

## Unlocking Competition in Corrections

by Marc Levin, Esq., director of the Center for Effective Justice

With Texas projected to need another 9,600 prison beds by 2010,<sup>1</sup> it is expected that the 80<sup>th</sup> Legislature will focus first and foremost on policy changes that can reduce or eliminate the need for new beds by preventing crime, lowering recidivism rates, and reducing probation revocations.

However, to the extent new beds are needed, Texas faces a choice of whether to build permanent new facilities or temporarily lease beds from county jails or private operators. Another issue is the regulation of existing private beds, which requires exercising necessary oversight without micromanagement that stifles the innovation and cost savings offered by private management. Finally, there may be opportunities to explore the benefits of outsourcing and competition in probation and community corrections.

Private prisons are well established in Texas, as the state currently has contracts with private operators to maintain 15,505 secure corrections beds, approximately 10 percent of the state's total capacity. The facilities are run by Corrections Corporation of America (CCA), Geo Group, and Management Training Corporation (MTC). According to the Bureau of Justice Statistics, more than 12 percent of all federally sentenced offenders and about 6 percent of state prisoners are currently managed by private operators.<sup>2</sup> Three-fifths of U.S. states utilize private prisons.

### Policy Recommendations

- Raise or eliminate caps on private prison capacity.
- Meet new capacity needs through temporary leases from private operators.
- Explore use of private operators in community corrections and probation.
- Focus state oversight of private correctional facilities on results rather than process.
- Study reassigning responsibility for oversight of private correctional facilities.

### Role of Private Facilities in Absorbing New Capacity

The state's prison residential corrections capacity is currently 152,526, a figure which includes not only prisons, but also state jails, pre-parole transfer facilities, and intermediate sanction facilities, whether run by the state or private operators. This figure excludes the 70,000 county jail beds and beds at federal pris-

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ons and detention centers. Due to overflow, the state currently leases another 1,417 beds from county jails. In the coming months, the Texas Department of Criminal Justice (TDCJ) is expected to lease another 300 to 400 beds which are currently targeted to be at county jails.<sup>3</sup> TDCJ projects that it will need a total of 3,100 contract beds by August 2007. County jails statewide currently have 3,900 empty beds, although this figure includes the 44 county jails out of compliance with the Jail Standards Commission and thus ineligible to receive state inmates. Some counties look at temporary leases with TDCJ as a way to bolster their budgets since some of their county jail space would otherwise be empty. The private operators have also expressed interest in further expanding capacity to hold TDCJ prison overflow inmates on either a temporary or permanent basis subject to the approval of the Department and the state leadership. To date, TDCJ has given no indication that they intend to expand private contracts in lieu of contracting with the counties for overflow space or building further state-operated capacity.

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These statutory caps apply only to prison beds located at the privately managed correctional centers and not to the three other types of privately operated beds in Texas. Those are state jail beds, pre-parole transfer facilities, and intermediate sanction facilities. Intermediate sanction facilities house parolees who commit violations of their parole.

Private contract costs currently range from an average of approximately \$20 to \$30 per day. Contract term, number of offenders housed, inmate classification, program requirements, facility location, staffing patterns, and total number of beds under management with TDCJ are among the variables that affect the vendor cost of running the privately managed facilities. Vendors price their bids to be competitive with one another and to be lower than the state's costs for similar types of facilities housing minimum to medium security inmates.

Because there is no statutory cap on any privately managed beds except the correctional centers (prisons), it is within TDCJ's sole discretion whether to expand the capacity at any of the other privately operated facilities. House Corrections Committee Chairman Jerry Madden introduced House Bill 87 in the third and final special session of the 79<sup>th</sup> Legislature to slightly adjust the statutory caps on prison beds upward. Madden's legislation would have raised the former cap to 1,200 and the latter cap to 4,780. The bill stalled in the Calendars Committee, as the special session was limited to tax relief and school finance.

## Benefits of Private Facilities

On average, it costs the state \$40 a day to keep an offender in a state prison. Similarly, the state pays county jails \$40 a day for each bed it rents. However, the state pays private prisons between an average of \$20 and \$30 a day to house inmates.

National studies comparing public and private prisons show that private facilities offer significant savings, in the range of 5 to 20 percent.<sup>4</sup> The Reason Foundation examined 28 studies comparing the cost of government prisons with their private counterparts that house 150,000 inmates across the country. They found that 22 of the studies conclude that private prisons cost taxpayers an average of 15 percent less than state facilities while six found the costs to be about the same.<sup>5</sup>

Savings in Texas from private prisons are estimated to be between 10 and 14 percent.<sup>6</sup> Adjusting for health care costs explains why the savings of private prisons compared to state prisons are estimated at 10 to 14 percent, which is less than the 25 percent difference between \$30 and \$40 a day.

TDCJ currently contracts with the University of Texas Medical Branch at Galveston and Texas Tech University Health Sciences Center to care for chronically ill prisoners, whether they are in a state or private prison. Private prisons do accept inmates with health problems that do not require incarceration in a medical unit and maintain infirmaries to treat such ailments, the cost of which are included in their contracts with the state. It is estimated that the state spends \$7.42 per day per offender on health care (about \$2,800 a year), which includes both services provided by prison infirmaries and care provided by hospitals.<sup>7</sup> Like private prisons, county jails operate infirmaries, but refer seriously ill patients to the state's hospital units. Therefore, there is no need to adjust for health care costs when comparing the expense of leasing county jail beds with leasing beds from private operators.

Not only are beds at private facilities cheaper to lease than those at county jails, but just as importantly private facilities offer far more education, treatment, and job training services than jails, all of which are correlated with reduced recidivism.<sup>8</sup> According to a 2005 study, only a third of Texas county jails have any kind of substance abuse treatment program and half of these were reported to be sporadic in nature.<sup>9</sup> Similarly, only 44 percent of Texas county jails offer inmate education programs. In contrast, private facilities' contracts with TDCJ require them to offer both substance abuse and educational programming.

The lack of programming at county jails is a consequence of their intended purpose. They were designed primarily to hold accused suspects awaiting trial and offenders serving very short sentences for misdemeanors. Accordingly, they were not set up to provide a continuum of programming geared to offenders serving longer sentences.

As required by their contracts with the state, privately operated facilities offer the same educational

and rehabilitative programming as their state counterparts. Thus, for example, privately operated state jails offer the same drug education courses as the government-run state jails and both are taught by certified counselors. However, in both cases these courses are not comparable to the clinical treatment programs offered at state-operated Substance Abuse Felony Punishment facilities (SAFP). Private operators could provide such intensive drug treatment, but the state does not contract for that because of the expense involved. SAFP's cost the state approximately \$46 per day per offender to operate.<sup>10</sup>

National research comparing the recidivism rates of public and private prisoners has found a 29 percent lower recidivism rate among inmates released from private prisons, which may be attributable to more effective programming and reentry services, including perhaps greater legal latitude to incorporate faith-based programs.<sup>11</sup> In 2004, more than 1,000 inmates at Corrections Corporation of America (CCA) facilities completed an intensive voluntary faith-based program developed by the Chicago-based Institute in Basic Life Principles (IBLP).<sup>12</sup> An Iowa federal district judge in June struck down the state's funding of the Innerchange Freedom Initiative faith-based prison program, a decision which is on appeal.<sup>13</sup>

Private prisons also offer a buffer against the creation of powerful unions within state prison bureaucracies that can become obstacles to measures to control costs and promote alternatives to prison. The California Correctional Peace Officers Association (CCPOA), the state's prison guards' union, is the most prominent example of this problem. The *Los Angeles Times* noted in June, "With 31,000 members, the union is one of the most powerful players in California politics, having contributed millions to candidates and initiative fights in recent years."<sup>14</sup> A federal court recently warned that California was returning to an era when union leaders were allowed to "overrule the most critical decisions" of prison administrators.<sup>i</sup>

<sup>i</sup>The *Times* reported on the findings of a special master appointed by a federal judge as part of the state's pending prison overcrowding litigation:

After launching "one of the most productive periods of prison reform" in California history, Gov. Arnold Schwarzenegger has retreated from the cause and given the guards union a "disturbing" level of clout over prison policy and operations, a federal court investigator charged Wednesday. Special Master John Hagar accused Schwarzenegger of backpedaling and warned that California was returning to an era when union leaders were allowed to "overrule the most critical decisions" of prison administrators.

While a government monopoly over prison operations can create powerful vested interests, privatization fosters a positive incentive for greater efficiency in state-run prisons. A study by Vanderbilt University professors found that states utilizing private prisons had considerably more success in keeping public corrections spending under control than states with no private prisons. From 1999 to 2001, states with large percentages of inmates under private management experienced a 5.9 percent growth rate in corrections expenditures compared with a 12.5 percent increase in expenditures for states with less than 5 percent of prisoners in private facilities and an 18.9 percent growth rate in states with no private prisons.<sup>15</sup>

### Oversight of Private Facilities

Private prisons are adept at self-regulation. For example, CCA uses 840 criteria to grade its facilities during a three-day, on-site audit process.<sup>16</sup> The audit includes the 500 criteria established by the American Correctional Association, which are then augmented with 340 additional items developed by CCA. Further, as publicly traded companies, private operators such as Corrections Corporation of America, GEO, and Cornell are subject to extensive federal regulations—including Sarbanes-Oxley—ensuring the accuracy of their financial statements. Furthermore, private operators do not enjoy the sovereign immunity of the state in lawsuits, making it easier for prisoners alleging abuse to obtain damages.

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per innovation. For example, TDCJ requires that private prisons use the same key systems that state prisons utilize. Similarly, private prison operators are required to tailor their educational services to exactly match those offered by the state's Windham School District. This means not simply making sure private operators offer the same curriculum, but also mandating such details as the school calendar and the days off given to teachers.

### Role of Private Operators in Community Corrections and Probation

Although Texas is a national leader in private prisons, we are not on the cutting edge in outsourcing community corrections and probation functions. At least seven states have privatized misdemeanor probation programs, including Georgia, Colorado, Connecticut, Florida, Missouri, Tennessee, Utah, and Wyoming.<sup>17</sup> In these states, either the state or probation departments enter into a contract with a single provider, which may in turn subcontract for services.

Such a privatized probation system allows the state or local contracting entity to pick and choose among companies based on their track record in collecting restitution and reducing the rate at which probationers abscond, recidivate, and are revoked to prison. Georgia has implemented guidelines for drafting contracts, required registration and reporting of private companies, and imposed sanctions for noncompliance. According to a U.S. Justice Department study, results indicate that collection of fines and restitution increased from \$41 million to more than \$61 million in 2000.<sup>18</sup> More than 30 companies hold contracts with active caseload ranges from 24 to 27,113 probationers, resulting in a high degree of competition and diversity of services.

In February, California Governor Arnold Schwarzenegger announced a groundbreaking plan to move at least 4,500 nonviolent women prisoners from traditional prisons in rural areas to privately operated community centers near their families where they would receive education, drug treatment, job training, and counseling.<sup>19</sup> These centers would be run by private operators, although in a concession to the prison guards' union, the employees would be state guards and members of the union.

Here in Texas, the federal government commissioned CCA to convert a prison in Taylor to a family detention facility for illegal immigrants awaiting their court hearing. Pursuant to a contract with Immigration and Customs Enforcement, the new Don T. Hutto Correctional Center is only the second such family detention facility in the country.<sup>20</sup> Instead of jumpsuits and locks on cell doors, the facility has toys, playpens, playground equipment, and classroom space for instruction of children and adults. Perhaps most importantly, the facility will allow families to stay together as they await deportation instead of the previous policy of incarcerating the parents and children separately. Most detainees are single mothers with one to two children between the ages of 6 and 12.

## Recommendations

### *Raise or Eliminate Caps on Private Prison Capacity*

There is no sound penological basis for capping the capacity of private prisons at 1,000 per unit. These facilities must comply with either American Correctional Association or State Jail Standards Commission rules governing details such as the size of each inmate's cell. The current 1,000 cap prevents cost efficiencies associated with expanding existing private facilities, leading to the unnecessary and more costly construction of new facilities. The overall cap on total private prison capacity should also be raised or repealed. Decisions regarding whether to meet increasing capacity needs through new state prisons, county jails, or private facilities should be made based on a cost-benefit analysis, not an arbitrary cap.

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### *Meet New Capacity Needs Through Temporary Leases from Private Operators*

If the state were to construct enough new prisons to meet the projected need for another 9,600 beds by 2010, the construction costs alone would amount to nearly \$1 billion.<sup>21</sup> Moreover, these high fixed costs would effectively lock the state into filling these beds, even as future reforms and demographic trends may reduce capacity needs. Indeed, the LBB's current projections show prison population leveling off in 2011, the last year for which it currently forecasts. Private operators clearly offer the state a lower cost and more programming than county jails.

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Private operators could also be asked to submit proposals for specialized units, such as clinical drug treatment units similar to SAFF and units for nonviolent female inmates, young inmates between 18 and 25, and DWI offenders.

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### *Explore Use of Private Operators in Community Corrections and Probation*

Private operators may also be able to assist the state in moving away from traditional incarceration for nonviolent offenders. One way to address the state's projected need for more medium and high security beds would be to convert some government-run state jails into prisons and move the nonviolent drug and property offenders now in those state jails to privately operated community corrections centers that would offer more treatment, job training, and reentry programming. Already, the majority of inmates at state jails are transferees from prisons due to overflow.

Private operators could also be asked to submit proposals for specialized units, such as clinical drug treatment units similar to SAFF and units for nonvio-



lent female inmates, young inmates between 18 and 25, and DWI offenders. When creating additional capacity, it makes far more sense to use it as an opportunity to rationalize the system through greater specialization of units, rather than simply addressing overflow in a haphazard way that continues to commingle inmates with very different needs.

The Legislature should also study the role that private operators could play in probation. Georgia provides an example of how outsourcing management of some probationers can create competitive incentives to improve performance. The American Legislative Exchange Council (ALEC) has developed model legislation for probation privatization.

### ***Focus State Oversight of Private Correctional Facilities on Results Rather Than Process***

The goal of state oversight of private correctional facilities should not be to insist that every aspect of these facilities be identical to those of their state counterparts. While these facilities should be at least as humane and offer comparable services as the state's facilities, there should be considerable flexibility so that private operators can experiment with innovative methods of meeting their contracts with the state and accomplishing their goals of securing and reforming inmates. Benchmarks should be focused on performance rather than process. For example, if a private prison can develop an educational program that enables more inmates to obtain G.E.D.'s, the program should be permitted, even if the curriculum, type of instructor, length of courses, and other details differ from the Windham School District that serves state prisons.

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### ***Study Reassigning Responsibility for Oversight of Private Correctional Facilities***

The Legislature should consider recommitting private prison oversight to a separate agency, board, or commission, which could also make a biennial recommendation to the Legislature on whether additional state correctional facilities should be privatized. Currently, private operators are in a tenuous position because they compete with TDCJ, but depend on TDCJ for renewal of their contracts and are subject to their regulatory authority.

## **Conclusion**

The reasons for outsourcing correctional services to private operators are largely the same as in other areas of public policy. While public and private monopolies have little incentive to improve their performance, competition among providers provides a natural incentive for innovation and cost savings. Ideally, Texas will enact reforms that will reduce or eliminate the need to expand the capacity of its correctional facilities.

Realistically, though, these reforms will take years to be fully implemented. In the interim, short-term leases with private operators offer the most efficient means of addressing capacity overflow while avoiding the fixed costs associated with building new state prisons. At the same time, the new private immigration detention facility in Taylor and the proposed private community corrections centers in California suggest that private operators can play an integral role as the state hopefully transitions from traditional incarceration to more restorative solutions for non-violent offenders. 

Marc Levin, Esq., is the director of the Center for Effective Justice at the Texas Public Policy Foundation. Contact Marc Levin at: [mlevin@texaspolicy.com](mailto:mlevin@texaspolicy.com).

## Endnotes

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