policy, in that the sum of interpretations, judgments and actions of staff throughout a bureaucracy constitute *actual* policy. In the case where government functions are devolved from the institutions of government, such as prison privatization, a question arises about the extent to which the interpretations, judgments and actions of privately employed prison staff sum up to constitute public prison policy.

Using the Virginia Department of Corrections (2008a) as an example, once convicted and sentenced to incarceration, an inmate will be processed and assessed by a number of prison staff. The first stage is security assessment, where prisoners are screened and their security status is determined to allow their placement in a facility. Although there are strict guidelines governing this process depending on the nature of the offense, number of previous convictions and mental health history, there is still a significant amount of discretion involved on behalf of the staff. The outcome of the inmate’s treatment and future in general, depends in a great part on their initial placing. Once assigned to a facility, the inmate will undergo health and mental screening by prison staff and will be assigned a treatment program supervisor. Depending on the facility and the status of the offender, the treatment program will involve classroom education, employment training, actual work, substance abuse treatment, or anger management classes, for example. Many of these prison staff contribute to the inmate’s report file, which in a large part determines their eligibility for parole and transfer to lower security institutions (Virginia Department of Corrections, 2008b).

The prison management is responsible for ensuring that the operation of the prison is effective, conducting liaisons with other state agencies, hiring of staff, staff supervision, and ensuring quality standards are met. The prison superintendent is ultimately responsible for all of the inmates whilst they are present in the prison. The superintendent will also work with
centralized Department of Corrections (DOC) officials in determining budgets and setting priorities.

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<td>Inmate Rehabilitation Services</td>
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<td>Probation Officers</td>
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<td>Treatment Program Supervisors</td>
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Table 1: Prison Roles in Virginia Department of Corrections (VADOC, 2008a)

The management of a prison will ultimately determine the nature of services received by inmates, the location strategy for allocation of inmates to facilities and decisions on overcrowding, and overall has a great impact on the quality and success of a prison.

The action of ‘street-level’ prison staff, namely the wardens, correctional officers and treatment program staff, will constitute the implemented policy in the prison and that of the DOC. The individual judgments the staff make over whether or not to enforce certain rules or enact certain punishments will certainly have a large impact on inmate rehabilitation, punishment
and prison standards. In all cases, the staff are accountable to their supervisors, who are accountable to the prison superintendent, who is accountable to the officials in the central offices of a DOC.

In the case of the entire prison ownership and management being privatized, the operation of a prison staff is now governed and regulated through monitoring and enforcement of a contract between a DOC and a private corporation. The chain of accountability is legally passed through the contracting procedures, although ambiguities can still be present as previously observed. The ‘public’ policy of the DOC now becomes the ‘private’ policy of a corporation through the contractual process. As a contract cannot specify operating procedures that outline actions to be taken in every eventuality, as this is far too restrictive and unenforceable, it is not possible therefore, to specify policy exactly. Furthermore, the contract can specify standards for prison operations and prison services, but ensuring enforcement to the letter is very costly. The contract can also specify standards in results, but given that a causal relationship between prison services received and recidivism rates is not guaranteed, this would serve to increase costs, as the private corporation seeks to mitigate the risk. A contract retrieved from an Australian DOC for the private construction and management of a prison facility was 302 pages long (Victoria State, ND). It is evident that the time and skill required to develop a contract is formidable. As is often the case in many other areas of government, the selected contractor has to be involved in the actual writing of the contract, to account for lack of expertise and resources in the government department.

The managerial staff working in a central state DOC, for example, would typically be involved in overseeing the operations of all prisons and parole services and would continuously deal with emerging issues, budget changes, and continual development of best practices and
policy. In many ways, policy implementation is an experimental and evolutionary process that captures the continual discretions and decisions of managerial staff (Pressman and Wildavsky, 1984). One disadvantage to contracting is that, unless provision for change is specifically included, innovation and change may not be forthcoming. Some scholars have called for prison contracts to be based primarily on results, thus freeing the private prison corporations from regulatory constraints and encouraging more innovation in treatments and services. A particular issue arises in the managerial staff in a private prison – the superintendent and chief correctional officers, who may be responsible for internal budget controls, staff management and overall discharge of punishments and services. Unless specified explicitly in the contract, they will necessarily have a wide discretion for action in discharge of their duties and control and allocation of staff resources. The key problem is that, should a contractually-unspecified situation arise in which they are called to exercise their discretion result a serious complication, where does accountability lie? On one hand, the officer involved may be accountable, however, his defense may be that the situation was unavoidable and he had no other choice but to use his best judgment. On the other hand, the state DOC is accountable because they failed to provide detailed guidelines in contractual operating procedures. Cases such as this will surely arise also in public prisons, however, the question of accountability is somewhat simpler, and lessons learnt can immediately be incorporated into operating procedure.

Conclusions and Recommendations

It is evident from the brief examination of prison operations that prison staff necessarily have wide latitude in the discharge of their coercive duties, both at the ‘street-level’ and managerial level. It is also evident that in the case of prison privatization, the role of state
employees changes fundamentally. State employees must have the ability and expertise to
develop, tender, refine and enforce a prison contract. In most states, where both private and
public prisons operate, state DOC staff must also have the ability to be involved in the
management of actual prison operations. Further research is necessary to investigate the way in
which state DOCs are re-structuring, training and managing their staff to meet these new
operating realities.

In a legal sense, the question of administrative discretion within public bureaucracies has
long been a challenge, however, generally street-level staff are shielded from major implications
provided they are not negligent or plainly contravening rules. Managerial staff are legally
responsible for the actions of staff under their supervision. This changes in the case of prison
privatization, as state DOC officials now are no longer involved in the detailed supervision of
prison superintendents. As a result of this inconsistency in accountability, the moral arguments
can be enacted – that is it fundamentally, morally wrong for the state to delegate coercive power
without clear lines of public accountability. This is equally a policy issue in addition to a legal
and moral issue; DOCs may need state-wide or federal policy initiatives to research and develop
more innovative and accountable mechanisms in private prison administration. Part of this policy
should also consider the issue of state capacity in coercive powers, in the event of a major
contractual default by a private corporation. Contracts should have built in redundancy measures,
or states should refrain from total privatization of all prisons.

Prison privatization through contracting appears to a type of government policy: contracts
effectively become detailed statements of policy. There is a fundamental issue regarding the
public visibility of this policy in private cases, and the fact that policy is being continually
created by non-state agents, who may have interests other than the public interest in mind.
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